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THE
PENAL LAW OF BRITISH INDIA

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PENAL LAW
OF
BRITISH INDIA

BY

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TABLE OF ABBREVIATIONS.

A. C.	..	Appeal Cases (L. R. from 1891—).
A. & E.	..	Adolphus and Ellis' Reports (1834—1840). New Series (1841-1852)
A. I. R.	..	All India Reporter (1922—).
A. L. J. R.	..	Allahabad Law Journal Reports (1904—).
A. W. N.	..	Allahabad Weekly Notes (1881—1908)
Agra	..	Agra High Court Reports (1866—1868).
Alison	..	Alison's Criminal Law of Scotland.
App.	..	Appendix.
Austin	..	Austin's Jurisprudence.
Bacon	..	Bacon's Abridgment of the Law.
B. & A.	..	Barnwell and Alderson (K. B. Reports, 1817—1822).
B. & C.	..	Barnwell and Creswell (King's Bench, 1822—1830).
Beav.	..	Beavan's Reports (Rolls, 1839—1866).
Bell	..	Bell's Crown Cases Reserved (1858—1860).
B. H. C. R.	..	Bombay High Court Reports (1862—1875).
B. L. R.	..	Bengal Law Reports (1868—1875).
Bing.	..	Bingham's Cases (Common Pleas, 1834—1840).
Bishop		Bishop's Criminal Law.
Black		Blackstone's Commentaries (Ed. 1773).
Bligh		Bligh's House of Lords Reports (1819—1821).
Bligh N. S.	..	Bligh's House of Lords Reports (1827—1837).
Bom. L. R.		Bombay Law Reporter (1899—).
Boul.	..	Boulnois' Reports (Calcutta, 1862—1875).
B. & S.	..	Best and Smith (Q. B., 1861—1869).
B. U. C.		Bombay Unreported Cases (1802—1898).
Bur. L. J.		Burmah Law Journal (1923—).
Bur. L. R.		Burmah Law Reports (1895—).
Burr.		Burrow's Reports (K. B, 1757—1771).
Cald.		Caldecott's Settlement Cases (K.B, 1776—1785).
C. C. R.		Crown Cases Reserved.
C. L. J.		Calcutta Law Journal (1905—).
C. L. R.	..	Calcutta Law Reports (1878—1883).
C. P. L. R.		Central Provinces Law Reports (1887—1904).
C. W. N.	..	Calcutta Weekly Notes (1896—).
Camp.		Campbell's Reports (N. P. 1808—1816).
C. B.	..	Common Bench Reports (C. P. 1845—1856).
C. P.	..	Common Pleas (Law Reports, 1866—1874).
C. P. D.		Common Pleas Division (L. R., 1875—1890).
C. & K.		Carrington and Kirwan (N. P., 1843—1850).
C. & M.		Crompton and Meeson (Exch., 1832—1834).
C. & P.	..	Carrington and Payn (N. P., 1823—1841).
Ch. D.	..	Chancery Division (L. R., 1875—1890).
Cl. & F.	..	Clark and Finnelly (N. P., 1831—1846).
Coke		Coke's Reports (1752—1816).

Cox	Cox's Criminal Cases (1843—).
Cr. Car.	Croke's Reports of the Reign of Charles I (1625—1641).
Cr. L. J.	Criminal Law Journal (1904).
Cr. P. C.	Criminal Procedure Code (1898).
D. & B.	Dearsley and Bell's Crown Cases (1856—1858).
Dears.	Dearsley's Crown Cases (1852—1856).
Den. C. C.	Denison's Crown Cases (1844).
Doug.	Douglas's Reports (K. B., 1778—1784).
Dow.	Dow's House of Lords Reports (1812—1818).
Dow & C.	Dow and Charles' House of Lords Reports (1827—1831).
Dowl. & Ry. D. & Rv. D. & R.	Dowing and Ryland's King's Bench (1822—1827).
D. & R.	Magistrate's Cases (1822—1827).
East	East's Pleas of the Crown.
East R.	East's Reports of the King's Bench (1801—1812).
E. B. & E.	Ellis Blackburn and Ellis (Q. B., 1858).
E. & B.	Ellis and Blackburn (Q. B. 1852—1858).
E. & E. Ell. & E.	Ellis and Ellis (Q. B. 1858—1861).
E. & I. App.	English and Irish Appeal Cases (1861—).
Esp.	Espinasse's Reports (N. S. 1793—1807).
Exch.	Exchequer.
Ex. D.	Exchequer Division.
Forst.	Forster (Dublin C. C., 1767).
F. B.	Full Bench.
F. & F.	Foster and Finlayson (Nisi Prius, 1856—1867).
Foster	Foster's Crown Law (1743—1761).
Hagg.	Haggard's Reports. (Admiralty Cases 1822—1837 Consistorial Reports 1789—1802 Ecclesiastical Reports, 1827—1833).
Hale	Hale's Pleas of the Crown.
Hare	Hare's Reports (1841—1853).
Hawk.	Hawkin's Pleas of the Crown.
Hay.	Hay's Reports (Calcutta 1862—1863).
H. & C.	Harlstone and Coltman (Exchequer, 1862—1865)
H. L.	House of Lords.
H. L. C.	House of Lords Cases (1847—1866).
Hob.	Hobbart's Reports (1608—1625).
Hyde	Hyde's Reports (Calcutta, 1863—1864).
I. A.	Law Reports, Indian Appeals (1876—).
I. C.	Indian Cases (1909).
I. J.	India Jurist (Old Series, Calcutta, 1862; New Series, Calcutta, 1866, 1867).
I. L. R., All.	Indian Law Reports, Allahabad High Court (1876—).
I. L. R., Bom.	Indian Law Reports, Bombay High Court (1876—).
I. L. R., Cal.	Indian Law Reports, Calcutta High Court (1876—).
I. L. R., Lah.	Indian Law Reports, Lahore (1920—).
I. L. R., Mad.	Indian Law Reports, Madras High Court (1876—).
I. L. R., Pat.	Indian Law Reports, Patna (1922—).
I. L. R.,Ran.	Indian Law Reports, Rangoon (1924—).
J. P.	Justice of the Peace, (Reports 1836—).
Keb.	Keble's Reports, King's Bench (1661—1679).
Kel.	Kelyng's Reports, King's Bench (1673—1706).

L. B. R.	..	Lower Burmah Rulings (1901—).
L. & C.	..	Leigh and Cave's Crown Cases (1861—1865).
L. L. J.	..	Lahore Law Journal (1920—).
L. J. Ch.	..	Law Journ. Reports Chancery (1822—).
L. J. C. P.	..	Law Journ. Crown Pleas.
L. J. Ex.	..	Law Journ. Exchequer.
L. J. M. C.	..	Law Journ. Magistrates' Cases.
L. J. M.	..	Law Journ. Matrimonial Cases.
L. J. P. M. & A.	..	Law Journ. Probate, Matrimonial and Admiralty.
L. J. Q. B.	..	Law Journ Queen's Bench.
Ld. Raym.	..	Lord Raymond's Reports (K. B. & C. P. 1694—1734).
Leach	..	Leach's Crown Cases (1730—1788).
L. R. A.	..	Law Reporter , Allahabad (1920—).
L. R. A. C.	..	Law Reports, Appeal Cases.
L. R. C. C.	..	Law Reports Crown Cases (1866—).
L. R. C. P.	..	Law Reports, Common Pleas (1866—1875).
L. R. C. P. D.	..	Law Reports, Common Pleas Division (1876—).
L. R. E. & I.	..	Law Reports, English and Irish Appeal Cases.
L. R. Q. B.	..	Law Reports, Queen's Bench (1891—).
L. T.	..	Law Times (1845—1858).
L. T. (N. S.)	..	Law Times New Series (1859—).
Ld. Ray.	..	Lord Raymond's Reports (Common Law, 1694—1734).
Lewin	..	Lewin's Crown Cases (1822—1833).
Loff.	..	Lofft's Reports, King's Bench (K. B., 1772—1774).
Mad.	..	Madras.
M. H. C. R.	..	Madras High Court Reports (1862—1875).
M. L. J. R.	..	Madras Law Journal Reports (1891—).
M. & R.	..	Manning and Ryland's Reports (K. B., 1827—1830).
Man. & R.	..	
Marsh.	..	Marshall's Reports Common Pleas, 1813—1816).
Mood. C. C.	..	Moody's Crown Cases Reserved (1824—1844).
M. I. A.	..	Moore's Indian Appeals (1836—1873).
M. & R.	..	Moody and Robinson (Nishi Prius, 1830—1843).
M. & S.	..	Maule and Selwyn (King's Bench, 1813—1819).
M. & W.	..	Meeson and Welby (Exchequer, 1836—1847).
Mod.	..	Modern Reports (King's Bench, 1669—1732).
N. L. R.	..	Nagpur Law Reports (1905).
N. & M.	..	Neville and Manning (K. B., 1832—1836). Magistrates' Cases
Nev. & M.	..	(K. B., 1832—1838).
Nol.	..	Nonal's Magistrates' Cases (K. B., 1791—1793).
Oudh L. J.	..	Oudh Law Journal (1915—).
Oudh W. N.	..	Oudh Weekly Notes (1924—).
Palm.	..	Palmer's Reports (King's Bench, 1619—1629).
Parl. Rep.	..	Parliamentary Reports.
Pat. L. J.	..	Patna Law Journal.
Pat. L. R.	..	Patna Law Reporter (1924—).
Pat. L. T.	..	Patna Law Times (1920—).
P. C.	..	Privy Council.
P. J. L. B.	..	Printed Judgments, Lower Burmah (1893—1900)
P. L. R.	..	The Punjab Law Reporter (1900—).
Price	..	Price's Reports Exchequer.
P. R.	..	Punjab Record (1862—).

P. W. R.	Punjab Weekly Reporter ,1906—).
P. & D.	Perry and Division (Q. B., 1838—1841).
Q. B.	Queen's Bench Reports (Adolphus and Ellis Q. B., 1841—1852).
Ray.	Lord Raymond's Reports (Common Law, 1694—1734).
R. & M. C. C. R.	Russel and Mylne Crown Cases Reserved (1829—1831).
R. R.	Revised Reports (1735—1865).
R. & R.	Russell and Refan (1799—1823).
Rob	Robert's Reports.
Roll	Sir H. Rolle's Reports (K. B., 1614—1625).
Russ. & Ry.	Russell & Ryan's Crown Cases Reserved (1799—1823).
S. J. L. B.	Select Judgments, Lower Burmah (1872—1892).
Salk.	Salkets' Reports (1689—1712).
Show.	Shower's Report (H. L., 1740; Q. B., 1678—1695).
Sm.	Smith (Q.B., 1803—1806).
Sm. & B.	Smith (Q. B., Ireland—1824—1825).
Steph. Comm.	Stephen's Commentaries on the Laws of England.
Steph. Cr. L.	Sir James Stephen's Criminal Law.
Steph. Dig.	Sir James Stephen's Digest of Criminal Law.
Str.	Strange's Reports (King's Bench, 1795).
Str. Tr.	Howell's State Trials (1163—1584).
Sw. & Tr.	Swabey and Tristam (1858—1865).
Sty.	Style's Reports (Q. B., 1646—1655).
Taunt.	Taunton's Reports (Common Pleas, 1807—1819).
T. L. R.	Times Law Reports (1885—).
T. R.	Durnford and East's Term Reports (K. B., 1785—1800).
Vent.	Ventries' Reports (1688—1691).
Ves.	Vesey's Reports (Senior, 1740—1756).
Ves. J.	Vesey's Reports (Junior, 1789—1817).
Weir	Weir's Law of Offences, Vol. I (4th Ed., 1905).
Will. W. & D. W. W. & D.	Willmore, Wellaston and Devison (Q. B., or K. B., 1695—1735).
Will. W. & H. W. W. & H.	Willmore, Wollaston and Hodges (K. B., 1838—1839)
Wilson	Wilson's Reports (1805—1817).
W. R.	Weekly Reporter (Calcutta, 1862—1875).
W. Cr. L.	Weekly Criminal Letters.
Wym.	Wyman's Revenue and Criminal Rulings.
Yelv.	Yelverton (Q. B., 1603-1613).

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1	Repealed in part	Act XII of 1891 (Sch.).
2		
4		
4	Substituted	IV of 1898, S. 2.
5	Repealed in part	XIV of 1870 (Sch.).
15	„ „	XII of 1891 (Sch.).
19 *ill.* (*a*)	Amended as to U. P	XII of 1881, S. 2.
21 *cl.* 11 & Expl. 3	Added	XXXIX of 1920.
21	„ (words)	X of 1927.
28	Amended	I of 1889, S. 9.
34		XXVII of 1870, Ss. 1—12.
40		„ „
40	Added (words)	VIII of 1882, Ss. 1—10.
40	„ „	VIII of 1913, S. 2.
56	Added (words & figures)	XXVII of 1870, Ss. 1—12.
61	Repealed	XVI of 1921.
62	„	„ „
64	Added (words & figures)	VIII of 1882, Ss. 1—10.
64		X of 1886, Ss. 21—24.
67		VIII of 1882, Ss. 1—10.
71		
73		
75		X of 1886, Ss. 21—24.
75	Substituted	III of 1910, S. 2.
108-A	Added	IV of 1898, S. 3.
120-A		VIII of 1913, S. 3.
120-B		„ „
121	Substituted (words)	XVI of 1921.
121-A	„	XXVII of 1870.
121-A	Added (words)	XVI of 1921.
122	Substituted (words)	XVI of 1921.
124-A	Added	XXVII of 1870.
124-A	Substituted	IV of 1898, S. 4.
131	Amended	XXVII of 1870, Ss. 1—12
131		X of 1927.
132 to 140	(sp[illegible])	X of 1927.
138-A	Added	XIV of 1887.
153-A	„	IV of 1898, S. 5.
162	Amended	XVIII of 1887, S. 18.
163	„	„ „
171-A to 171-I	Added	XXXIX of 1920.
177		III of 1894, S. 5.
178		X of 1873, S. 15.
181		„ „
182		III of 1895, S. 1.
193 Expl. 1	Repealed in part	XIII of 1889 (Sch.).
194	Amended	XXVII of 1870.

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194	Added	Act IX of 1890, S. 149.
195	"	" " "
195	"	" XXVII of 1870.
203	"	" III of 1894, S. 5.
212	"	" " "
214	"	" VIII of 1882, Ss. 1-10.
214 *ill.*	Repealed	" X of 1882 (Sch.).
216	Amended	" X of 1886.
216-A	Added	" III of 1894.
216-B	"	" "
222	Amended	" XXVII of 1870.
223	"	" " "
225-A	Added	" " "
225-A	Amended	" X of 1886.
225-B	Added	" "
230	Amended	" XIX of 1872, S. 1.
230	"	" VI of 1890, S. 1.
263-A	"	" III of 1895.
292	"	" VIII of 1925.
293	"	" "
294	"	" III of 1895.
294-A	Added	" XXVII of 1870.
295-A	"	" XXV of 1927.
304 A	"	" XXVII of 1870.
307 *ill* (*c*)	Amended	" XII of 1891 (Sch.).
309	"	" VIII of 1882.
335	"	" "
366	"	" XX of 1923.
366-A	Added	" "
366-B	"	" "
372	Amended	" XVIII of 1924.
373	"	" "
375	"	" X of 1891, S. 1.
375	"	" XXIX of 1925.
376	Added (2nd Paragraph).	" " "
410	Amended	" X of 1891, S. 1.
435	"	" " "
477-A	Added	" III of 1895.
478	Amended	" IV of 1889, S. 3.
489	"	" " "
489-A to 489-D	"	" XII of 1899, S. 2.
490	Repealed with effect from 1-4-1926	" III of 1925 (Sch.).
492	" "	" " "
505	Substituted	" IV of 1898, S. 6.
505	Added (words)	" X of 1927.

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CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

2996. Topical Introduction.—This chapter consisting of 80 sections deals with all offences involving personal injury. They are, therefore, classed as offences affecting the human body. The chapter follows no intelligible line of division. It first deals with murder and allied offences.(3) They are thrown into the first sub-division of offences affecting life. The next sub-division consisting of 7 sections(4) then deals with offence affecting procreation, such as miscarriage, infanticide and the like offences. They have evidently been placed next in order, because they imperil life and are thus akin to murder. The third sub-head consisting of 20 sections deals with offences which involve hurt. The next 10 sections make an excursion into offences dealing with illegal restraint and confinement. Then follow 10 more sections on the offences involving assault and battery which, to be in logical sequence, should have been placed immediately next after the offences relating to hurt. The offences relating to kidnapping abduction, slavery and forced labour (ss. 359-374), covering 16 sections really belong to the family of offences, of which illegal restraint and confinement are examples, while rape and unnatural offences really belong to offences dealing with sexual gratifications which are in part included in Chapter XX.

However, taking the sections as we find them, the scheme of the chapter appears to be to take capital first, crime, then other cognate offences imperilling life and then minor offences, such as hurt, assault and the like. Offences involving forfeiture of personal freedom are dealt with in two groups interspersed by the batch of sections dealing with assault and battery. The two great sub-divisions of the offences here dealt with would then fall into those concerned with personal injuries and those affecting personal liberty. The essential distinguishing feature between these two classes is that, while the intention is a part of the definition of the former and is necessary for the constitution of the crime, and has therefore to be affirmatively proved by the prosecution, it need not be proved, but will be implied in offences affecting personal freedom, and in which law presumes an evil intention from the evil deed, on the principle of *res ipsa loquitur*. In one sense, intention is present in both cases, for, without intention there can be no crime; but the intention which enters in the composition of the former is something different from that implied in offences of the latter description. This discrimination is shown by law in making the former acts offences when they are done intentionally or with knowledge, the latter when they are done voluntarily or wrongfully and knowedge of the evil deed is only required when, but for that knowledge, the act might be innocent.

2997. Adverting now to the offences falling into the category of personal injuries, the chapter classifies them into five principal heads accord-

(3) Ss. 299-311. (4) Ss. 312-318.

ing to the act and effect. These are: (*i*) murder; (*ii*) voluntary culpable homicide; (*iii*) grievous hurt; (*iv*) hurt; and (*v*) assault. The difference between the first two is the subject of sections 299 and 300; grievous hurt and hurt are defined in sections 319 and 320, while the definition of force is full to pedantic precision in section 349. The distinction between culpable homicide and murder is not perhaps so happy, but all the same it is one upon which depends the punishment of all serious attacks on human life. Offences against personal freedom may consist of a momentary restraint, which would be probably treated as too trivial to call for any punishment, or it may aggravate into the more serious crime of kidnapping and abduction, in which there may be a total deprivation of personal freedom. The constitution of these offences depends no less upon the mentality of the accused than upon the exercise of will on the part of the person aggrieved.

2998. The sections are mostly subject to well defined exceptions which have been already considered and the knowledge of which is, of course, presumed throughout the Code. It will be the purpose of the ensuing commentary to present the offences as affected by these general provisions and to trace the evolution of their various phases, presenting as great a diversity as may be imagined from the external manifestation of that entity which both the philosophers as well as the legislators call the mind.

Of Offences Affecting Life.

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Culpable homicide.

Illustrations.

(*a*) *A* lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused, *Z*, believing the ground to be firm, treads on it, falls in and is killed. *A* has committed the offence of culpable homicide.

(*b*) *A* knows *Z* to be behind a bush, *B* does not know it. *A* intending to cause, or knowing it to be likely to cause *Z*'s death, induces *B* to fire at the bush. *B* fires and kills *Z*. Here *B* may be guilty of no offence; but *A* has committed the offence of culpable homicide.

(*c*) *A*, by shooting at a fowl with intent to kill and steal it, kills *B*, who is behind a bush; *A* not knowing that he was there. Here, although *A* was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill *B*, or cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to

have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

[*Act*—s. 32. *Death*—s. 46.]

Synopsis.

(1) *Analogous Law* (2999-3001).
(2) *English Limitation a Year and a Day* (3001).
(3) *What is Culpable Homicide* (3002-3004).
(4) *Causing Death* (3005-3014).
(5) *Meaning of "Causes"* (3007).
(6) *Proximate Cause* (3011).
(7) *Cause Too Remote* (3013).
(8) *Contributory Cause When Immaterial* (3015-3017).
(9) *Neglect Accelerating Death* (3018-3022).
(10) *Causing Death by Poisonous Drugs* (3022).
(11) *Death by "Doing an Act"* (3023-3026).
(12) *Intention or Knowledge Requisite* (3027-3042).
(13) *Gross Negligence may Amount to "Knowledge"* (3038).
(14) *Causing Death Without Knowledge* (3043-3045).
(15) *Knowledge Presumed from Cruelty* (3045).
(16) *Enlarged Spleen and Liver* (3046-3047).
(17) *Intention: Knowledge: Motive*: (3048).
(18) *Homicidal Intention* (3049-3050).
(19) *Intentional Injury Likely to Cause Death* (3050).
(20) *Proof of Homicidal Intention* (3051-3053).
(21) *Evidence of Intention* (3052-3053).

2999. Analogous Law.—This is a chapter in the Code in which the English precedents would have to be carefully examined before being applied to illustrate the rules here enacted. This is because the two systems approach the question from two different standpoints. Under English Law the offence is considered objectively; it is considered subjectively in the Code. But the result attained is in each case the same, though the method of arriving at that result is different (§§ 65-69). This will be apparent from the discussion under the section under which it would be more appropriate to examine the standpoints of the two systems. For the present it may, perhaps, be stated that the definition of culpable homicide here given will sometimes correspond with homicide so-called in English Law, and sometimes with manslaughter which is homicide not under the influence of malice, but where the blood is heated by provocation, and before it has time to cool.(5) This is exception 1 to s. 300. Other cases excepted under that section

(5) *Per* Taunton, J., in *Taylor's case*, 2 Lew. 215.

are also those classed as manslaughter as distinguished from murder in English Law. But before adverting to these analogies, it is first of all necessary to appreciate the precise meaning of the offence here described, and the extent to which it is distinguishable from the offence called murder.

3000. Explanation 3 is not in accordance with the English Law inasmuch as while under the English Law the child must be completely emerged to constitute a human being, the explanation here renders even a partial emergence sufficient.(6) But though it may be so, the child must be alive and developed beyond the fœtal stage.

English Limitation a Year and a Day.

3001. In accordance with an ancient rule of English Law no person can be held criminally liable for compassing the death of another, unless the latter dies within a year and a day of the act, the day of the act being counted as the first day in the calculation.(7) The reason for this rule is to limit the liability of the accused to a definite time after which other causes are as likely to supervene as the primary cause becomes too remote. The adaptability of this rule to the Indian Code was considered by the Law Commissioners, who however, adopted the views of the English Law Commissioners who had characterised the rule as arbitrary, observing that "it cannot but be regarded as some sacrifice in point of principle to allow a murderer to escape, merely because the deceased from natural strength or constitution, or from accidental circumstances connected with the injury, happened to linger for more than a year." They, however, did not propose to alter the rules, remarking that they were not aware that any practical inconvenience had resulted from it. This limitation was, indeed, adopted in an early draft of the Code, but it was subsequently omitted and its adoption in the Indian Code was condemned by the Law Commissioners, on the ground that it involved a sacrifice of principle without the corresponding consideration of age which commended it to the English Law Commissioners.(8)

3002. What is Culpable Homicide.—This section purports to define culpable homicide, but the definition is by no means exhaustive or complete, for there are cases mentioned under the next section which must be read as a part of this definition. But so far as regards this definition, the offence is described to be the *causing* of death by doing an *act* with at least the knowledge in the actor that his *act is likely* to cause death. If there is something else than knowledge——for example, intention, the offence may or may not be culpable homicide: If there is something less than knowledge of the likelihood of his act causing death, the offence may amount to culpable negligence, but it will not be homicide. In determining the nature of the offence, regard must then be had to the essential elements which are common to all such offences: (*i*) the mentality of the accused, (*ii*) the nature of his act, and (*iii*) its effect upon the human victim. The first may present itself in its most dismal form, as where a person commits murder

(6) *Budho*, (1916) P. R. 29; 32 I. C. 148.

(7) Hawk C. P. C. 31, s. 9, p. 79; 4 Black. 197; 1 East 344.

(8) First Rep., ss. 327, 330.

for the sake of rape or robbery. It may assume its least culpable aspect where death is the consequence of his negligence. In the one case there was deliberation, in the other there was no deliberation at all But these are not the extreme cases, nor cases necessarily antithetical. For, there may be an intention to kill and yet the homicide may be justifiable. Such cases have been considered in the foregoing pages[9] and they must be therefore eliminated from the present discussion.

3003. The cases to be so eliminated may be designated excusable or justifiable homicide, and the principal cases falling into that category are the following:—

I. *Excusable homicide*:—

(*a*) Where death is caused by accident or misfortune in the doing of a lawful act in a lawful manner by lawful means with proper care and caution, and without any criminal intention or knowledge (s. 80).

(*b*) Where an act is done in good faith for a person's benefit (s. 92).

(*c*) Where such is done by a person with deranged or immature mind (ss. 82-85).

II. *Justifiable homicide*:—

(*a*) By a person who is bound or by mistake of fact, in good faith believes himself *bound* by law (s. 76).

(*b*) By a person who is justified or by mistake of fact, in good faith believes himself to be *justified* by law (s. 79).

(*c*) By a Judge acting judicially in the exercise of any power which is or in good faith he believes to possess under law (s. 77).

(*d*) By a person acting in good faith and pursuant to the judgment or order of Court.

(*e*) By a person acting without any criminal intention to cause harm, and in good faith to avert other harm to person or property (s. 81).

(*f*) By a person exercising his right of private defence (s. 100).

3004. All these cases are exceptional and must therefore be excluded from a discussion under these sections. For the rest, the section deals with the elements necessary to constitute culpable homicide, and which are (*i*) the causing of death, (*ii*) the doing of an act, and (*iii*) the presence of the intention to kill or knowledge that the act was likely to cause death.

3005. Causing Death.—In the first place then there must be the causing of death. Now "death" here means the death of a human being[10] so that the death caused must be death of a human being. But as the explanation has it, the causing of the death of a child in the mother's

Death must be of a Human Being.

(9) Ss. 76-106. (10) S. 46.

womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.[11] This explanation makes two things clear. In the first place, it excludes human fœtus from the category of a human being, and in the second place it makes infanticide depend upon the fœtus being sufficiently advanced to have assumed the human shape and its emergence from its mother's womb.

The use of the "child" must be understood to imply that the fœtus has developed sufficiently to respire. If therefore the child is killed in the womb, the fact that it was then alive and was consequently still-born would not make it a homicide, though the offender would be punishable under either s. 312 or 315, according to its stage of development in the womb. In this respect this section is wider in its term than the English Law under which *complete* and not only *partial* emergence is necessary to constitute the child a human being. So the English Commissioners, in their draft Code of 1879 which presented the existing law, had adopted the following section: "A child becomes a human being within the meaning of this Act when it has completely proceeded in a living state from the body of its mother[12]; whether it has breathed or not,[13] and whether it has an independent circulation or not, and whether the navel string is severed or not,[14] and the killing of such child is homicide, when it dies after its birth in consequence of injuries received before, during or after birth."[15] Here again the Indian rule differs. For while under English Law it is homicide to cause injuries *before* the birth of child, if it dies in consequence after it is born, under the Code it will only be an offence under s. 315, and in any case, it will not amount to homicide.[16]

Explanation 3.

3006. The term "human being" would then in the present connection mean a living man, woman, or child, at least partially delivered.[17] The clause "though the child may not have breathed," suggests that a child may be born alive, though it may not respire, or it may respire so imperfectly that it may be impossible to obtain satisfactory proof that respiration has taken place.

Meaning of "Causes."

3007. The question what is causing death, still remains, and it must be answered in the light of the two explanations added to elucidate the meaning of the expression. Now an act may be said to cause death when the death results from the act itself, or from consequences naturally or necessarily flowing from that act. In one sense, anything contributing to or bringing about the effect is spoken of as its cause. Thus, if a person fall from a ladder, the ladder would be as much spoken of as the cause of the fall as his elevation and losing his balance. But this is not the sense in which causation is understood in law.

(11) Expl. 3.
(12) *Poulton*, C. & P. 329.
(13) *Brain*, 6 C. & P. 349.
(14) *Contra*, in *Enock*, 5 C. & P. 539; *Trilloe*, C. & Marsh. 650; *Wright*, 9 C. & P. 754.
(15) *Trilloe*, C. & Marsh. 650.
(16) Expl. 3, Comen.
(17) *Budho*, (1915) P. R. No. 29, 32 I. C. 148.

It is there used in relation to man, and as such, cause must mean exerting his power into action.[18]

3008. But a person may produce a desired effect as much by the use of force as by working upon the other's fancy. As Lord Hale put it: "If a man, either by working upon the fancy of another, or possibly by harsh or unkind usage, puts another into such passion or grief, or fear, that the party either dies suddenly, or contracts some disease whereof he dies, this may be murder or manslaughter in the sight of God, but not in *foro humano*, because no external act of violence was offered, whereof the common law can take notice, and secret things belong to God."[19] But it is evident that the use of violence is by no means necessary to constitute a cause, it is concievable that the same result may be attained by an act unaccompanied by transmission of force. As Sir James Stephen asked: "Suppose a man kills a sick person intentionally, by making a loud noise which wakes him, when sleep gives him a chance of life; or suppose, knowing that a man has aneurism of the heart, his heir rushes into the room, and roars into his ear 'Your wife is dead!' intending to kill and killing him, why are not these acts murder?"

That they should be so regarded was the view taken by the framers of the Code, who had added an illustration to that effect[20] adding: "Mr. Livingston, we observe, excepts from the definition of homicide cases in which death is produced by the effect of words on the imagination or the passion. The reasoning of that distinguished jurist has by no means convinced us that the distinction which he makes is well founded. The reasonable course, in our opinion, is to consider speaking as an act, and to treat A as guilty of voluntary culpable homicide, if by speaking he has voluntarily caused Z's death, whether his words operated circuitously by inducing Z to swallow poison or directly by throwing Z into convulsions. There will, indeed, be few homicides of this latter sort. It appears to us that a conviction, or even a trial, in such a case would be an event of extremely rare occurrence. There would probably not be one such trial in a century. It would be most difficult to prove to the conviction of any Court that death had really been the effect of excitement produced by words; it would be still more difficult to prove that the person who spoke the words anticipated from them an effect which, except under very peculiar circumstances, and on very peculiar constitution, no words would produce, still it seems to us that both these points might be made out by overwhelming evidence; and supposing them to be so made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol or a sword. Suppose it to be proved to the entire conviction of a Criminal Court that Z, the deceased, was in a very critical state of health; that A, the heir to Z's property, had been informed by Z's physicians that Z's recovery absolutely depended on his being kept

(18) *West*, 2 C. & K. 784.
(19) 1 Hale P. C. 429.
(20) *Ib.*, (*b*): "*A*, with the intention or knowledge aforesaid, relates agitating tidings to *Z*, who is in a critical stage of a dangerous illness; *Z* dies in consequence. *A* has committed the offence of voluntary culpable homicide."

quiet in mind, and that the smallest mental excitement would endanger his life; that A immediately broke into Z's sick room, and told him a dreadful piece of intelligence, which was a pure invention; that Z went into fits, and died on the spot; that A had afterwards boasted of having cleared the way for himself to a good property by this artifice; these things being fully proved, no Judge could doubt that A had voluntarily caused the death of Z; nor do we perceive any reason for not punishing A in the same manner in which he would have been punished, if he had mixed arsenic in Z's medicine."(21)

3009. This view was concurred in by the Law Commissioners who observed: "Having maturely considered the matter, we come to the same conclusion with the authors of the Code, that if death is certainly caused by words deliberately used by a person with the intention of causing that result, or with the knowledge that in the condition of the party to whom the words are spoken, it is likely that they will make such an impression upon him as to cause his death, and without any such excuse as is admissible under any of the provisions in the Chapter of General Exceptions, there is no sufficient reason why that person should be excepted from the penalty of culpable homicide, any more than one who has caused death by the infliction of a bodily injury which he knew to be likely to cause death.

Here is the wilful doing of that which is known to be likely to produce evil, manifesting the *mens rea* essential to criminal responsibility; the evil produced is death; the efficient cause, the words spoken, It is scarcely agreeable to reason that having traced the effect to its cause, the law should refuse to acknowledge it as an effective cause, or that the Judge should be obliged to say, it is true, the effect was produced by the operation of words, but words in law are not an act, therefore, the speaker is not criminally responsible."(22) Indeed, the only reason, why words producing nervous shock resulting in death, are treated as insufficient in themselves to justify a charge of homicide is that the effect produced is indirect and too remote, so that the words could not be looked upon as its cause. But surely the question whether they do or do not constitute the cause cannot be disposed of without reference to facts. For if as in the case supposed by the codifiers, death is unerringly traceable to the words spoken, why should not the latter be held to be the cause of the former?

3010. The recent English view is certainly in that direction. So in a case where the accused unlawfully assaulted B, who at the time had in her arms an infant, which was thereby so frightened that it died, whereupon he was indicted for the murder of the infant, Lord Denman told the jury that the accused would be guilty of manslaughter if the jury thought that the assault on B was the direct cause of the infant's death. The prisoner was, however, acquitted.(23) Indeed, as the authors justly remark, such a case of homicide is only theoretically possible; but in practice it is scarcely likely. And if such a case is ever launched, it is not likely to be accompanied by proof of all the facts which would unmistakably point to the verbal fright as the cause of death.

(21) Note M, Reprint, pp. 142, 143.

(22) 1st Rep., s. 249, Reprint, p. 248.

(23) *Towers*, 12 Cox. 530.

All the same, it is just as well to note that law does not exclude the possibility of such cases, and the word "causes" is wide enough to embrace such a contingency. And this was the intention, for the authors wrote: "The next point to which we wish to call the attention of His Lordship in Council is the unqualified use of the words 'to cause death' in the definition of voluntary culpable homicide. We long considered whether it would be advisable to except from this definition any description of acts or illegal omissions, on the ground that such acts or illegal omissions do not ordinarily cause death, or that they cause death very remotely. We have determined, however, to leave the clause in its present simple and comprehensive form."(24) And so it remains. But the illustration was advisedly omitted, probably because it did not accurately convey all that the Legislature intended to be the essential ingredients of such homicide.(25)

3011. But this is an instance of causation of rare occurrence. The more usual modes of causing death are by striking, poisoning, drowning, starving, but as stated before, death may be caused by any means of which there are thousands by which human nature may be overcome. But there may be cases in which more than one cause may have contributed to the death. Suppose, for instance, the husband beat his wife, and the latter being terrified threw herself out of a window and from the combined effects of which she died. Could the husband be held to have caused her death? Such a case arose in England, and Heath, Gibbs and Bayley, JJ., were of opinion that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner was, however, acquitted, the jury holding that the deceased had thrown herself out of the window from her own intemperance, and not under the influence of his threats.(1) But in another case the deceased was riding on horseback, when the prisoner struck him with a stick, whereupon the deceased spurred his horse on to avert a further attack, but the horse took fright and threw down the deceased from the effects of which he died; and it was held that the accused was guilty of manslaughter.(2)

Proximate Cause.

Of course, where two or more persons armed with deadly weapons set upon a man and beat him to death, the fact that it was impossible to ascertain who struck the fatal blow would be no flaw in their conviction for murder.(3)

3012. In another case the accused inflicted dangerous wounds on the deceased, who following the attack, continuously suffered from high fever for 40 days, at the end of which period symptoms of blood

(24) Note *M.*, Reprint, p. 141.

(25) The illustration was on this ground animadverted upon by three competent critics of the Bill—1st Rep., ss. 246, 247. And though the Law Commissioners defended it against their criticisms, (*i. b.*, s. 248), still it was considered advisable to drop it.

(1) *Evans*, (1812) unrep., cited in *Hickman*, 5 C. & P. 151.

(2) *Hickman*, 5 C. & P. 151.

(3) *Kappa* v. *Kappa*, 7 Cr. L. R. 125.

poisoning developed, followed on the next day by symptoms of brain fever. He died the next day. It was held that the wounds inflicted by the accused were the cause of his death within the meaning of this section and that the accused were rightly convicted of murder.(4)

Cause Too Remote.

3013. But the doctrine of criminal causation has reasonable limits. It is not interminable, and there are cases when the Court would regard the cause as too remote to support a criminal charge. Such was the case in which the prisoner and the accused had some dispute, whereupon the former pushed the boat of the latter with his foot, and who thereupon stretched out over the bow of the boat to lay hold of a barge to prevent the boat drifting away, and in so doing he lost his balance and fell overboard and was drowned. The Court held that the facts, even if proved, did not suffice to make the prisoner liable for manslaughter.(5) Here the facts were held to be insufficient because the push was too remotely connected with the subsequent drowning, as there were two intervening acts on the part of the prisoner—his stretching out to seize the barge and losing his balance which equally accounted for his death.

This was more clearly brought out in a similar case in which the deceased had slipped into the water to escape an assault from the prisoner to rob or murder him, and got drowned. The body showed marks of violence due to the assault, but they were insufficient to cause death, which was caused by drowning, and Erskine, J., told the jury that a man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force applied either to the body or the mind; and it then became the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded from the circumstances by which the deceased was surrounded; not that the jury must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take.(6)

3014. There are other instances of such remoteness, but they arise out of "illegal omissions," which will have to be presently considered.

Explanation 1.

3015. Contributory Cause When Immaterial.—In this connection it would, however, be more convenient to take note of the two explanations. The cases last considered clearly show that the cause must not only be the *causa sine qua non*, but it must also be a cause reasonably proximate. If it is too remote, it is a negligible cause as much to support a criminal prosecution as it is to support an action in tort. But if the cause is otherwise good and sufficient, explanation I makes it a matter of indifference that it was *per se* insufficient to cause death of an ordinary healthy person. This is the very reverse of the doctrine of contribution which has a recognized place in the law of torts. But for obvious reasons, a criminal cannot be heard to apportion his crime on the ground that he had only accelerated and not caused the death of the deceased which was *ex visitatione Dei* imminent. And in this respect the English

(4) *Nuro*, 7 S. L. R. 83, 23 I. C. 744.
(5) *Waters*, 6 C. & P. 328.
(6) *Pitts*, C. & Mars. 284.

rule is coincident,[7] and, indeed, necessarily so. For the fact that a person was moribund or was suffering from mortal disease can never be pleaded as a justification for the fatal stroke. It may be that in such a case, he merely accelerated his death, but acceleration merely points to time, death was the result as much in the one case as if the person had been sound. But, of course, this does not mean that the accused in either case is liable to the same penalty, or, indeed, for the same offence. All that can be said is, that the accused in each case may rightly be held to have *caused* the death of the deceased. But as has been observed before (§§ 3002-3004) all persons who cause death of another, are not necessarily guilty of culpable homicide, nor can they be visited with the penalties reserved for that offence.

3016. The degree of crime depends upon the most essential ingredient which has still to be considered, namely, intention or knowledge. If suppose a person kicks another in the stomach, of which he dies. Here he has certainly caused his death, whether the man was or was not suffering from an enlarged spleen, the rupture of which compassed his death. But it is evident that the accused cannot be visited with the penalty provided for culpable homicide irrespective of other considerations. If suppose he knew of his disease and intending to kill him, he lighted upon that means as the easiest mode of despatch, he would then be unquestionably guilty of not only homicide but of murder, assuming of course, that there were no extenuating circumstances present. But if the accused was ignorant of the fact that the deceased was suffering from an enlarged spleen, and intending to chastise but not to kill him, he gave him a kick as a punishment for some delinquency, it is evident that he could not be visited with the same penalty, nor held liable for the same crime.[8]

3017. The finding that death was caused by a person is not, therefore, conclusive as pointing to any crime. For that purpose, other elements are necessary (§§ 3027-3037). And even where death follows a personal injury, it may be only *post hoc* and not necessarily *propter hoc*. In order then to connect the injury with the effect, it is not merely necessary to shew that there was an injury after which death ensued. It is further necessary to show that it was in consequence of the injury that death was caused. But under this explanation it will be sufficient for this purpose if it is shown that death was *accelerated* by the injury. In other words, what the Legislature means is that when causes more than one contribute to the death, each one of those causes—provided it is a cause, will be treated as a sole cause for the purpose of determining the criminal responsibility of the offender. And in judging whether it is a cause, the test to apply is, whether it accelerated the end. It therefore follows that, in order to hold that the accelerating injury had caused the death, the Court must be satisfied (*a*) that the death at the time when it occurs was not caused solely by the disease, and (*b*) that it was caused by the bodily injury to this extent, that it was accelerated by such injury.

(7) 1 Hale P. C. 428; *Murton*, 3 F. & F. 492; *Martin*, 5 C. & P. 128; *Webb*, 2 Lew. 196; *Ismail*, 11 S. L. R. 79, 44 I. C. 335.

(8) *Fox*, 2 A. 522; *O'Brien*, 2 A. 766; *Randhir Singh*, 3 A. 597; *Idu Beg*, 3 A. 776; *Aiman*, 1 A. L. J. R. 162, to the same effect; *Megha Meah*, 2 W. R. 39; *Panchanun Tantee*, 5 W. R. 97; *Bysagoo Noshyo*, 8 W. R. 29.

If therefore, the injury consists of several strokes given in a *melee*, the question whether each one of the strokes was the cause of death, would depend upon whether it had accelerated the death. And if two or more strokes given by different persons had that effect, each of the assailants would be deemed to have caused the death, though the strokes may singly or collectively be insufficient to cause it. The question whether the injury had the effect of accelerating the death is a question of fact, which calls for close examination. Death may be accelerated by aggravating the disease or it may produce a general debility in consequence of which death is caused though the disease showed no symptoms of increase. On the other hand, the injury inflicted may be so inconsiderable that it could scarcely be taken into account. But the question in each case is a question of fact. Take the following case. Four persons joined in beating a fifth, out of whom two gave him fatal blows on his head, while the remaining two, while ignorant of the serious nature of the injuries already inflicted by their comrades, struck him on the body without exceptional violence, it was held that they could not be held liable for causing the man's death and that the only offence of which they were guilty was one under s. 323 and they were let off with a sentence of imprisonment for one year.(9)

3018. Neglect Accelerating Death.—So again, for the same reason, though it is not quite so obvious, that Explanation 2 lays down that no man can be heard to say that he did not cause the death, because it might have been prevented by restoring to proper remedies and skilful treatment. The authors of the Code, in justifying this clause say: "We see no reason for excepting the cases of persons who die of slight wound, which, from neglect or from the application of improper remedies, have proved mortal from the simple general rule which we propose. It will, indeed, be in general more difficult to prove that death has been caused by a scratch than by a stab which has reached the heart; and it will, in a still greater degree, be more difficult to prove that a scratch was intended to cause death than that a stab was intended to cause death; yet both these points might be fully established. Suppose such a case as the following:—It is proved that A inflicted a slight wound on *Z*, a child who stood between him and a large property; it is proved that the ignorant and superstitious servants about Z, applied the most absurd remedies to the wound; it is proved that under that treatment the wound mortified, and the child died. Letters from A to a confidant are produced; in those letters A congratulates himself on his skill, remarks that he could not have inflicted a more severe wound without exposing himself to be punished as a murderer, relates with exultation, the mode of treatment followed by the people who have charge of Z, and boasts that he always foresaid that they would turn the slightest incision into a mortal wound. It appears to us, that if such evidence were produced, A ought to be punished as a murderer.

Explanation 2.

"Again, suppose that A makes a deliberate attempt to commit assassination; in the presence of numbers he aims a knife at the heart

(9) *Gul Shah*, (1914) P. W. R. 41, 25 I. C. 1005.

of Z, but the knife glances aside, and inflicts only a slight wound. In such cases there is no doubt whatever as to the intention. Suppose that the person who received the wound, is under the necessity of exposing himself to a moist atmosphere immediately afterwards, and that, in consequence, he is attacked with tetanus and dies. Here again, however slight the wound may have been, we are unable to perceive any good reason for not punishing A as a murderer."(10) The policy of this rule was questioned, but it was upheld by the Law Commissioners, who said: "The meaning of the Commissioners we conceive to be this, that whereas in countries in which good medical treatment is common, it is difficult to suppose that a person inflicting a slight wound on another could contemplate his death as a probable result, such a result may be supposed to enter into his contemplation in a country where bad medical treatment is far more common than good, and, therefore, the definition of homicide ought not to exclude death resulting from a slight wound as the primary or original cause."

In England, the rule is somewhat similar, but it only applies if the death took place within a year and a day from the date of the injury.(11) So Lord Hale said, that if a man give another a stroke not in itself so mortal but that with good care might be cured, yet if the party die of this wound within the year and day, it is murder, or other species of homicide, as the case may be; though if the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill-applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound is not in itself mortal, for want of proper applications, or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder or manslaughter, according to circumstances, for though the fever or gangrene, and not the wound, be the immediate cause of the death, *causa causati*.(12)

3019. The English view as since expounded and maintained in several cases, then appears to be that ill-treatment is a matter of no consideration, if the injury inflicted was itself dangerous, though it may not have been necessarily mortal.(13) So Erle, J., said in a case: "I am clearly of opinion, and so is my brother Rolfe, that where a wound is given, which, in the judgment of competent medical advisers, is dangerous, and the treatment which they *bona fide* adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible, and, of course, those who aided and abetted in it."(14) Then adverting to the argument of unskilful treatment as being a contributory cause of death, he said: "To admit this evidence would be to raise a collateral issue in every case as to the degree of skill which the medical man possessed." In another case, a similar plea raised for the prisoner, was disposed of by Park, J., who said: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial,

(10) Note *M.*, Reprint, p. 143.
(11) 1 Hawk P. C. C. 31, s. 9; 1 East P. C. C. 5, s. 112; 4 Black 197.
(12) 1 Hale P. C. 428.
(13) *Holland*, 2 M. & Rob. 351; *Pym*, 1 Cox 339; *McIntyre*, 2 Cox 379.
(14) *McIntyre*, 2 Cox 379.

as if the prisoner was so unfortunate as to accelerate her death, he must answer for it."(15)

3020. In all such cases, the infliction of an initial dangerous or severe injury was postulated, but the section is unqualified, and it may then raise a question whether the infliction of an injury, however insignificant would be regarded as causing death under this section. It may be that a negligible scratch aggravated by some adventitious causes produces an effect which was otherwise impossible and could not have been foreseen. Would it then be right to say that the scratch inflicted was the cause of the death, though the presence of the scratch had only a secondary place in the chain of causation; death being immediately traceable to other and more potent causes unconnected with the injury?

Such a case may arise, as was supposed by the authors where a slight injury is aggravated by the application of unskilful salves in consequence of which death ensues; or it may be that it is brought about by the accused himself, as by his intemperance in a hot climate or his removal to a hospital where a highly infectious disease, such as erysipelas happens at the time to be prevalent. Indeed, there may be a thousand potent contributory causes to which it would be more correct to attribute death than to the initial injury. In one sense it is no doubt true that if no bodily injury had been received, the man would not have died; and it may, therefore, be said, that the injury is in some sense the cause of death. But it seems indispensable that the death should be connected with the act of violence or other primary cause, not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstance.

3021. In the cases last supposed, the bodily injury caused death under extraordinary circumstances. Its direct influence in producing that result was small, and the intervening circumstances which more immediately caused death could scarcely have been foreseen. Nevertheless, the use of the words "to cause death" without qualification or exception brings such cases within the term of the definition of the offence of culpable homicide. The difference between these cases and others of less complexity, is a matter to be considered by the Court in estimating the effect of evidence. And though, as the authors have pointed out, there may be cases in which this fact may be found coupled with the intention or knowledge requisite to complete the offence of homicide, still where the intervening cause was unexpected, it would be impossible to hold that initial injury had caused the death within the meaning of this explanation.

Causing Death by Poisonous Drugs.

3022. It will be observed that the two explanations only refer to the infliction of "bodily injury" as causing death. They do not refer to any other act by which homicide is possible. Suppose, for instance, a person is laid up with an ailment and calls in a doctor who gives him something in small doses which instead of curing his ailment aggravates it and accelerate his death. Here Explanation 1 is clearly inapplicable, and yet the victim

(15) *Martin*, 5 C. & P. 130.

died in the same way as if one fell blow had struck him down. In both cases death was accelerated, but the methods adopted were different. But in spite of no reference to it in the explanation it is apprehended, that the law is in either case the same. Some instances of such cases have been already given in the section dealing with criminal negligence (§§ 2810-2813), and those cases are authorities for holding that if added to negligence there is the criminal intention or knowledge, the accused would be indictable for homicide or murder if the other necessary elements of that crime are present.

3023. Death by "Doing an act."—Hitherto the only question that has been discussed, is the meaning of cause as applied to death. The means by which death may be caused have been only incidentally referred to. But they play an important part in the concatenation of causes and upon them depend the measure of criminal liability. In one sense it is no doubt true that no one can be said to cause death unless he does an act in relation to the deceased, and which has a fatal ending. But what should be understood by the act which connects the criminal with the crime. In ordinary simple cases such acts may consist of such things as beating, administering poison or the like. But these do not exhaust the catena of causes into which an act enters. It is evident that the word "act" is used here in the very largest sense as connoting the doing of a thing by the exercise of power or otherwise.(16)

Such power may be exercised by application of force as in the case of assault, or it may take the form of an alarming message communicating to a person in distress (§§ 3008, 3009). In each case it is an act because it is something done in relation to another. It is not necessary that the act should have been done in execution of a duty, though it would be an aggravating circumstance if a person bound to another by the ties of duty causes his death. It is for this reason that regicides, patricides, filicides, and the like are commonly regarded with peculiar loathing. But duty may as often be an aggravation as an extenuating circumstance. For it all depends upon the intention. A schoolmaster,(17) a father,(18) or a peson in *loco parentis*(19) has the right of correction, but it must not be excessive. If, therefore, it was excessive and unmerciful and the child dies, the act may amount to culpable homicide if the object of the chastisement was the good of the child, and it may amount to murder if it was illegal or immoral (§ 334).

3024. Now the word "act" as defined in the Code,(20) includes both an act properly so-called as well as an illegal omission. Death may then be as much caused by a positive doing of a thing as by omitting to do what a person was legally bound to do. And as to which the authors wrote: "The first point to which we wish to call the attention of his Lordship in Council is the expression 'omits what he is legally bound to do' in the definition of voluntary culpable homicide. These words, or other words tantamount in effect, frequently recur in the Code. We think this the most convenient place for explaining the

(16) S. 32.
(17) Of course, the other objective sense of the word as implying the effect of which the power exerted is the cause is out of question here.
(18) *Hopely*, 2 F. & F. 202.
(19) *Griffin*, 11 Cox. 402.
(20) *Cheeseman*, 7 C. & P. 455.

reason which has led us so often to embody them; for if that reason shall appear to be sufficient in cases in which human life is concerned, it will *a fortiori* be sufficient in other cases.

"Early in the progress of the Code it became necessary for us to consider the following question: when acts are made punishable on the ground that those acts produce, or are intended to produce, or are known to be likely to produce, certain evil effects, to what extent ought omissions which produce, which are intended to produce, or which are known to be likely to produce, that same evil effects to be made punishable?

"Two things we take to be evident; *firstly*, that some of these omissions ought to be punished in exactly the same manner in which acts are punished; *secondly*, all these omissions ought not to be punished. It will hardly be disputed that a gaoler who voluntarily causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who voluntarily causes the death of an infant entrusted to her care by omitting to take it out of a tub of water into which it has fallen, ought to be treated as guilty of murder. On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die. It is difficult to say whether a Penal Code, which should put no omissions on the same footing with acts, or a Penal Code which should put all omissions on the same footing with acts, would produce consequences more absurd and revolting. There is no country in which either of these principles is adopted. Indeed, it is hard to conceive how, if either were adopted, society could be held together.

"It is plain, therefore, that a middle course must be taken; but it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn it will, we fear, include some cases which we might wish to exempt, and will exempt some, which we might wish to include.

"Mr. Livingston's Code provides that a person shall be considered as guilty of homicide who omits to save life, which he could save, 'without personal danger or pecuniary loss.' This rule appears to us to be open to serious objection. There may be extreme inconvenience without the smallest personal danger, or the smallest risk of pecuniary loss, as in the case which we lately put of a surgeon summoned from Calcutta to Meerut to perform an operation....We pronounce with confidence, therefore, that the line ought not to be drawn where Mr. Livingston has drawn it....What we propose is this, that where acts are made punishable on the ground that they have caused, or have been

intended to cause, or have been known to be likely to cause a certain evil effect; omissions which have caused, which have been intended to cause, or which have been known to be likely to cause the same effect, shall be punishable in the same manner, provided that such omissions were, on other grounds, illegal."[21] An omission is illegal if it is an offence or a breach of some direction of law, or if it is such a wrong as would be a good ground for a civil action.[22]

3025. The authors then went on to defend their rule by a few illustrations of the way in which it will operate:—

"(*i*) A omits to give Z food, and by that omission voluntarily causes Z's death. Is this murder? Under our rule it is murder if A was Z's gaoler, directed by law to furnish Z with food. It is murder if Z was the infant child of A, and had, therefore, a legal right to sustenance, which right a Civil Court would enforce against A. It is murder if Z was a bed-ridden invalid, and A, a nurse hired to feed Z. It is murder if A was detaining Z in unlawful confinement, and has thus contracted a legal obligation to furnish Z, during the continuance of the confinement with necessaries. It is not murder if Z is a beggar, who has no other claim on A than that of humanity.

"(*ii*) A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death. This is murder, if A is a peon, stationed by authority to warn travellers from attempting to ford the river. It is murder if A is a guide who had contracted to conduct Z. It is not murder if A is a person on whom Z has no other claim than that of humanity.

"(*iii*) A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off, it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal[23]. But if A be a mere passer-by it is not murder."[24] It is, of course, apparent that if criminality is to attach to omissions, and there are a large number of cases in which it should obviously be so attached, a definite line of demarcation must be drawn somewhere, otherwise criminality will become only another name for non-performance of duty. "It is, indeed, most highly desirable that man should not merely abstain from doing harm to his neighbours, but should render active service to his neighbours. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing man with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others, would be preposterous. We must grant impunity to the vast majority of those omissions, which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such ommissions only when they are distinguishable from the rest by some circumstance which marks them out as peculiarly fit objects of Penal legislation."[25]

(21) Note M, Reprint, pp. 139, 140.
(22) S. 43.
(23) S. 289.
(24) Note M, Reprint, pp. 140, 141.
(25) *Ib.*, p. 141.

3026. At any rate this is also the view of English law, and under both systems then, criminality depends upon the doing of some positive injury or illegal omission by which injury is caused. And in order to ascertain what kinds of killing by omission are criminal, it is necessary in the first place to ascertain the duties which tend to the preservation of life. They are as follows : "A duty in certain cases to provide the necessaries of life ; a duty to do dangerous acts in a careful manner and to employ reasonable knowledge, skill, care and caution therein ; a duty to take proper precautions in dealing with dangerous things; and a duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life. Such is omission of parents or guardians, and in some cases the duty of masters, to provide food, warmth, clothing, etc., for children[1]; the duty of a surgeon to employ reasonable skill and care in performing an operation; the duty of the driver of a carriage to drive carefully; the duty of a person employed in a mine to keep the doors regulating the ventilation open or shut at proper times. To cause death by the omission of any such duty is homicide, but there is a distinction of a somewhat indefinite kind as to the case in which it is and is not unlawful in the sense of being criminal. In order that homicide by omission may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence. There must be more, but no one can say how much more carelessness than is required in order to create a civil liability.[2]"

3027. Intention or Knowledge Requisite.—But the fact that death was caused by a person may or may not be a crime, and if a crime, it may not amount to homicide, unless there is present the all-essential element of criminality—the intention of causing death, or the intention of causing such bodily injury as is likely to cause death, or the knowledge that the act is likely to cause death. To say the least, in order to constitute culpable homicide, there must be at least the knowledge connecting the act with the effect as a likely contingency. This knowledge of likelihood is the very least which makes homicide culpable, whether the act in the course of which it was committed be legal or illegal.

(1) Knowledge of Likelihood.

3028. In other words, the fact a person was engaged in an unlawful act, and in the course of which he commits homicide, the unlawfulness of his act will not dispense with the proof of knowledge of likelihood. So the authors wrote: "To punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow-creature. The utmost that he can do is to abstain from everything which is at all likely to cause death. No fear of punishment can make him do more than this; and, therefore, to punish a man who has done this can add nothing to the security of human life. The only good effect which this punishment can produce will be to deter people from committing any

(1) There is no such duty in India. (2) 3 History Cr. L. 10.

of those offences which turn into murders what are in themselves mere accident. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way. For example, hundreds of persons in some great cities are in the habit of picking pockets. They know that they are guilty of a great offence; but it has never occurred to one of them, nor would it occur to any rational man, that they are guilty of an offence which endangers life. Unhappily one of these hundreds attempts to take the purse of a gentleman who has a loaded pistol in his pocket. The thief touches the trigger, the pistol goes off, and the gentleman is shot dead. To treat the case of this pick-pocket differently from that of the numerous pick-pockets who steal under exactly the same circumstances, with exactly the same intentions, with no less risk of causing death, with no greater care to avoid causing death; to send them to the house of correction as thieves, and him to the gallows, as a murderer, appears to us an unreasonable course.... We trust we have judged correctly in proposing that when a person engaged in the commission of an offence causes death by pure accident, he shall suffer only the punishment of his offence, without any addition on account of such accidental death."(3)

3029. This provision of the Code will be found embodied in illustration (*c*) to this section. As such, it is in direct conflict with the corresponding rule of English Law according to which, if a person whilst committing an unlawful act accidentally kills another, he would be liable for manslaughter or murder according as his act was felony or misdemeanour.(4) But this was an extreme view and its rigour has been considerably relaxed in several cases, the trend of which may be said to rather approach the rule here enunciated.(5) However, so far as the rule is here propounded, it is manifest that the mere prosecution of an illegal act does not dispense with the necessity of proof of the knowledge of likelihood. This raises the question (*i*) what is knowledge, and (*ii*) when should a person be said to possess knowledge that his act is likely to cause death.

3030. Now knowledge implies consciousness. That consciousness is necessarily of a future contingency the happening of which may depend upon a variety of circumstances, which it is impossible, that all should be present in the mind of the offender. For it is not necessary that in order to constitute the offence of culpable homicide, the death should have ensued immediately after the act, or that no other contributory cause should have supervened in the interval. The offender could not be expected to foresee so far ahead. Nor does the section require it. It requires however, such knowledge as men in his position might be expected to possess. For instance, if *A* strikes *B* on the head with a heavy stick, it is common knowledge that *B* is likely to die of the stroke. He may recover but his death was more likely. This inductive inference is termed "knowledge" in this section. In strictness, it is not knowledge at all, for there can be no knowledge without perception. But it is knowledge in its wider sense as connoting such

(3) Note M, Reprint, pp. 149, 150.
(4) *Hodgson*, (1730) 1 Leach 6.
(5) *Per* Vaughan, B., in *Edmeads*, 3 C. & P. 390; *Collison*, 4 C. & P. 565; *per* Littledale, J., in *Howell*, 9 C. & P. 450; *Lee*, 4 F. & F. 63; *Warner*, 5 C. & P. 525.

inference as to a future probability as is only next to perception. In this sense, it is something more than belief, because it is based upon reasoned inference. It is much more than conjecture which is merely a mental leap into the dark. Knowledge is, of course, a mental act—a condition of the mind, and as such incapable of direct proof. Not the best evidence procurable can therefore warrant a finding that the accused knew a certain fact—all that such evidence would justify is a finding that its knowledge was extremely probable. And this is all that the law requires.(6)

3031. Again, the knowledge so proved can only be knowledge of the likelihood of a future event. But there are degrees of likelihood, as there are degrees of knowledge. And these degrees are used in the Code to differentiate culpable homicide from murder. Thus while this section speaks of the death as being likely, the next section refers to the knowledge of death being caused "in all probability," which is only one rendering of the phrase that death was most likely. The degree of probability would then in such cases determine the degree of crime. And this is the essential difference between the two offences, so far as they are based upon the existence of knowledge. (s. 302.) Now, as in the case of murder, the degree of likelihood approximates to a practical certainty, so in the case of culpable homicide there appears to be no limit fixed, beyond which the likelihood would degenerate into a mere possibility or less. So the authors of the Code wrote. "We long considered whether it would be advisable to except from the definition any description of acts or illegal omission, on the ground that such act or illegal omissions do not ordinarily cause death, or that they cause death very remotely.

3032. There is undoubtedly a great difference between acts which cause death immediately, and acts which cause death remotely; between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the effects of the evidence in a particular case, not by the Legislature in framing the law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death; but if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see reason for exempting the person who caused it from the punishment of voluntary culpable homicide."(7)

3033. The question whether there were facts in a given case from which it could be reasonably inferred that the accused had knowledge that his act was likely to cause death, is then a question of fact upon which it will be the function of the jury to decide. It will be for them to say if the fact then present in the mind of the accused, were sufficient to have directed his mind and led it to infer that a certain act on his

(6) S. 3, "Proved," Indian Evidence Act (I of 1872).

(7) Note M.

part was likely to produce the resultant effect. It the facts warrant a high degree of likelihood, it would be a question whether the offence committed is not capital. But in judging of the likelihood the fact to be remembered is that that term points to a degree of probability less than that which does not count for the purpose of this section. This line must be mentally present before the jurors, who have for this purpose to place themselves into the situation of the accused and then judge as to what was the degree of his mental consciousness at the time of the act in question. Of course, for this purpose, it is necessary to take not only the facts as proved, but also the facts which are probable. This furnishes the data upon which the inference both of knowledge as well as the likelihood is to be made.

3034. In ordinary cases, this is by no means a matter presenting formidable difficulties. The only difficulty is to take a mental note of all the facts, circumstances and probabilities, after which it is comparatively easy to determine the state of the accused's mind at the time of the offence. But in so doing, regard must be had to the nature of the weapon used, the injury inflicted and the course it took, and whether it was natural or otherwise (§§ 311-313).

3035. As was remarked in a Calcutta case: "In judging of knowledge had by the accused, we must consider the circumstances—the blow that to one person, or under ordinary circumstances, may not in the ordinary course of nature, be likely to cause death, may yet be imminently dangerous to another, or under special circumstances."[8] So where the prisoner who resented his wife's leaving the house and then returning, gave her a violent kick on the back with his bare foot from which she, a girl of 8 or 9 years, fell down and died almost immediately, and the medical evidence showed that the violence used occasioned rupture of the abdomen, the Court said: "To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such a character, that no reasonable man could be ignorant of the likelihood of its causing death."[9] In this case it is evident that the prisoner did not intend to cause death and it is also certain that he had no clear consciousness of the fatal effect of his kick, which he had given *ex jure maritii* by way of chastisement. It was, however, a brutal kick and one which—if he did not know, he ought to have known—might terminate fatally. These considerations were not ignored by the Court who, however, observed: "If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. Acts probably or possibly involving danger to others, but which in themselves are not offences, may be offences under ss. 336, 337, 338, or 304-A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged

(8) *Ketabdi Mundul*, 4 C. 764. (9) *Ib.*

with regard to the knowledge, or means of knowledge, of the offender, and placed in their appropriate place in the class of offences of the same character."[10]

3036. Criminal knowledge is then in such cases demonstrated *a posteriori*. It takes into account not only knowledge but means of knowledge, not only the knowledge which is, but which judging from the effect ought to have been, in the accused. A person may then truthfully declare that he did not know that his act was likely to cause death and yet he may be rightly found to have had that knowledge. The truth is that in civil cases arising out of tort as well as in criminal cases, the standard which the Court fixes before itself is that of a reasonable man and the question it ultimately asks itself is not whether the accused had the knowledge, but whether as a reasonable man he could have had that knowledge. And for this purpose, the act itself is the real test.[11] If the knowledge was accompanied by a certain criminal intention, that fact may reflect on the knowledge, but intention *per se* is not necessary. And if there is, it may then, independently of knowledge, amount to culpable homicide of the aggravated type spoken of in s. 304[12] or murder.

3037. In one case, the house of one Lall Mahomed was broken into by a thief. Lall Mahomed raised an alarm and grappled with the thief but was being worsted when the prisoners who were his neighbours came to his rescue and attacking the thief they beat and kicked him so severely that he died. There were no less than 141 marks of separate blows visible on the body of the deceased, and several of his ribs were broken, and they were convicted of doing a rash and negligent act under s. 304-A, read with s. 109. But Pearson, J., held that the case fell within the comprehension of this section. "It may be doubted whether his assailants if they did not intend to kick him, did not at least intend to cause such bodily injury as they must have known to be likely to cause his death. But if it be held that they did not jointly purpose to kill him, but only to cause such bodily injury as was likely to cause death and that no one of them supposed the hurt inflicted by himself in particular to be likely to cause death, and that the offence is therefore taken out of the category of murder, it must still come under s. 304."[13]

The case is one provided for by s. 300, exception 2. Here there was a brutal assault committed on a malefactor. But the result would have been the same if the accused had committed the assault upon his own mother.[14] Two men were charged for the murder of the deceased on the following facts: The deceased had enticed away a woman who was the wife of one, and the daughter of the other accused and the latter armed themselves with sticks with a view to chastise

(10) *Ketabdi Mundul*, 4 C. 764, followed in *Idu Beg*, 3 A. 776.

(11) *Per* Straight, J., in *Idu Beg*, 3 A. 776; *Kanhai*, 35 A. 329; *Ram Newaz*, *ib.* 506; *Hanuman*, *ib.* 560; *contra* in *Dhian Singh*, 9 A. L. J. 180 dissented from; *Gulab*, 40 A. 686; *contra* in *Chandan Singh*, *ib.* 103 dissented from, to the same effect *Bhola Singh*, 29 A. 282; *Kure*, 16 A. L. J. 614; *Duma*, 19 M. 483; *See* this point further discussed under s. 325, post.

(12) *Faquir Mahomed*, (1869) P. R. No. 10.

(13) *Mony*, 5 N. W. P. H. C. R. 235.

(14) *Nidomarti*, 7 M. H. C. R. 119.

him, and lay in wait for him on the road by which he was expected to pass. When he came up they belaboured him on the chest and back, but avoided beating him on the head. The deceased died of the injuries inflicted. And the question was as to the offence of the accused. It was held that it fell under clause 2 of s. 304, that is to say, it was a culpable homicide with knowledge of the likelihood of death but without the intention to cause death or such bodily injury as was likely to cause death.(15)

Gross Negligence may amount to "Knowledge."

3038. A person may be under a mistake of fact. He may then be said to possess no knowledge as is ordinarily understood by that term, but if he acted blindly being driven by a momentary impulse which he took no trouble to guide or control, and without exercising that care and caution which might be expected from a reasonable man placed in similar circumstances, he would be deemed to possess knowledge of the likelihood of the consequence, whatever may have been the real state of his mind. In such a case the imputation of knowledge may be merely a legal fiction, a working hypothesis.

An apt illustration of this is furnished by the following case. The accused was returning home by night when he was suddenly confronted by an object lying by the side of the road, and three paces away from it. Under the *bona fide* impression that what he saw was a supernatural object, and without pausing to reflect and being under the influence of unbounded fear, the appellant struck three successive blows with his *lathi* on the object. As he struck the third blow he discovered by the light of the moon and by the face of the object being then uncovered that it was no other person but his close friend. He then turned and fled. He was convicted of murder, but on appeal his offence was held to be culpable homicide, "his culpability consisting in having struck these deadly blows without taking the slightest precaution with the view of ascertaining whether the object on which he struck the blows was a human being or not. In this case the appellant took not only no reasonable precaution, but took no steps to ascertain that fact. "The general principle of law seems to us to be that if a man strikes deadly blows and is so negligent that he takes no reasonable means to satisfy himself as to whether he is striking at a man or not, and the death of a human being ensues, he is guilty of a killing, which has no legal justification or excuse, and therefore amounts to the culpability which is necessary to show the commission of the crime of culpable homicide not amounting to murder. In other words, it removes the case from the category of death by misadventure or justifiable homicide."(16) While, therefore, holding the accused guilty of this offence, his mistake was held to extenuate his crime and the two months' imprisonment which he had already undergone before the hearing of his appeal was held to be more than a sufficient punishment.

3039. The fact that the accused really believed in the presence of an evil spirit would seem to be only an extenuation and not a justi-

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(15) *Faquir Mahomed*, (1890) P. R. No. 10; *Daras*, 75 I. C. (P). 689, (1923) A. I. R. (L.) 317.

(16) *Kangla*, (1898) A. W. N. 1663.

fication for the use of great violence. The accused in another case, had been called in to exorcise the spirit which was supposed to have possessed one Gidowa, a girl of 18, who had been complaining of some pain in the back. Gidowa had consented to the use of a certain amount of violence for exorcising the evil spirit. The accused called in one Jamaludin, and the two joined in beating her. She was also trodden upon and kicked. After this the third accused appeared from the village and joined in the assault, using his fists on her sides. Thereupon she died. The medical witness testified to there being many wales on her skin, and her lungs and kidneys were ruptured. The prisoner *bona fide* believed her being possessed by spirits and having acted as directed by them. It was contended for them that the predicament of the accused was as if they had been insane and their case was covered by s. 84. But this suggestion was dismissed with the remark that whatever their condition, they had not lost self control. The case was indeed, one in which the knowledge of the likelihood was to be imputed from the nature of the act, and in that view the accused were convicted of an offence under this section and sentenced each to three years' rigorous imprisonment.(17)

3040. Other cases similarly decided are explicable from the same standpoint. Such was the case of an unskilful eunuch who performed an operation to emasculate a man with his consent, but which he, being ignorant, did by simply cutting off his private parts with a knife, in consequence of which the patient died of haemorrhage.(18) But if the accused had in this case shown that he had successfully performed similar operations on other persons, it would have extenuated his crime to one under s. 304-A. This was shown by a Kabiraj who was tried for having killed a man by cutting out his internal piles with an ordinary knife. But the fact that he had performed similar operations sucessfully before saved him from the penalty to which the eunuch in the former case was held liable.(19)

In another case, certain snake-charmers, by professing to cure snake-bites, induced several persons to let themselves be bitten by a poisonous snake, from the effects of which three of those bitten died. It was held that the accused's offence would be culpable homicide, if they really believed in their cures.(20) In so holding the Court observed: "Any person who makes a poisonous snake bite another must be held to know that he is likely to cause death; and must be held to know that it is an act imminently dangerous, and there was no excuse for incurring the risk of death in this case."(21) A similar view was taken in another case in which a snake-charmer had in sport placed a snake on the head of one of the spectators. The snake bit him and he died and the accused was held to have committed culpable homicide as he was presumed to possess the knowledge that the putting of a venomous snake the fangs of which he had not extracted, on the head of a person was dangerous.(22)

(17) *Jamaludin*, (1892) B. U. C. 603.
(18) *Baboolun Hijraj*, 5 W. R. 7.
(19) *Sukaroo Kobiraj*, 14 C. 566.
(20) *Punai Fattama*, 3 B. L. R. (A. C.) 25, 12 W. R. 7.
(21) *Per* Jackson, J., in *Punai Fattama*, 3 B. L. R. (A. C.) 25.
(22) *Gonesh Dooby*, 5 C. 351.

3041. Of course, knowledge of the likelihood in such cases is widely apart from motive. The motive in the last case was to cure and not kill the deceased. The accused could not then have actually known, that their assault was likely to have a fatal termination. But it was the effect of their act, and in such cases law infers the cause from the effect. It therefore imputes a knowledge, but for which any amount of cruelty and brutality would go unpunished. But at the same time it does not wholly ignore the motive, but takes it into consideration in awarding the punishment.

3042. And where the injury caused is moderate, it treats it as a consentient act, entitling the accused to an acquittal.[23] This was the view taken of a husband who had beaten his wife with the intention of exorcising the evil spirit which he believed had possessed her. The injuries so inflicted were, however, slight and the wife did not die of them. The accused had not taken the plea of consent, but the Court took it into consideration, holding that " in such a matter an ignorant man acting with good intentions and not resorting to causing any grievous hurt or serious injury must be more leniently judged than a man of better education or experience." [24] This appears to have influenced the Court who in a similar case, but in which the injury inflicted was more severe, convicted the accused under s. 304-A.[25]. The section was, of course, inapplicable, though the light sentence passed was justifiable.

3043. Causing Death Without Knowledge.—A person may sometimes intend to cause death, but may fail to cause it in fact; and the act which results in death may not be in prosecution of the object of causing death, in which case the Courts are inclined to the view that the accused cannot be deemed to have caused death, with the knowledge pre-requisite for the offence of murder or culpable homicide. Several cases illustrate this view. In one case, one Gour Gobindo struck the deceased Dil Mohomed a blow or a slap on the left ear which knocked him down, and then he and others without enquiry as to whether he was dead or not, in haste hung him up to a tree so as to make it appear that he had committed suicide. The accused were convicted of hurt, but the High Court quashed the proceedings and directed a retrial and committal of the accused to the Sessions on the charges of murder, culpable homicide and hurt. The facts of the case were not clear. The deceased was said to have casually met the accused to whom he complained of their encroachment and threatened to complain; whereupon the accused slapped him or gave a blow from which the deceased fell down. The case was heard by Norman and Seton-Karr, JJ., who held that if the blow had killed the deceased whom he afterwards hung up with the help of the other accused, then the assailant would be guilty of offences punishable under section 304 or 324 according to his intention and the intensity of his blow; while the other accused would be guilty of fabricating false evidence (s. 193) or of causing disappearance of evidence (s. 201). If however the blow did not kill the deceased then all would be guilty of culpable homicide, since the jury might fairly presume against the accused that they must have

(23) S. 87; *Dhondi*, (1895) B. U. C. 785.
(24) *Dhondi*, (1895) B. U. C. 785
(25) *Nga Po Kyaw*, (1902) 1 U. B. R. (786). P. C. 1.

known that they were *likely by that act to cause* death.(1) In this case the facts were not clear. But in Khandu's case (2) the accused had confessed that he had struck his father-in-law three blows with a stick with force intending to kill him. The deceased fell down at the door of his hut whereupon the accused kept under deceased's head a box of firewood and set the hut on fire. The medical evidence proved that the deceased's death was due to burning and not to the wounds on the head. Upon these facts Birdwood, J., held that the offence was one of attempted murder. He said: "The accused admits that he struck the deceased with the intention of killing him. In intention, therefore, he was a murderer. But on the evidence, such as it is, it must be found that the striking did not amount to murder. It was, however an attempt to murder." (3) Parson, J., however, dissented and held that it was murder because that was his intention. The case being referred to Sargent, C. J. the latter agreed with Birdwood, J., holding "that as the accused undoubtedly believed he had killed his victim, there would be a difficulty in regarding what occurred from first to last as one continuous act done with the intention of killing the deceased."(4) In this case it will be noted that neither Gour Gobind's case was cited nor its reasoning considered.

3044. In a third case the accused suspected that his wife was carrying on an intrigue with one Madari. He kicked her below the navel. She fell down and became unconscious. Some people came up and tried to revive her but thought that she was dead. The accused then again went inside the house where his wife lay and hung her up by a string tied to the roof of the house to give it the appearance of suicide. It was held that the only offence of which he could be convicted is that of greivous hurt.(5) In a fourth case the accused struck his wife a violent blow on the head with the plough-share which rendered her unconscious. The accused believing her to be dead hanged her to conceal his own crime. The case came up before Napier and Sadashiv Aiyar, JJ., who differed on the accused's offence, Napier, J., being of opinion that the accused's intention to kill must be held to have continued upto the time of hanging; while his colleague would follow the language of Sargent, J., in Khandu's case already cited. In view of this difference the case was referred to a Full Bench who agreed with the reasoning in Khandu's case, adding that the causing of death postulates the existence of human life; and that therefore a man cannot be said to commit culpable homicide "if his intention was directed only to what he believed to be a lifeless body."(6) This view may be supported on the ground that no person can be convicted of a mistake of fact. If therefore A assaults B and believes that B is dead his belief is a mistake of fact. If therefore A buries B and B dies in consequence of A's burial of B, A does not aggravate his assault of him which must be judged apart from his subsequent act. It might be said that in burying B, A was not sufficiently careful, for if he were more careful he would have discovered that B was still alive. But, for this purpose is A to feel B's pulse; otherwise how is he to know that an apparently lifeless body is still alive ?

(1) *Gour Gobindo*, 6 W. R. 55.
(2) *Khandu*, 15 B. 194.
(3) *Khandu*, 15 B. 194 (199).
(4) *Ib.*, p. 201.
(5) *Dalu Sardar*, 18 C. W. N. 1279 26 I. C. 157.
(6) *Padani Goundan*, 42 M. 547 (F. B.) following *Khandu*, 15 B. 194.

The phrase "*causes death*" must then be understood to imply the continuance of the intention to cause death by the act which actually causes it.

Knowledge Presumed from Cruelty.

3045. It has been said that in inferring knowledge the Court looks to the result. If it is one which could not have been arrived at without foreknowledge, the Court presumes it. Such knowledge may be legitimately presumed where the assault is committed with an axe or a *dao* (7) or other deadly weapon, or where a man is hit with great force on a vital part of his body. The husband and the wife had a quarrel. The former bit her little finger, and the two fell together by a stone where a knife lay. The husband seized it and made a dash at her throat with it. The wife thereupon seized his testicles and by gripping and squeezing them reduced them to a pulpy condition from the effects of which he died. Davies, J., held that the result was unforeseem and that knowledge of it could not be imputed to the wife. Benson, J., held that the great violence used was sufficient to support the finding that she had knowledge of the likelihood. In consequence of this difference of opinion, the question was referred to Subramania Aiyar, J., who unhesitatingly agreed with Benson, J., in holding that the violence of the attack on a man's delicate part was sufficient to justify an inference that the assailant was aware of the likely effect of her attack. The case was, therefore, one of culpable homicide, and the accused was sentenced to rigorous imprisonment for seven years.(8)

In another case, the accused Mt. Tulsa, a young widow of twenty, wishing to elope with her lover at night, wanted to elude the vigilance of her parents who were naturally opposed to her elopement, drugged them by mixing *dhatura* seeds in their food, from the effects of which they were seized with illness, but being removed to the hospital they ultimately recovered. Tulsa was condemned to transportation under s. 307 and her conviction was upheld on appeal by Edge, C. J., and Burkitt, J., who said: "It appears to us that we must presume that people of her age have the ordinary knowledge of what the results may be of administering *dhatura* It would be dangerous in the extreme, to the public in this country, if Judges were to hold that it could not be presumed that a woman of twenty years of age in an Indian village was not aware that death might be caused by the administration of *dhatura*. If we were to hold that such was the presumption, we fear that poisoning by *dhatura* would become more frequent than it is."(9) But no reference was made to this case in another case of the same Court in which a different view was taken of the robber who had drugged a person with *dhatura*, intending to rob him and in which the Court held it to be only a case under section 326 of the Code and not one under section 307.(10) The conflict will be found adverted to in the Introduction (§§ 74, 76).

Natural Consequences Presumed.

3046. Enlarged Spleen and Liver.—But, of course, in all such cases it is only justifiable to presume that the man was aware of the natural consequences of his act. The only exception to which this rule is liable are those stated, in the first two explanations. Subject to the rules there stated,

(7) *Sobeel Mahee*, 5 W. R. 32
(8) *Kaliyani*, 19 M. 35.
(9) *Tulsha*, 20 A. 143.
(10) *Bhagwandin*, 30 A. 568.

which have been already considered, no one can be held liable for a consequence not directly and naturally flowing out of his act. An example of this is furnished by the cases of enlarged spleen or liver, the rupture of which, though it may be due to violence, is the immediate cause of death. In such cases, the accused could not be said to possess knowledge of the likelihood of death, if he did not know of the diseased condition of those organs. Here it is no doubt true that the accused by his violence causes the death of another, but it is equally apparent that he at the same time has no reason to know that the amount of violence which he uses is likely to cause death. In short, the offence in such cases is not culpable homicide, because there was not in the accused the knowledge of the likelihood of death as a consequence of his act, and the degree of violence used is therefore the measure of his knowledge.

In other words, if a person kick another with such brutal violence that he thereby ruptures not only the diseased spleen but also some other healthy organ, and death is the result, could it be said that death was due only to the diseased spleen and not to the ruptured abdomen? Here explanation I at once becomes relevant for the solution of the question. And death would be deemed to be caused by the accused, irrespective of the disease. And the question of culpability would then depend (other things being equal) solely upon the question of knowledge and intention. And the rule that knowledge and violence vary in proportion would then solve the rest of the problem. In such cases, then, the question to ask is: What was the violence used and what would have been its effect, if the sufferer had not been suffering from disease. So if the accused strike one blow with a light bamboo stick not more than an inch in diameter, and the blow was aimed not at the head, but at the side, and which had the effect of rupturing his spleen, it was held that the amount of the violence used and not the effect produced was the criterion of the crime, and that the offence of the accused was consequently no more grievous hurt.[11] In any other view a man may have to be punished no less for his misfortune than for his crime.

3047. Of course, in such cases, the assault may be not wilful and intentional, but the assailant can only be punished for the injury inflicted and for the effect which he may expect to be produced in a normally healthy person. Indeed, there is the natural presumption in favour of health—for healthy condition is normal; and an assailant has, therefore, reason to presume his victim to be healthy. As such, if the assailed received only such injury as would be designated hurt, the assailant could be only liable for that offence irrespective of the consequence.[12] Such would be the case if a person gave another not a very violent blow[13] or a kick,[14] or threw a brick-bat at him,[15] which fell on his enlarged spleen rupturing it, from which he died. In such cases, the utmost that a person could be said to have done is to cause hurt, and a convicion for that offence alone would be proper.

(11) *Megha Meah*, 2 W. R. 39; *Madur Jolaha*, 8 W. R. 28; *Ainuddi*, 34 C. L. J. 515; *Fox*, 2 A. 522; *O'Brien*, 2 A. 766; *Idu Beg*, 3 A. 776.

(12) *Fox*, 2 A. 522; *Randhir Singh*, 3 A. 597.

(13) *Fox*, 2 A. 522.

(14) (1881) 1 Weir (H. C. P.) 288 (289); *Aiman*, 1 A. L. J. 162.

(15) *Randhir Singh*, 3 A. 597.

So where the deceased who had carried some paddy to the house of the accused asked him for his wages, and the two had some alteration in the course of which the accused gave the deceased a severe push on the back, which caused him to fall from the top of accused's steps to the road below, a distance of two-and-a-half cubits. In falling the deceased fractured his big toe and on the fifth day after the fall he died from tetanus brought on by the fracture. The accused was convicted under s. 304-A, but the High Court held that the act done was not rash or negligent, but amounted to the use of criminal force, for which he could be convicted only under s. 352.(16) In a similar case, the husband having been subjected to great provocation by his wife, pushed her with both his arms so as to throw her with violence on the ground. She was suffering from enlarged spleen and death was due to its getting ruptured. The Court held that the offence of the accused was one under s. 323.(17) The same view was reiterated in another case in which on a similar provocation being given, the accused kicked his wife in the spleen which caused it to rupture and in consequence of which the wife died immediately.(18) In both these cases the husband was ignorant of the disease, and the Court naturally measured the offence by the severity of the violence.

3048. Intention: Knowledge: Motive.—Whenever there is knowledge proof of intention is unnecessary. If such proof is available, it may be useful for explaining an act which may be otherwise inexplicable. But it is not necessary to establish the crime; though its existence would naturally aggravate it. Indeed, the presence of intention would not only justify the enhanced penalty provided in s. 304 for culpable homicide with intention, but it may take the offence wholly out of the category of that offence and aggravate it into the capital crime of a murder. The prosecution have, therefore, to be wide-awake as to facts bearing on intention. But motive, as distinguished from intention, is not a part of the definition of this effence and is, indeed, never required to establish a crime. Proof of motive is, therefore, by no means necessary to establish this offence. But this does not mean that proof of motive is altogether irrelevant. For, proof of motive is always relevant—not indeed as proving the offence, but as a spring of human action supporting the proof of intention, explaining and connecting it with the act.

It is, indeed, a fact that motive underlies every offence, but the motives of men are often deep and unfathomable and their name is legion. It is as much as law can do to dive for their intention and knowledge. If law had further required a further proof of motive, the task of bringing offenders to justice would have been indeed great. Beside, it would otherwise have defeated the very object for which penal laws are enacted, namely, the preservation of law and order. The principle of law is that no man shall do evil so that good may come; and it, therefore, punishes all malefactors irrespective of their motive (§ 253).

But with intention the case is otherwise. It may be proved in a case of homicide. If it exists, it must be proved—because it has an important bearing on the offence.

(16) *Acharjee*, 1 M. 224.
(17) *Punchanun Tantee*, 5 W. R. 97.
(18) *Bysagoo Noshyo*, 8 W. R. 29.

3049. Homicidal Intention.—Now, homicidal intention spoken of in this section is of two kinds. In the first place, it may be an intention of causing death, and in the second place, it may be an intention of causing such *bodily injury* as is likely to cause death. It will be seen that while intention is spoken of in connection with the causing of death or of bodily injury causing death, knowledge is spoken of in connection with an *act* which is likely to cause death. Now since the word "act" is wide enough to include the bodily injury spoken of in the second clause, the sense of the section would be unimpaired if it defined culpable homicide as follows:—

"Whoever causes death by doing an act with the intention of causing death or with knowledge that he is by such act likely to cause death commits the offence of culpable homicide."

The second clause has, however, been added, probably because, it meets the requirements of a large number of cases in which the offender causes dangerous injuries, though he does not intend thereby to cause death. Such cases are, therefore, expressly declared to fall within the definition of this offence.

3050. Adverting now to this clause as enacted here, it will be seen that it requires the presence of intention, but the intention is to cause a dangerous hurt, and not death. Death may ensue, and if it does, it is because it was likely. If it is averted, it is because it was not certain. Such may be the case of a person who is willing to kill but whose act is not decisive of his intention. Between him and another who intends to cause death, there is no difference in the offence or the punishment, though there is evidently a difference of degree in criminality,[19] which the Court may take into consideration in awarding the sentence. In the majority of cases, this difference would probably mean a difference in the nature of the weapon, the degree of violence used, the motive which led up to its use and the circumstances, such as a sudden quarrel or the like which attended it.

(1) Intentional Injury Likely to Cause Death.

The bodily injury which is likely to cause death may consist of a severe blow on the head or on other vital parts of the body. The question whether the assailant's intention was to cause death or only to cause bodily injury as was likely to cause death, must be investigated in the same way as the question of knowledge (§§ 3036-3048). But as intention is the determination of the will, proof of intention does not flow from the same facts. Knowledge implies cognition, intention implies volition; knowledge is not the invariable concomitant of intention. A person may know but may be unwilling. And if he wills to perform a certain act, he may or may not know of the consequence. He may, for instance, strike a blow but misjudge its effect. If there is intention, it is not necessary that there should be knowledge also. But one who wills an effect cannot for a moment be compared with one who merely causes it consciously. Law therefore, shakes its terrors only upon him who commits a crime intentionally.

(19) *Nga Min Po*, (1900) 1 U. B. R. 288, 7 Bur. L. R. 247; *Nga Shwe Baw*, 7 Bur. L. R. 250.

3051. Proof of Homicidal Intention.—This makes it all the more necessary that the real import of this word should be accurately gauged. As has been pointed out elsewhere,[20] in determining both the criminality and the measure of criminality of an act, the Code has regard solely to the actual, as distinct from a presumed or constructive, intention. So it was pointed out by Norman and Campbell, JJ., that "under the Penal Code, no constructive but an actual intention is required."[21] But while this is true as a principle, it is equally true that in most cases such intention is merely a matter of inference and it can seldom be the subject of direct proof. Indeed, if such proof were invariably required, proof of a crime under the Code would in most cases be impossible. For, as Brian, C. J., observed: "It is a trite learning that the thought of man is not triable, for the Devil himself knows not the thought of man."[22]

Intention and knowledge are the internal and invisible acts of the mind, and their actual existence cannot be demonstrated except by their external and visible manifestations. Observation and experience enable us to judge of the connection between men's conduct and their intention. And this has led the Judges to formulate the rule that every sane person of the age of discretion is presumed to intend the natural and probable consequence of his own act.[23] This was originally a rule of evidence intended to aid the judge in connecting the act with the actor's mentality—the seen with the unseen. But in the English Criminal Law the rule has now attained the dignity of a legal axiom changing the entire mode of proof, which is wholly at variance with the Indian Criminal Law. But even regarded as a rule of evidence it is likely to have but a limited application in the interpretation of acts, for the distinction made in the Code between intention and knowledge does not easily lend itself to the making of the presumption which takes no note of these two phases of the human mind. And at all events it is inferential proof. It is not direct evidence. Even as such, it is based upon certain generalizations which are manifestly inapplicable to all cases. For the working of the human mind is not in all cases uniform. A savage thinks differently from a civilised man. The habits and customs of a people mould their thoughts and intentions. A sight which may pass unnoticed in one country may lead to a deadly duel in another. A touch which would pass unnoticed in the case of an Englishman may lead a Hindu to commit deliberate murder.

Evidence of Intention.

3052. The intention of a man must then be judged by its external manifestations as presented in the case of the same individual or others of his own caste, creed and habit of thought. The fallacious standard of a reasonable man will never do in such a case. For, in such a case what the Court has to find out is, as far as possible, his actual intention; what he himself intended and not what ought as a reasonable man to have intended. In this respect the proof of intention and knowledge materially differ (§§ 339-342). No doubt, the data

(20) Introduction, §§ 65-67.
(21) *Gurreeboollah*, 5 W. R. 42.
(22) Year Book, 17 Ed. IV, 1, cited *per* Lord Blackburn in *Brogden* v. *Metropolitan Railway Co.*, 2 App. Cas. 666 (692).
(23) Best Ev., § 433.

in each case are the outward acts and conduct, but the line of ratiocination is in each case different, though the result arrived at may not be different. For the object in each case is the same—to arrive as far as possible at the real intention or knowledge of the offender. And where the criminality of the act depends upon either intention or knowledge, the Court may then legitimately presume that a man intends or knows the natural and inevitable consequences of his own acts. And where the act done is highly injurious the Court may even presume an intention, for in such a case *res ipsa in se dulam habit*—the facts speak for themselves. "It is a universal principle," said Lord Ellenborough, C. J., "that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act." (24) Thus the deliberate use by a sane man of deadly weapons, the deliberate discharge of loaded fire-arms, a cruel and brutal assault (25) leads, at once to the inference that his intention was to cause death. No proof of intention beyond that which such an act of itself supplies is requisite. A person who plunges his dagger into another's abdomen, or one who cunningly mixes arsenic with his food, can have obviously but one intention—that of causing his death.

3053. But where the weapon used or means adopted is not unerringly fatal, it may then be a question whether the intention was to cause death. Such would be the case where the accused strikes another a blow with a stick. The act may be an indifferent one if the blow given is slight, and the stick used is a walking stick. Even if a severe blow is struck with a heavy stick, and the man dies, it does not necessarily follow that the assailant had then intended to kill him. As was observed by Innes and Muttusami Aiyar, JJ.: "The effect of a severe blow upon one man will be very different from what it will be upon another, and it does not follow when the victim dies, that it was intended to inflict such injury as is sufficient to cause death." (1) But such evidence may be eked out by other facts, such as evidence of a previous intimidation, determination, or again, by the proof of some motive, as of hatred, avarice, jealousy or revenge, or of some expected gain or advantage, such as the acquisition of some property or putting out of the way an inconvenient witness. On the other hand, it may be controverted by other facts, such as grave and sudden provocation, as where a person entered the bed chamber of the accused to have criminal intercourse with his wife, and was struck down with a single blow, in which case the Court regarded the offence as one of causing grievous hurt under the very grave and sudden provocation.(2) There are other cases illustrating the same rule, but they will have to be considered in connection with the exceptions to the next section.

Murder.

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

(24) *Dixon*, 3 M. & S. 11 (15).
(25) *Elem Molla*, 37 C. 315.

(1) *Muwala Kondaiya*, (1881) 1 Weir 300.
(2) *Chullendee*, 3 W. R. 55.

Secondly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly.—If it is done with the intention of causing bodily injury to any person, and the bodyily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly.—If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations.

(*a*) *A* shoots *Z* with the intention of killing him. *Z* dies in consequence. *A* commits murder.

(*b*) A knowing that *Z* is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. *Z* dies in consequence of the blow. *A* is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if *A*, not knowing that *Z* is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here *A*, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

(*c*) *A* intentionally gives *Z* a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here *A* is guilty of murder, although he may not have intended to cause *Z*'s death.

(*d*) *A*, without any excuse, fires a loaded connon into a crowd of persons and kills one of them. *A* is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

When culpayable homicide is not murder.

Exception 1.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations.

(*a*) *A*, under the influence of passion excited by a provocation given by *Z*, intentionally kills *Y*, *Z*'s child. This is murder, inasmuch as a provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(*b*) *Y* gives grave and sudden provocation to *A*. *A*, on this provocation, fires a pistol at *Y*, neither intending nor knowing himself to be likely to kill *Z*, who is near him, but out of sight. *A* kills *Z*. Here *A* has not committed murder, but merely culpable homicide.

(*c*) *A* is lawfully arrested by *Z*, a bailiff. *A* is excited to sudden and violent passion by the arrest, and kills *Z*. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(*d*) *A* appears as a witness before *Z*, a Magistrate, *Z* says that he does not believe a word of *A*'s deposition, and that *A* has perjured himself. *A* is moved to sudden passion by these words, and kills *Z*. This is murder.

(*e*) *A* attempts to pull *Z*'s nose. *Z*, in exercise of the right of private defence, lays hold of *A* to prevent him from doing so. *A* is moved to sudden and violent passion in consequence, and kills *Z*. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(*f*) *Z* strikes *B*. *B* is, by this provocation, excited to violent rage. *A*, a bystander, intending to take advantage of *B*'s rage, and to cause him to kill *Z*, puts a knife into *B*'s hand for that purpose. *B* kills *Z* with the knife. Here *B* may have committed only culpable homicide, but *A* is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration.

Z attempts to horsewhip *A*, not in such a manner as to cause grievous hurt to *A*. *A* draws out a pistol. *Z* persists in the assault. *A*, believing in good faith that he can by no other means prevent himself from being horse-whipped, shoots *A* dead. *A* has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration.

A, by instigation, voluntarily causes *Z*, a person under eighteen years of age, to commit suicide. Here, on account of *Z*'s youth, he was incapable of giving consent to his own death; *A* has therefore abetted murder.

Synopsis.

(1) *Analogous Law* (3054-3058).
(2) *Principle* (3059).
(3) *Distinction between Culpable Homicide and Murder* (3060-3063).
(4) *Knowledge—Homicidal and Murderous* (3064).
(5) *Operation of Exceptions* (3065).
(6) *Meaning of Words* (3066).
(7) *Essentials of Murder* (3067-3070).
(8) *Intention* v. *Motive* (3071).
(9) *Intentional Injury with Knowledge of Death of the person Injured* (3072-3074).
(10) *Intention and Injury Sufficient to Cause Death* (3075--3076).
(11) *Knowledge of Imminent Danger* (3077-3084).
(12) *Mitigation of Murder* (3085-3086).
(13) *Provocation as Mitigation* (3087-3095).
(14) *Provocation by Words* (3090).
(15) *Provocation by Acts* (3091).
(16) *Provocation must be Both Grave and Sudden* (3092-3095).
(17) *Provocation must be Also "Grave"* (3096-3107).
(18) *Offence during Loss of Self-control* (3101).
(19) *Vindictive Act Excluded* (3105-3106).
(20) *Death on Provocation and Others by Mistake or Accident* (3108).
(21) *Where Provocation is No Mitigation* (3109-3112).
(22) *Provocation a Question of Fact* (3113).
(23) *Causing Death by Exceeding the Right of Private Defence* (3114-3117).
(24) *Rule Applies where Act Illegal* (3115).
(25) *Homicide by Public Servant* (3120-3123).
(26) *Sudden Fight* (3124-3133).
(27) *No Pre-meditation and Duelling Excepted* (3125-3127).
(28) *Fight must be "Sudden"* (3128-3129).
(29) *Undue Advantage and Cruelty Excepted* (3130-3133).
(30) *Death by Consent* (3134-3137).

3054. Analogous Law.—This section defines murder with reference to the definition of culpable homicide given in and discussed under the last section. This definition materially differs in verbiage from the definition of English Law under which the same offence is thus defined:—

"Murder is the killing of any person under the King's peace, with malice prepense or aforethought, either express or implied by law."(3)

3055. Malice prepense, or *Malitia Præcogitata*, is in English Law the grand criterion which distinguishes murder from other killing. But this term is explained not so much to mean spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved and malignant heart.(4) This malice may be either express or implied. Express malice is when one with a sedate, deliberate mind and formed design kills another; which formed design is evidenced by external circumstances discovering that inward intention, as, lying in wait, antecedent menaces, former grudges and concerted schemes to do him some bodily harm. An instance of such malice is duelling where both parties meet to kill each other. So it is express malice if upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death.(5)

As an instance of implied malice is mentioned the deliberate poisoning of another against whom no enmity is proved.(6) So if a man kill another without any or without sufficient provocation, or a person kill a public servant in the execution of his duty.(7) So where one intending to kill *A* kills *B* whom he mistakes for *A*, in which case the felonious intent is transferred from *A* to *B*.(8) Indeed, in England all homicide is presumed to be malicious unless the contrary appears upon evidence.(9) "The legal import of the term 'malice,'" said Best, J., "differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to shew that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable cause."(10) In this sense "malice" approximates the homicidal intention which is an essential element of murder and culpable homicide. The Indian definition is, however, free from the artificiality of English Law. It defines murder somewhat circuitously, which has led to some difficulty in its exposition, but otherwise its language is plain and intelligible.

3056. There is, however, one noticeable difference between the English and the Indian rule. Under English Law, all killing is murder, un-

(3) 3 Inst. 47, 51; 1 Hale 424, 448; 1 *Hawk.* P. C. C. 31, s. 3; 4 Black 198; 1 East. P. C., p. 214.
(4) Fost Cr. L. 256, cited, 4 Black 198.
(5) 4 Black, 199.
(6) 1 Hale P. C. 455.
(7) 1 Hale P. C. 457; Foster 308; 4 Black, 200.
(8) 1 Hale P. C. 405.
(9) Foster 255.
(10) *Harvey*, 2 B. & C. 268.

less the contrary is established by the accused. Under the Code, the burden of proving the essential ingredients which constitute murder, is on the prosecution. So Tindal, C. J., laid down that "where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character and does not amount to murder."(11) In this view the offence is determined by the act apart from intention which is *presumed*. But the Code approaches the question from exactly the opposite standpoint. It looks primarily not to the effect but to the intention and knowledge of the offender. In a properly conducted trial the result arrived at is the same but the process by which it is reached is obviously different.(12)

3057. It will be observed that this section fastens the special requirements of murder upon the definition of culpable homicide. It then excepts from its comprehension five cases which it treats as culpable homicide. The simple course would probably have been to define only "homicide" and then define both "culpable homicide" and "murder." The result then would have been the same and the classification of the two offences would have obviated the circuity which renders the two offences by no means easy of comprehension.

3058. The arrangement would then have been something like this :—

Homicide is the causing of death of one person by another.

Homicide may be culpable, or it may amount to murder. It is culpable if death is caused by an act with the intention of causing or knowledge that he is likely by such act to cause death; or with the intention or knowledge of causing death under the following circumstances, namely:—

(1) If the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident, subject, however, to the following provisos:—

[Read here the provisos to s. 300, Excep. 1.]

(2) If the offender whilst exercising the right of private defence, unjustifiably causes the death of the person against whom he is asserting the right and which death is caused without meditation and intention.

(3) If the offender causes the death by doing a lawful act in an unlawful manner.

(4) If the death is caused in a mutual combat.

(5) If the death is caused by valid consent.

The offence is murder in the following cases:—

(1) If the act is done with the intention of causing death.

(2) If the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused.

(11) *Greenacre*, 8 C. & P. 35. (12) 1 Weir 288

(3) If the act is done with the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death.

(4) If the act is done with the knowledge that it is so imminently dangerous that it must in all probability cause death; or such bodily injury as is likely to cause death and he commits such act without any excuse for incurring the risk or causing death, or such injury as aforesaid.

3059. Principle.—There is no radical difference between the offence of culpable homicide and murder. The causing of death is common to both the offences. The act which caused it is the act of the offender in each case. There must necessarily be criminal intention or knowledge in both cases. The true difference then lies in the degree; there being the greater intention or knowledge of the fatal result in the one case than in the other. This difference is attempted to be accentuated by the four clauses describing the offence under this section. But no abstract enunciation of the difference can be an infallible guide in determining the true nature of the crime. All the same, it is necessary to see how far the Code regards the two offences distinct, and what is the criterion for distinguishing them.

3060. Distinction between Murder and Culpable Homicide.—In the first place it may be premised that the two offences of homicide and murder are neither mutually exhaustive and exclusive, nor do they between themselves provide that every case of killing must be either one or the other. Indeed, as has been sufficiently pointed out in the foregoing discussion, the question of offence depends upon the degree of criminality and that again depends upon the offender's knowledge and intention. That knowledge and intention may again be of the kind specified in this or the last section, or it may not. If it is, then alone would the question arise whether the offence is murder or homicide. Now comparing the two sections, it will be observed that the Code treats culpable homicide as the generic crime. It makes murder as a special offence falling under the general category of homicide.

In this view, all murder must necessarily be culpable homicide, but not *vice versa*. But an offence may possess all the essential ingredients of murder, and yet be only a culpable homicide if it possesses the additional mitigating elements set out in the exception. But these exceptions are exhaustive only in so far as they lay down the only cases in which an offence possessing all the elements of murder is the inferior offence of culpable homicide, by reason of the alleviating circumstances reducing the primary heinousness of the crime. Apart, however, from those exceptions, an offence may still be culpable homicide, if it does not possess the attributes of the offence of murder. As Sir Barnes Peacock, C. J., observed : "It does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions in s. 300. To render culpable homicide murder the case must come within the provisions of clauses 1, 2, 3, or 4 of section 300."(13)

3061. In a case *prima facie* appearing to be either of culpable homicide or murder, the first thing to see is whether it is culpable homicide.

(13) *Sheikh Basu*, 8 W. R. 47 (51).

If it is, then reference should be made to this section to see if it is not also murder. If it be murder, then reference should be made to the exceptions to see if the offence, though murder, is not by reason of any of the circumstances mentioned in the exceptions, reduced in degree. If the offence proving to be culpable homicide does not fit in with the requirements of this section, it is then culpable homicide. If it does answer even the requirements of that offence, it may then be grievous hurt or hurt, or any of their derivative offences, or an offence punishable under section 304-A, or indeed, some other section of the Code. This, however, does not conclude the search. For the offence, though falling under some penal section, may be excepted under the provisions of Chapter IV (ss. 76-106) or it may be merely an abetment falling under Chapter V (ss. 107-120) or an attempt falling under s. 511 of the Code.

3062. If, however, the question is narrowed down so that the only question to be considered is the applicability of this or the last section, then regard must be had to three questions which underlie the two offences, namely, (*i*) intention or knowledge of the offender, (*ii*) the act and its nature, and (*iii*) the effect and how it was connected with the act. The exact nature of the offence it was connected with the act. The exact nature of the offence depends upon the degree of criminality present in the first, the brutality or cruelty implied by the second and the nature and extent of the injury actually effected. The sections regard the latter as merely ancillary to the first; and the two sections, therefore, do not specifically refer to them in describing the offences, which are done solely with reference to the offender's mentality, which it describes in the following gradations:—

S. 299.	S. 300.
I. INTENTION:—	Subject to certain exceptions culpable homicide is murder, if the act by which the death is caused is done –
A person commits culpable homicide if the act by which the death is caused is done—	(1) with the intention of causing death;
(*a*) with the intention of causing death;	(2) with the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the *person to whom the harm* is caused;
(*b*) with the intention of causing such bodily injury as is likely to cause death;	(3) with the intention of causing bodily injury intended to be inflicted which is *sufficient in the ordinary course* of nature to cause death;
II. KNOWLEDGE:—	(4) with the knowledge that the act is *so imminently dangerous that it must in all probability cause death* or such bodily injury as is likely to cause death.
(*c*) with the knowledge that the act is likely to cause death.	

3063. The words italicized mark the difference between the two offences. Clause (*a*) and Clause (1) show that where there is an intention to kill, the offence is always murder, unless it finds a place in any of the exceptions. Clause (*c*) and Clause (4) show that intention to kill is necessary for neither offence. Knowledge of death may be as much incriminating as intentional homicide. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide, if it

is the most probable result, it is murder. The essence of Clause (2) is to be found in the knowledge that the person harmed is likely to die. Such knowledge may be of the peculiar infirmity or disease from which the person may be suffering, immature age, peculiarity of the constitution, or other special circumstances which make life fragile and easy to overcome. The section illustrates this by supposing the case of a man striking a blow on a diseased part of a person of which he has knowledge.[14] It is, of course, intended to meet cases of enlarged liver and spleen, which may be easily ruptured by a blow of no great violence, and in which case the degree of criminality depends upon its knowledge (s. 299). Clause (*b*) and Clause (3) appear to be correlated, and the question whether the causing of a certain injury is culpable homicide or murder, depends upon the degree of the likelihood of death, in consequence of the injury.

The offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death; it is murder, if such injury is *sufficient, in the ordinary course of nature, to cause death.* The distinction is fine, but appreciable. It is much the same distinction as that between Clause (*c*) and Clause (2) already noticed. It is a question of the degree of probability. "Practically," observed Melvill, J., "it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient, in the ordinary course of nature, to cause death."[15] It is not so much the nature of the weapon used as the nature of the injury inflicted that would determine the difference here made. The weapon may be the same, but it may cause injuries of different proportions. It depends upon the constitution of the man and the part of the body injured.

3064. Knowledge—Homicidal and Murderous.—An elaborate discussion pointing out the salient differences between the two offences, occurs in a case decided by Plowden, J., of the Punjab Chief Court,[16] but in which the points noticed are, as was to be expected, exactly the same. With regard to Clause (*c*) and Clause (4) as in the above table, he, however, observes as follows: "Every act causing death that falls within the first part of the definition in Clause (4) of s. 300, whether or not it satisfies the whole definition in that clause, also falls within the definition in Clause (3) of s. 299. But the converse is not true. Every act causing death, that is done with the mere knowledge that the doer is likely by such act to cause death, falls within Clause (*c*) of s. 299, but it does not satisfy even the first part of the definition in Clause (4) of section 300, as that clause requires not merely knowledge that the act is likely to cause death, but further knowledge, namely, that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.

"Further—and this is a most important point—the definition of murder in the fourth clause of s. 300 comprises two elements (in addition to an act causing death) of which the second element is as essential as the first, and both are as essential as an act causing death. To cause death merely by doing an act with the knowledge that it is imminently dangerous that

(14) Ill. (*b*).
(15) *Govinda*, 1 B. 342.
(16) *Barkatulla*, (1887) P. R. No. 32, followed in *Ghufar*, (1887) P. R. No. 62; *Suba*, (1887) P. R. No. 40; *Attra*, (1891) P. R. No. 9.

it must in all probability cause death, does not constitute murder as defined in Clause (4) of section 300, but is merely culpable homicide not amounting to murder. In order that an act done with such knowledge should constitute murder, it is also necessary that it should be committed without any excuse for incurring the risk of causing death or such bodily injury." An act done with such knowledge alone is not *prima facie* an act of murder, subject to proof that there is some excuse. It becomes an act of murder, only if it can be positively affirmed that there was no excuse.

"The requirements of this clause are not satisfied by the act of homicide being an act of extreme recklessness; it must be wholly an inexcusable act of extreme recklessness. It follows that when, in view of all the circumstances found to exist in a particular case, it cannot be affirmed of an act falling in other respects within cl. (4) of s. 300 that it was committed without any excuse for incurring the risk mentioned, then such act, notwithstanding that it was done with the knowledge that it was so imminently dangerous that it must in all probability cause death, is merely culpable homicide not amounting to murder under section 299, cl. (3). It is culpable homicide, because the act causing death is done with the knowledge that the actor is thereby likely to cause death; it is not murder, because it does not satisfy both parts of the definition of murder in cl. (4) of s. 300. Being culpable homicide and not being murder, the act is necessarily culpable homicide not amounting to murder.

"It may be useful here to point out that the Indian Penal Code contemplates that, when an act is culpable homicide, whether amounting to murder or not amounting to murder, by reason of the act being done with the knowledge described in cl. (*c*) of s. 299 (or with the knowledge described in cl. (4) of s. 300, which knowledge satisfies the definition in cl. (*c*) of s. 299), an intention to cause death or to cause such bodily injury as is likely to cause death must be absent when intention of either kind exists with the knowledge described, the knowledge merges in the intention, and a higher degree of guilt is imputable. That the degree of guilt is higher when a murderous intention exists (which intention seems to be deemed to import the specific knowledge), and is lower when the knowledge is unaccompanied by such intention, seems a necessary inference from the language of s. 304 as to punishment. The practical effect is that, strictly speaking, in every case where an act is found to be culpable homicide not amounting to murder under cl. (4) of s. 300 and cl. (*c*) of s. 299 or to be culpable homicide not amounting to murder under cl. (*c*) of s. 299 by reason of the act being done with the knowledge that the doer is likely thereby to cause death, an intention to cause death or to cause such bodily injury as is likely to cause death ought to be expressly negatived. In the process of mentality, knowledge is something less than intention, for it may be due to a mere recklessness as distinct from mental determination. But knowledge is again something more than belief and as there may be knowledge without intention, so there may be intention without knowledge. There can be no knowledge where in point of fact there is no probability. Suppose a private loads his musket with powder and ball, and forgetting to cap the nipple presents it at his officer intending to kill him. He pulls the trigger, but there being no cap, the gun does not discharge. He is then arrested, could he be said to have done an act "knowing it to be so imminently dangerous that it must in all probability cause the death of a human being." Undoubtedly, he believed

his act to be so. But belief is not knowledge, for knowledge must be of a fact in existence. The private could not in such a case be convicted of attempted murder.(17)

3065. Operation of Exceptions.—"Further it may be pointed out that the operation of the five exceptions to s. 300 is practically somewhat different in respect to an act which falls within one of the first three clauses of s. 300, and in respect to an act which falls within the 4th clause. These four clauses, it should be remarked, describe exhaustively all the classes of acts to which the five exceptions apply. The exceptions operate in this way. The existence of all the circumstances described in an exception excuses an act which would otherwise be murder within one of the first three clauses, to the extent that the act constitutes only culpable homicide not amounting to murder and not murder. Here the act is *prima facie* murder unless and until an exception is established. There is no inconsistency involved in finding that an act falls within one of these clauses and also falls within an exception, for all the circumstances of any exception may co-exist with the murderous intention. When however, an act falls within the 4th clause of section 300, as regards the knowledge with which it is done, and the circumstances constituting an exception exist, there is this difference, it cannot consistently be affirmed (at the end of a trial and upon all the evidence) of an act causing death done with the knowledge described, in one breath that it was done without any excuse for running the risk of causing death, and in the next breath that it was done under circumstances which the law declares to be an excuse for the act of causing death to the extent of preventing the culpable homicide not amounting to murder. It has recently been decided by this Court that it is a matter of fact, and not of law, whether a particular act of homicide committed with the knowledge described in cl. (4) of s. 300 is committed without any excuse. As the 4th clause is framed, it need never be determined as a matter of law what circumstances, other than or falling short of the five exceptions, constitute an excuse, it being in each case a question of fact whether from concomitant circumstances which are proved the just inference is that the act was done 'without any excuse.' As this 4th clause is expressed like the three preceding clauses to be subject to the five exceptions which are legal excuses for murder (as contra-distinguished from culpable homicide), it is evident that the words 'without any excuse' in cl. (4) do not mean merely "in the absence of the circumstances" described in the exceptions. A jury or Court as a Judge of fact is left at liberty to affirm upon proof of circumstances other than, or falling short of an exception, not that these circumstances form an excuse for murder, but that in view of them the jury or Court is unable to affirm that the particular act of homicide was committed without any excuse, and is therefore unable to pronounce the act to be culpable homicide amounting to murder as defined in cl. 4 of s. 300."(18)

3066. Meaning of Words.—"*If the act by which the death is caused*": For the meaning of "act," *see* §§ 3023-3026 and for the meaning of what is *causing* death, *see* §§ 3005-3022. "*With the intention of causing death*": The intention of causing death may be manifested by word or

(17) *Per* Westroop, J., in *Cassidy*, 4 B. H. C. R. 17; but it would have been different if the musket had been capped though it failed to act. *See* s. 307, comm.

(18) *Barkatulla*, (1887) P. R. No. 32.

deed, or by the consequence in which case *res ipsa loqitur.* "*Causing such bodily injury as the offender knows to be likely to cause the death*": For what is "likely to cause death," *see* §§ 3027-3045. This clause goes much further and requires that the offender must be conscious of the likehood of the person injured by him dying from the effects of his injuries.

"*Sufficient in the ordinary course of nature to cause death,*" in which case knowledge of the likelihood may be presumed, but it need not be proved.

"*It is so imminently dangerous*": The words "imminent" and "eminent" are derived from the same root,[19] which means prominent or projecting. In common parlance it means that something is ready to fall or happen on the instant. Hence, a danger is said to be imminent if it is immediately threatened or impending. The danger, imminent so as to cause death, must in the case of injury be "sufficient in the ordinary course of nature to cause death." But it must be something more. It must be an act in which death was humanly certain or almost so, and it will cause surprise if the result is otherwise. The danger must not only be of certain or almost certain death, but of a death which is near, and may be counted by the days, it may be, by hours.

"*Without any excuse*" (in clause 4) means without *any* exculpatory circumstances other than those mentioned in the five exceptions to this section.[20] The word "excuse" also occurs in the explanation to s. 81 where it means "to justify." The phrase would here mean something which is a justification of the act, and does not merely mitigate the crime.

For the meaning of phrases used in the exceptions, reference should be made to the ensuing commentary (§§ 3085-3137).

3067. Essentials of Murder.—The gravest species of murder—and by its nature the simplest—is one in which the offender intentionally causes death. In other words, it is a case in which the death caused is clearly traceable to the murderous intention. There is no doubt about the effect and no uncertainty about its cause. Such would be the case of murder by poisoning, in which case, if the person poisoned dies and the person administering it is traced—there is the effect connected with the cause. All that is then required is intention. Such intention would be presumed, or it may be proved, or interred from the proof of motive as distinguished from intention. Avarice, love, hatred, jealousy and revenge are the main springs of human action. They impel men to commit the darkest deeds recorded in history. They are ever the fruitful source of murder in all countries.

3068. Intention can of course be rarely proved by direct evidence. Such evidence may, however, be sometimes available. A previous intimidation or threat may unmistakeably connect the deed with the threat, which would then be the best evidence of the intention. The accused, one Major Oneby, was indicted for the murder of one Gower. The two were friends, and, as such, entered a tavern where they began to play at hazard, and while at play they had a quarrel in which there was

(19) Lat. *Eminens*—from *eminere*, to stand out, or project.

(20) *Suba*, (1888) P. R. No. 40.

mutual exchange of abuse and missiles hurled at each other, but which, however, missed their aim. They then both drew their swords, but were prevented from drawing them by mutual friends. They both sat down for an hour, after which the deceased said to the prisoner: "We have had hot words but you were the aggressor; but I think that we may pass it over." He then offered his hand to the prisoner, who said: "No damn you; I will have your blood." The company afterwards dispersed and the prisoner calling out to the deceased said "Young man, come back, I have something to say to you." The deceased returned and then the door was closed, and the rest of the company was excluded; but they heard the clashing of swords, and the prisoner gave the deceased the mortal wound. The deceased being asked on his death bed if he had received the wounds in a manner which among swordsmen is called "fair," answered "I think I did." The words used by the prisoner were held to contribute *express malice*(21) and the case was held to be one of murder.

3069. This was, of course, the case of duelling in which there is necessarily the intention of killing one's adversary. But there are other cases in which evidence of intention may be equally conclusive. Such would be the case where a person has a motive for getting rid of another, or where from the character of the weapon and the manner in which it is used, it is certain that the offender intended to cause nothing short of death. For instance, a person stabbing another in his abdomen or heart or giving him a sword-cut across his chest, could not reasonably be accused of any thing short of deliberate intention to kill him. It may be that he mistook his victim for a spectre; but this reduces the crime not because there was no intention, but because it was mitigated by a favourable circumstance in his favour.

3070. The cases in which there is an intention to cause death, and death is caused in pursuance of the intention, are, therefore, comparatively simple. They are, however, not the only cases of murder—nor, indeed, are they of frequent occurrence. For a murderer seldom takes the risk of betraying his intention. His plot is deep-laid and he works in the dark and often without numerous accomplices. In such case intention may have to be inferred from circumstances and they may be disjointed and even appear contradictory. But it is the duty of the Court to place them in their natural logical sequence and perspective, and then judge them in the light of probability and reason, eliminating from consideration all circumstances that are unnatural, improbable and inconsistent with the ordinary course of the life of a person in the situation of the accused—and not in the situation of the judge or the jury. Intention in murder is sometimes all in all. It explains the act and gives it a character. Its discovery must, therefore, be the main concern of those engaged in the investigation of crime.

Intention v. Motive.

3071. The present section limits this investigation by confining it only to particular points. Proof of intention is then only required on the five points noted in the clauses. The first clause requires that the intention proved should be that the accused had resolved to cause death of the person killed, and that death had been caused in pursuance of that intention. A

(21) *Oneby*, 2 Str 766.

may intend to murder B. He may do nothing more. A few months later when A had probably abandoned his murderous intention, B may provoke A to a mortal conflict in which B may receive a fatal injury. Could A be convicted of the murder of B because of his one-time intention to kill him? The words "with the intention," used in Clause I, clearly imply that the murderous intention is present at the time of causing death. That intention must be to kill another, though the accused may believe in the resurrection of his victim. Such, indeed, was the case of a person who finding himself still poor after the birth of his son, offered it as a sacrifice to his God intending thereby to make peace with him, and believing that if the son was left alone he would come again to life in three days.(22) The intention of a robber or a highwayman is, of course, transparent. He intends to kill his victim so that he may not give information about his crime. Here the intention is to kill, the motive being to prevent one's discovery. Intention is thus always distinguishable from motive (§ 253). As before remarked, the offence requires only proof of intention and not of motive.

3072. Intentional Injury with Knowledge of Death of the Person Injured.—The second clause is less exacting. It requires not the intention *to cause death*, but only the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. Such a case would arise where the offender, having knowledge that a person was suffering from diseased spleen or liver, causes hurt in those regions which may not have been sufficient in the ordinary course of nature to cause death, but which with the special knowledge of the diseased condition of the deceased his assailant must have known to be likely to cause his death. In this case there is both intention and knowledge—the intention is to injure, the knowledge relates to the consequence of the injury. The knowledge of likelihood to the injured, places the offender upon election. As a citizen it is his duty to prevent any injury to another. It is still more his duty not to cause injury to another. It is an offence to injure him—and it is homicide if he injures him knowing that his injury may terminate fatally. If, therefore, he intended to injure him and knowingly took the risk of another's death, law esteems his offence to be the same as if he had both intended the injury as well as the injured's death. A person who handles a deadly weapon, such as a loaded gun, sword, dagger or a shikar-knife, knows that the causing of death is in his power. He also knows that he cannot measure the force of his blow, when he strikes another in a vital part. If he, therefore, strikes, and death ensues, he could not be heard to say that he had not intended the death his blow has caused.(23) Even where the weapon used is not deadly, there is a stage beyond which the accused may well be presumed to have anticipated death.

Clause 2.

3073. Such would be the case where a man after having been severely beaten by the accused, falls down senseless and is then several times kicked by him. He may not thereby intend his death, but if death ensues, its knowledge may well be imputed to him.(24) It is not necessary that the accused should injure the vital parts of the deceased.

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(22) *Bishendharee Kahar*, 7 W. R. 100.
(23) Ills (*c*), (*d*).
(24) *Nilmadhub Sircar*, 3 W. R. 22; *Ram Acre*, 9 O. L. J. 490.

He may avoid them and yet intend to destroy his life.[25] In one case one Saifullah's wife, by name Mt. Phulmani, had a quarrel with her husband, and she therefore left his house for her mother's in the company of her husband's brother Budhu and one Pusho. No impropriety was alleged with either. But Pusho began to talk about the abduction in the market place. This led to her discovery and she was taken back to her husband's. Pusho, Budhu and his brother Saifullah met one night in the latter's house. The accused Huriah was then also present. Pusho took up the part of the injured husband and accused Budhu of having got his brother a bad name. Budhu retorted, and thereupon all the four accused set upon him and cruelly beat him with their fists and a wooden ruler. They then realized what they had done and offered him some rice to eat, but which he could not eat. They then escorted him to his house, but on the way he fainted and was unable to walk. Saifullah then carried him on his back and left him near the house of one Maree in a field, where his body was discovered next morning. **The medical evidence proved that death was due to violence.** The case went up before the High Court, and Seton-Karr, J., held it to be a case of hurt, while Kemp, J., held it to be a case of murder, and this view was upheld by Jackson, J., to whom the case was referred, and who held the case to be covered by this clause.[1]

3074. The same view was taken curiously, also on a reference to a third Judge on the following facts. The accused and the deceased were men of low condition and great friends. They quarrelled about a petty matter, but their quarrel subsided. A little later it was found that the accused had struck the deceased on the head with a light stick which fractured his skull causing death within three days. The evidence pointed to the accused having struck the deceased as he lay sleeping in his verandah. The medical evidence showed that the skull of the deceased had been fractured in two places and that there had been a large effusion of blood. Campbell, J., held the offence to be culpable homicide, but his colleague Jackson, J., held it to be one of murder. In consequence of this difference of opinions, the matter was referred to Kemp, J., who agreeing with Jackson, J., held the case to be covered by this clause. He said : "when a man strikes another on the head with a stick, when the other is asleep and consequently helpless, and fractures his skull in two places, I think it may be fairly said that the act was done with a knowledge that it was likely to cause death; such act, therefore, comes within the definition of culpable homicide as laid down in s. 299 of the Indian Penal Code. The next question is whether such act comes up to the definition of culpable homicide amounting to murder as laid down in s. 300. I think that it does; for the act was clearly done with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death."[2] In this case the offence was held to fall under the next clause, but as it will be presently seen, the two clauses overlap, and an offence falling under this clause may also fall under the next clause, and *vice versa* (§§ 3075-3084). In another case where the accused had struck the

(25) *Kutab Ali*, (1911) P. R. 14, 12 I. C. 973.

(1) *Poshoo*, 4 W. R. 33.

(2) *Sheikh Choolye*, 4 W. R. 35; *Bahaduri*, 99 I. C. 77, (1927) L. 63; *Baldeo*, (1926) O. 184.

deceased repeated blows on the head with a highly lethal weapon (a *dao*). the Court held the offence to be murder under this clause.[3] The same view was maintained in another case where a blow was given with a bottle full of liquid.[4]

Clause 3.

3075. Intention and Injury Sufficient to Cause Death.—The third clause deals with the case of the intention to cause injury, but which injury is sufficient in the ordinary course of nature to cause death. It will be observed that, while under the last clause what was required is both intention to cause bodily injury as well as knowledge that it was likely to cause death, the same intention is necessary, also under this clause, though it dispenses with the necessity of knowledge that the injury is likely to cause death. All it requires instead is, that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The accused may not know of its sufficiency in this respect. He may not be aware that the injury inflicted is likely to cause death. But if he intended to injure and the injury so intended was ordinarily fatal, he commits murder, whatever may have been his ignorance or misconception on the latter point. It may be that the injury so inflicted is not only ordinarily fatal but the accused is also conscious of it. His case would then fall both under this as well as under the last clause, and it may then be a question whether in view of these combined circumstances the offence is not one in which the offender intended to cause death within the meaning of the first clause

This clause is really intended to meet cases in which dangerous injuries are inflicted, but in which it may not be possible or easy to prove knowledge of likelihood on the part of the accused. In the case of some classes of injuries, it is easy to say what was intended, for instance, in a wound with the sword on the head,[5] or in a wound with knife in the abdomen.[6] A man who inflicts such a wound intends to inflict a wound which he must know will be dangerous to life. But in the case of wounds with blunt instruments, such as the stick used in this case, the intention is not so clear. The effects of a severe blow upon one man will be very different from what it will be upon another and it does not follow when the victim dies, that it was intended to inflict such injury as is sufficient to cause death.[7] A judge must always find whether the bodily injury inflicted was that which was intended by the prisoner.

3076. The accused stabbed the deceased in a vital part in the back. The injury inflicted was not severe, and it healed up in a week, at the end of which symptoms indicative of tetanus were observed and the deceased died from it on the following day. According to the medical evidence, tetanus was caused by a *bacillus* which entered the body by the breach of surface caused by a wound. The question was whether the wound inflicted by the accused was sufficient in the ordinary course

(3) *Sobeel Mahe*, 5 W. R. 32.
(4) *Shwe Hlaw*, (1910) 10 Bur. L. R. 29.
(5) *Bantu*, 69 I. C. (P.) 439; (1923) A. I. R. (L.) 68.
(6) (1881) 1 Weir 300; *On Shwe Kalaw*, 1 R. 436; but otherwise where no intention or knowledge *Ghulam Muhayuddin*, 3 L. L. J. 581, 63 I. C. 450.
(7) (1881) 1 Weir 300; *On Shwe Kalaw*, 1 R. 436.

of nature to cause death. And it was so held by the Court, who said: "The death of the deceased was indirectly but certainly caused by the appellant. It seems to me that when a man stabs another in a vital part, such as that described in the medical evidence in this case, he must be held to have intended to cause death, and if death ensues either directly from the wound or in consequence of the wound creating conditions which give occasion to the appearance of a fatal disease, the person inflicting the wound is guilty of murder."(8)

Where a person during the course of a sudden fight, without premeditation and probably in the heat of passion took undue advantage and acted in a cruel manner in using a knife or dagger, it was held that there was no ground for holding that his act did not amount to murder.(9) As the clause is worded, it provides that the injury *intended to be* inflicted should be sufficient in the ordinary course of nature to cause death. The ordinary course of nature would mean "in the usual course and if left alone." If the person injured recovers, the accused has the benefit of his recovery, for he could not then be convicted of murder though he may be of an attempt. If he dies in consequence of unskilled treatment he is none the less guilty, for the effect was the natural consequence of his act. But where the accused gave a love potion to another and it resulted in his death, he cannot be convicted of murder though he would unquestionably be killing by doing a rash and negligent act (s. 304-A).(10)

3077. Knowledge of Imminent Danger.—The last clause applies only to a case of dangerous action, without an intention to cause specific bodily injury to any person, *e.g.*, furious driving or firing at a target near the public road.(11) The knowledge which accompanies the act must, however, be that the act was so imminently dangerous that (*i*) it must in all probability cause death, or (*ii*) such bodily injury as is likely to cause death. Moreover, the accused must have committed the act (*a*) without any excuse for incurring the risk of causing death; or (*b*) such injury as is likely to cause death. The accused gave the deceased a severe beating with a stick, which caused his death 18 days later. The doctor stated that all the injuries were quite likely to have caused death but not that they were sufficient in the ordinary course of nature to cause death. It was held that the degree of probability referred to in s. 299 was all that was proved but that it fell short of that defined in this clause, and that therefore the accused could not be convicted of murder but only of culpable homicide under clause 1 of s. 304.(12)

Clause (4).

3078. This clause as compared with the last clause of s. 299, has presented considerable difficulty in its practical application to concrete cases. It will be observed that clause (*c*) of s. 299 speaks of the act as likely to cause death. Now an act cannot be said to cause death unless it is dangerous. The clause then means that the act is so dangerous as

(8) *Per* Sir T. White, C. J., in *Nga Dwe*, (1904) 10 Bur. L. R. 171.

(9) *Nga Kaman*, (1903) 9 Bur. L. R. 145; *Nga Shwe Tha U*, (1884) S. J. L. B. 271.

(10) *Phulmani*, 77 I. C. (Pat.) 801; 25 Cr. L. J. 449.

(11) *Gobinda*, 1 Bom. 342; *Sardino*, 9 S. L. R. 99, 30 I. C. 998; *Nawab*, (1914) P. R. No. 21, 25 I. C. 522.

(12) *Darhoon*, 8 S. L. R. 337; 29 I. C. 104.

is likely to cause death. Again, what is likely is also probable, so that we have clause *(c)* as meaning an act so dangerous that it will probably cause death. If this is contrasted with clause 4 of this section we arrive at the following result:—

Cl. (*c*), s. 299.	Cl. (4), s. 300.
The act is so dangerous that it must probably cause death.	The act is so imminently dangerous that it must *in all* probability cause death.

3079. The probability in the two cases relates to the causing of death. But in the one case it is comparatively not so strong as in the other.(13) Similarly, the act is in the two cases dangerous, but if it is imminently dangerous, it is *prima facie* murder and not merely culpable homicide. "There are many acts," said Sir Barnes Peacock, C. J., "falling within the words of s. 299, 'or with the knowledge that is likely by such act to cause death' that do not fall within the 2nd, 3rd, or 4th clause of section 300, such, for instance, as the offences described in sections 279, 280, 281, 282, 284, 285, 286, 287, 288 and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But, although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to cause death, or such bodily injury as is described in clause 2 or 3 of section 300."

"As an illustration, suppose a gentleman should drive a buggy in a rash and negligent manner or furiously along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill any one. In such a case, if he should cause death, I apprehend he would be guilty of culpable homicide not amounting to murder, unless it should be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death, or such bodily injury, etc., as to bring the case within the 4th clause of s. 300. In an ordinary case of furious driving, the facts would scarcely warrant such a finding. If found guilty of culpable homicide not amounting to murder, the offender might be punished to the extent of transportation for 10 years, or imprisonment for 10 years with fine,(14) or if a European or American, he would be subject to penal servitude instead of transportation. It would not be right in such a case that the offender should be liable to capital punishment for murder. The first part of s. 304 would not apply to the case. That applies only to cases which would be murder if not falling within one of the exceptions in s. 300. If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found as a fact that he knew that his act was so imminently dangerous that it must in all probablity cause death, or such bodily injury, etc., as in clause 4, s. 300.

"From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption; but I should never presume an intention

(13) *Apalu*, 1 R. 285. (14) Ss. 304 and 59.

to cause death merely from the fact of furious driving in a crowded street in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the fact of each particular case.

"Suppose a gentleman should cause death by furiously driving up to a railway station; suppose it should be proved that he had business in a distant part of the country, say, at the opposite terminus; that he was intending to go by a particular train; and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving it wanted only two minutes to the time of the train's starting; that the road was so crowded that he must have known that he was likely to run over some one, and to cause death. Would any one under the circumstances presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train? If the judge or jury should find that his intention was to save the train; but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing of death was such that he must have known, and did know, that his act must in all probability cause death, etc., within the meaning of clause 4, section 300.

"If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder, and liable to capital punishment."[15]

3080. The question whether the act of a person was dominated by a certain intention or knowledge is not a question the solution of which depends upon any dogmatic rules of law. It is the duty of law to lay down the degree of criminal consciousness which discriminates one offence from another. It can do no more. The rest depends upon the facts to which the Court must apply the tests here laid down for the purpose of arriving at a finding, which is a finding of fact and not of law. This will be more apparent presently.

Scope of Clause (4).

3081. This clause is stated to have been designed for that class of cases where the act of the accused is not directed against any one in particular, but there is that recklessness or negligence which places the lives of many in jeopardy, and of which the accused is well aware (§§ 3018-3022, 3038). This was pointed out by Sir Barnes Peacock, C. J., in the Full Bench case,[16] and such is the case assumed in the illustration (*d*) to the section, which is taken from Lord Hale[17] who says: "If a man so deliberately, and with an intent to do mischief, ride upon a horse used to kick, or coolly discharge a gun amongst a multitude of people and death be the consequence of such acts, it will be murder." So also Blackstone wrote: "Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief,

(15) *Gorachand Gopee*, 5 W. R. 45, F. B; *Ram Asre* 90 L. J. 490.

(16) *Ib.*

(17) 1 Hale P. C. 476; 4 Black 200; 1 Hawk, P. C. C. 29, s. 12; 1 East P. C. C. 5, s. 18; so Lord Coleridge, C. J., said in *Martin*, 8 Q. B. D. 54 (58): "If a man unwilfully fires a gun among a crowd, it is murder if one of the crowd is thereby killed."

ride upon a horse used to strike, or coolly discharging a gun among a multitude of people."(18)

The rule here enunciated is, therefore, as ancient as it is well-recognised. And the offender in such case is charged of murder because while in murder his act is directed against some persons singled out, his act is no less criminal if it is indiscriminately directed generally against man. So in England it has been held that if a man resolve to kill the first man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice.(19) And so Hawkins speaking of the instance of the person riding a horse used to kick amongst a crowd, says, it would be murder, though the rider intended no more than to divert himself by putting the people into a fright.(20) As opposed to this, the thugs who deliberately and recklessly poison travellers with *dhatura* with the intention of robbing them while they are insensible are clearly guilty of murder if their victims succumb to it.(21)

3082. These offences fall within the rule that a person doing an unlawful act—an act which is *malum in se*—is liable for the natural consequence arising from his act. So if A shoot at the poultry of B intending to steal it and by accident kill a man, it will be murder by reason of the felonious intent.(22) So Lord Coke said "If the act be unlawful it is murder; as, if A meaning to steal a deer in the park of B, shoots at the deer, and by the glance of the arrow kills a boy that is hidden in a bush, this is murder; for that the act was unlawful."(23) So it will be murder if a man set fire to a house, whereby a person in it is burnt to death.(24) But the mere doing of unlawful act does not render the doer liable for all the consequences, howmuchsoever remote. And law makes a distinction between the consequence resulting from a bare trespass, and an act committed with felonious intent.(25) Thus if A shoot at B's poultry intending to steal it and by accident kill C, it will be murder of C. But if A shoot only wantonly without felonious intent the offence will be only manslaughter.(1)

So Stephens, J., said: "Any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony, which caused death should be murder."(2) This is the rule here enacted. Such a case may arise if a person should mischievously poison a well from which people draw their supply of drinking water, or opening the draw of a bridge just as a train is about to approach it, or a large stone is hurled at some one intending only to hurt, though not to kill him, and by accident it kills him, or any other.(3) The accused was proved to have met the deceased casually on the way whom he inveigled into his confidence inviting him to take food of which he died. The object of the accused was merely to stupify the deceased to enable him to rob him of his personal effects which he

(18) 4 Black 199, 200; citing 1 Hawk. P. C. C. 74.
(19) 4 Black 200; *Muthumada*, 11 I. C. (M) 347.
(20) 1 Hawk, P. C. C. 31, s. 68.
(21) *Nanbu*, 45 A. 557.
(22) Fost. 258, 259.
(23) 3 Inst. 56.
(24) *Smithies*, 5 C. & P. 332.
(25) Fost. 258.
(1) Fost. 258, 259; 1 Hale P. C. 475.
(2) *Serene*, 16 Cox 311.
(3) 1 Hale P. C. 440, 441.

did. The Court held the accused guilty of murder under this clause and sentenced him to transportation.(4) The accused gave a boy aged 9 some sugar mixed with arsenic to eat of which he died. His motive was to keep the boy's father absent from the case in which he was an important witness against the accused. He was transported.(5)

3083. These cases show that this clause is intended to apply only when there is no intention to cause death, or in other words, when the three earlier clauses are inapplicable. It has then to be shown that *(i)* the act was one of extraordinary recklessness, and *(ii)* it was wholly inexcusable,(6) added to which the clause requires proof of *(iii)* the act being imminently dangerous, *(iv)* the danger so imminent being to human life, *(v)* and its imminence is such that it will either *(a)* in all probability cause death, or *(b)* such bodily injury as is likely to cause death. The recklessness and inexcausability of an act must be judged by the nature and occasion of the act. The same act may be at one time legal, and at another time wholly inexcusable.

Illustration *(d)* speaks of the discharge of a loaded gun in a crowd of persons. Such an act if inexcusable is murder if it kills some one. But if the gun was discharged to quell a riot in obedience to law, it would be an excusable act, and the killing in consequence would be justifiable. But in order to be excusable, such an act must be necessary for the public security. It is not justifiable merely because it was done in obedience to the command of a superior officer(7) (§§ 590, 597-598). The words "without any excuse" mean without any exculpatory circumstances, other than those specified in the five exceptions to this section.(8) The question whether an act is imminently dangerous depends upon the nature of the act and its evident risk to human life. The word "imminently" implies a risk which is both threatening and near (§ 3066). The danger threatened must be to human life. Ordinarily, the danger to human life would be proved by the danger if caused by killing some and wounding others.

3084. Lastly, there must be knowledge of the danger. Ordinarily such knowledge would be presumed if the act by which the death is caused was imminently dangerous.(9) But this would only create a presumption which may be rebutted by the accused. It has been stated before that this clause was intended to meet a case where the act of the accused is directed against no one in particular (§§ 3036-3037). But this is by no means necessary, nor, indeed, should the clause be held confined only to such cases. For there are cases in which a single individual may be the target of the accused's malice as in the case of the mother exposing her illegitimate child in the hope that it may be picked up, but with the certain knowledge that its exposure will in all probability

(4) *Ghutali*, 31 A. 48; *Tulsha*, 20 A. 143; *Bhagwan Din*, 30 A. 568; *Lala* (1911) P. L. R. 32, 9 I. C. 731. But in *Kesab Din*, (1920) P. W. R. 3, 55 I. C. 479 intention held to be the test.

(5) *Gauri Shankar*, 40 A. 360.

(6) *Ghufar*, (1887) P. R. No. 62; *Shwe Ein*, (1905) 3 L. B. R. 122, 3 Cr. I. L. J. 355.

(7) *Subba Naik*, 21 M. 249.

(8) *Per* Rattigan, J., in *Suba*, (1887) P. R. No. 40; *Barkatulla*, (1887) P. R. No. 32.

(9) *Lakshman*, (1888) B. U. C. 411.

compass its death. Such a case is, indeed, contemplated by s. 317, Explanation,[10] which was enacted to save such cases.

3085. Mitigation of Murder.—After generally laying down the normal cases, in which the presence of certain ingredients aggravates culpable homicide to murder, the section next turns to certain exceptional cases in which the atrocity of the offence is mitigated by certain palliative circumstances, which, though not offering a complete vindication of the offence, are yet such which the dictates of humanity and reason enjoin as fit subjects of mitigation. Shortly stated, these circumstances are those arising out of— Exceptions.

(1) Provocation.
(2) Private Defence.
(3) Exercise of Legal Powers.
(4) Absence of Premeditation.
(5) Consent.

3086. Under ordinary circumstances these subjects offer a sufficient justification for the offence, if they are kept within the legitimate bounds prescribed for them in Chapter IV. But it is not always possible for one to so poise his right as not to exceed it, especially at a moment of great heat and passion. Sometimes anger, sometimes recklessness or negligence, sometimes a wanton depravity of mind or want of self-restraint lead men to perpetrate deeds the commission of which they deplore in their cooler moments. These exceptions lay down the limits within which such excesses are taken into account in extenuation of the offence. Beyond them Law refuses to discriminate between one who committed a crime in cold blood and one who was impelled to commit it under the impelling force of his feelings or convictions.

3087. Provocation as Mitigation.—"We agree," wrote the authors, "with the great mass of mankind, and with the majority of jurists, ancient and modern, in thinking that homicide committed in the sudden heat of passion on great provocation ought to be punished, but that in general it ought not to be punished so severely as murder. It ought to be punished in order to teach men to entertain a peculiar respect for human life; it ought to be punished in order to give men a motive for accustoming themselves to govern their passions, and in some few cases for which we have made provision, we conceive that it ought to be punished with the utmost rigour. In general, however, we would not visit homicide committed in violent passion, which had been suddenly provoked, with the highest penalties of law. We think that to treat a person guilty of such homicide as we should treat a murderer, would be a highly inexpedient course—a course which would shock the univer-

(10) Cf. *Khodabux*, 13 W. R. 52. So Blackstone says: "If a man does such an act, of which the probable consequence may be and eventually is death such killing may be murder although no stroke be struck by himself, and no killing may be primarily intended: As was the case of the unnatural son, who exposed his sick father to the air against his will by reason whereof he died (1 Hawk. P. C. 78), and of the barlor, who laid her child under haves in an orchard, where a kite struck it and killed it (1 Hale, P. C. 432)."—4 Black 197.

sal feeling of mankind and would engage the public sympathy on the side of the delinquent against the law."(11)

3088. The indulgence which is shown by law in some cases to the first transport of passion, is a condescension to the frailty of human nature to the *furor brevis*, which while frenzy lasts, renders a man deaf to the voice of reason; so the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed.(12) In recognizing provocation as a mitigation of the crime law respects the infirmities and imbecilities of human nature.(13) It recognizes it as a frailty because it is beyond its power to check or regulate. For, given sufficient provocation, men will act in defiance of the law. And law would be cruel and unjust if it attempted to punish men for acts done when they were themselves the victims of an irresistible impulse. In order that provocation should operate in mitigation of the crime all the circumstances in the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but solely imputable to human infirmity.(14) This is substantially the sense of the three exceptions to which the main rule is subject.

3089. Adverting first to the rule itself, provocation is an extenuation only when the offender receives (*i*) grave and sudden provocation; (*ii*) in consequence of which he is deprived of the power of self-control. What is then a grave and sudden provocation? Is the loss of self-control a test of its gravity? It is no doubt a test, but by no means an infallible one. For while judging of the effect provocation produces on the mind of the accused, it is perfectly legitimate to take into account the condition of mind in which the offender was at the time of the provocation.(15) Still such provocation must have had an adequate cause,(16) or in other words it must be such provocation as will upset an ordinary man—and not merely such as sufficed to upset the accused who was a hot-headed man.(17) A person who flies into a passion without cause and goes about slaughtering men may be insane, but if sane, he could not defend his action on the ground of provocation. If such a plea were allowed it would be made the legal cloak for unbridled passion and atrocious crime.(18) The provocation may arise from anger or other emotion. But there must be a serious cause for it.(19) What causes may then arouse one's anger or other emotion? (§§ 3090-3112).

(1) Provocation by Words.

3090. In England, words as well as acts may cause such provocation. So Blackburn, J., in a case of wife-murder told the jury: "As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there

(11) Note M, Reprint, p. 144.
(12) Fost. 315.
(13) 1 Hawk. P. C. C. 31, s. 38; 1 East P. C. 236.
(14) 1 East P. C. 232; 1 Hale P. C. 466; 1 Hawk. P. C. 290; 4 Black. 191.
(15) *Khogayi*, 2 M. 122; *A Ve*, (1900) 1 U. B. R. 291.
(16) *Huri Giree*, 10 W. R. 26.
(17) *Sohrab*, 5 L. 67; *Bodhraj*, 76 I. C. (K) 105; *Khadim Hussain*, 7 L. 488.
(18) Cf. *Dudley*, 14 Q. B. D. 273.
(19) 3 Steph. Hist. Cr. L. 71.

may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he, having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. Now in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye, but I'll take no more for thee, for I will have no more children of thee: I have done it once, and I'll do it again.' Now, what you have to consider is, would these words which were spoken just previous to the blows, amount to such a provocation as would, in an ordinary man, not in a man of violent and passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did?"[20] In some earlier cases it appears to have been suggested that mere words unaccompanied by an act were insufficient to give provocation.[21]

But this view, if ever taken, is not the view of the Code. So the authors wrote: "We greatly doubt, whether any good reason can be assigned for this distinction. It is an indisputable fact, that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound, is anything but a proof that he is a man of a peculiarly bad heart. It would be a fortunate thing for mankind, if every person felt an outrage which left a stain upon his honour more acutely than an outrage which had fractured one of his limbs. If so, why should we not treat an offence produced by the unblameable excess of a feeling which all wise legislators desire to encourage, more severely than we treat the blameable excess of feelings certainly not more respectable?

A person who should offer a gross insult to the Mahomedan religion in the presence of a zealous professor of that religion; who should deprive some high-born Rajput of his caste; who should rudely thrust his head into the covered palanquin of a woman of rank, would probably move those whom he insulted to more violent anger than if he had caused them some severe bodily hurt. That on these subjects our notions and usages differ from theirs is nothing to the purpose."[22]

Provocative Acts.

3091. Not only words, but also acts may constitute a sufficient provocation. The nocturnal visit of a thief[23] or of a man for the purposes of intrigue[24] are acts which would inflame the passions of any man (§ 3105). There may, however, be acts which some people may look on with equanimity, while they may throw others into a paroxysm of the deepest rage. Such are acts done in violation of one's caste or customs, and of which the salient examples are given by the authors in their notes just

(20) *Rothwell*, 12 Cox 145; *Dini*, 94 I. C. 140, (1926) L. 485; *Sukhai*, 88 I. C. 844, (1925) A. 676.

(21) *Woodhead's case*, 1 Lewin 163; 1 Hale P. C. 455, 456; Fost. 290; to the same effect, *Mangal Singh*, 27 Punj. L. R. 15.

(22) Note M, Reprint, pp. 144, 145.

(23) *Gokool Bouree*, 5 W. R. 33.

(24) *Bechoo Saoni*, 19 W. R. 35; *Raham Shah*, 85 I. C. 374, (1925) L. 114.

quoted. In such cases the fact that the provocation is unreasonable is nothing. If it is an act which is sufficient to provoke a person in the position and situation of the accused, it is a sufficient extenuation.

Provocation must be Both Grave and Sudden.

3092. The section does not lay down a rule as to what shall be deemed to be a sufficient provocation. Indeed, such a rule is not possible. The clause, however, lays down the *extent* of provocation which amounts to mitigation. In the language of the clause, the provocation must be "grave and sudden"—and which means that it must be *both* grave as well as sudden. So must also be its effect, namely, the loss of self-control. If there was time to cool down, and the accused afterwards avenges himself for the insult given, he can hardly plead the extenuating circumstance here enacted. So where the husband, by name Bijye, was sleeping with his wife in a hut, the deceased entered it for the purpose of intriguing with his wife, whereupon the accused seized him and carried him to another hut where his father was sleeping. The latter came out and fetched a bamboo, and a few minutes later the deceased was dead. The question was whether the accused was entitled to the benefit of this exception. And Glover, J. (Mitter, J., concurring) said: "But the provocation and its effects must be sudden as well as grave; and when a man has time to cool down, and after having seized an instrument, under the circumstances stated in this case, takes him away to another room, and there, after being joined by another man, and so being in a position to render all resistance hopeless, deliberately first knocks his enemy down and then suffocates him with a bamboo pole placed and pressed upon his neck; the pole having to be fetched from outside, he can hardly plead the extenuating circumstances provided for in section 300, Exception.

"The deprivation of the power of self-control must continue in order to benefit a man who kills another under circumstances of grave provocation, and it would require very strong evidence to support the plea in this instance and to show that, so long, after the provocation was received, the prisoner Bijye was still in that state of mental derangement from anger that judgment and reason had no dominion over him."(25)

3093. The question whether the provocation given was "sudden" as well as "grave" enough to be an extenuation for the offence, depends upon the nature of the provocation it effects upon the person provoked and in short, upon the probability of its producing a similar effect upon other persons. But when it is said that the provocation must be "sudden" it is not implied that it should have all immediately preceded the homicide in point of time. For a person may by repeated or continuous provocation inflame another to a state of mind when the provocation immediately preceding the act is only the last straw, the gravity of which should be measured not by what it amounted to, but rather by what it implied.

This was the *ratio decidendi* of a case in which previous provocative acts to the accused were held to weigh with the Court in determining

(25) *Bechoo Saoni*, 19 W. R. 35; *Raham Shah*, 85 I. C. 374, (1925) L. 114.

the gravity of the provocation. The Court said: "It was argued that in determining what was the provocation which induced the act of the prisoner, all that took place before the deceased arrived on the scene must be left out of account, because there is nothing to show that he had taken any part in the trespass and assault and other aggravating conduct of his son. Assuming it to be the law that the provocation, which is contemplated by section 300, must have proceeded from the person whose death is the subject of the enquiry, either by his own acts or by acts of others which he instigated or otherwise abetted, and confining the provocation in this case, therefore, to the abusive language used by the deceased, we still think that it was grave enough and sudden enough to bring it within the character of that contemplated by the section. What is required is that it should be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. In the present case the abusive language used was of the foulest kind, and was addressed to a man already justly enraged by the conduct of the deceased's son. In the circumstances, we think, the provocation was sufficient to deprive him of his self-control.(1)

Such was the case of the accused whose case was disposed of by Sir Charles Turner, C. J., and Kindersley, J., and in which the appellant was convicted of the murder of one Norano Bisoyi, aged 60 and who complained of the deceased having injured him in many ways during a long series of years. He had seduced his cousin, had encroached on his ancestral tope and had cut down trees. He had persuaded the woman, whose land he had cultivated, to turn him out. He had usurped the appellant's share in the village. He had struck the appellant and abused him, and had constantly behaved in the most provokingly insolent manner to him. These facts were held to justify mitigation of the sentence, which was reduced from that of death to transportation for life.(2)

3094. In another case, the appellant had cut his wife down with a *mamoti* killing her instantaneously. He had previously heard of his wife's intimacy with another. One day he saw the latter and his wife weeding together in the field and their bodies frequently coming in contact. He upbraided her for it, but she said that she would do just as she liked, and that there were thousands of men as good as he. Upon this he killed her in the manner stated. The insulting answer was in itself wholly insufficient to mitigate the crime, but it was held to be the climax which, taken with her previous conduct, rendered the provocation sufficiently grave to mitigate the offence under this section, and the Court eventually passed a sentence of ten years' transportation.(3)

3095. In these cases the offence was the result of the accumulated provocation given by the same person. But is this necessary? Strictly construed, the clause would seem to suggest that all the provoca-

(1) *Khogoyi*, 2 M. 122; *A We*, (1900) 1 U. B. R. 291.
(2) *Mani Pradano*, (1882) 1 Weir 306 (307).
(3) *Venkatesan*, (1882) 1 Weir 307 (308).

tion should emanate from the same person, for it speaks of the death of the person who gave the provocation. But this is neither invariably necessary nor possible. Such was the case of the poor cultivator whose crop of rice had been repeatedly stolen, and who sat up one night to catch the thief, which he did in the act of stealing, and who thereupon acting on the sudden impulse of the moment, inflicted on him blows so severe as to have been likely to cause death, but which the accused did not know would cause his death. In fact, the death caused was due to the abnormal weakness in the deceased which was not known to the accused. It was held that the provocation received was sufficiently grave and sudden to mitigate the accused's offence under this exception.(4)

3096. Provocation must be also "Grave."—Not only must the provocation be sudden, but it must also be grave, and as remarked before, its gravity will be measured by the deprivation of self-control in which it must have resulted. Now before a provocation can be said to be "grave" it must be one which the Court recognises as sufficient to arouse a person's passions. It must, in fact, be a provocation which, though not intolerable, is sufficiently serious to explain the act. From this, it, of course, follows that the feeling had an adequate cause.(5) This implies that the provocative act was either illegal or one which though legal, was improper. Where the act is neither the one nor the other there is no legal cause justifying the provocation. For, if a thief breaks into one's house and the owner raises an alarm which provokes him to kill the owner, could he be heard to say that he had killed the owner because he had raised the alarm for his arrests? In one case the accused, a Brahmin aged 45 years had killed his wife aged 16, because the latter would not allow the former to have connection with her. It was held that the refusal could not mitigate the murder, but the alternative sentence of transportation was nevertheless passed.(6) A person has no right to the exclusive possession of the person of his mistress and if the latter abandons him for another, it is no provocation entitling the former to claim mitigation on the strength of this exception.(7)

3097. So a person cannot be said to have adequate cause if consumed by groundless jealousy, he takes another's life, though he may feel that he was acting in obedience to an uncontrollable impulse. So Rolfe, B., told the jury in a case: It is said that, if a man find his wife in the act of committing adultery and kill her, that would be only manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it. But I state it to you, without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder. However strongly you may suspect it, it would most unquestionably be murder. And if I

(4) *Gokool Bowree*, 5 W. R. 33 (39, 40).

(5) *Huri Giree*, 10 W. R. 26; *Pratapa*, 76 I. C. (P) 970 (mere abuse insufficient).

(6) *Nattekallappa*, (1886) 1 Weir 308 (309, 310).

(7) *Ghuntappa*, (1882) 1 Weir 306.

were to direct you, or you were to find otherwise, I am bound to tell you, either you or I would be most grievously swerving from our duty."[8]

But a suspicion may so get hold of a man as to amount to an insane delusion. When it is so the case is one for total exoneration and not merely mitigation (§§ 754-769). The accused in a case confessed that he had seen the deceased (a lad aged 8 years and who was his brother-in-law) arrange a clandestine meeting between his wife and a young man whom he actually saw enter his wife's apartment sometime before midnight, and again leave it after a considerable interval, and that in consequence of what he saw he had not had a wink of sleep until he killed him. It was held that the accused actually believed that he had ocular proof of his wife's infidelity, and that the estimate of his guilt must be made upon the basis of actual existence of the facts in regard to which the delusion existed, and had the accused acted under the immediate influence of such provocation his guilt would have been greatly mitigated under this exception.[9] [See this subject further discussed under s. 84 *ante*.] So a person could not be held to have an adequate cause for provocation, if he erroneously believed that he was being bewitched by another and in consequence of which he kills him. The appellant, one Ganduva, had been ill for three or four months. He believed his illness due to the witchcraft practised on him by his brother, whom he falsely suspected of intriguing with his wife. It was held that the fear that he was bewitched by the deceased, even if it were a provocation, was not so sudden as to reduce the offence from murder to culpable homicide.[10] A threat of causing death by witchcraft is, of course, no justifiable ground of provocation.[11]

3098. A provocation which is grave is not necessarily sudden: if it is one and not the other, this exception does not mitigate the offence (§§ 3081-3082). But in order to be sudden the provocation must have impelled the accused to act on the spur of the moment. If he takes time to reflect, he loses the benefit of this exception—for, time restrains the sudden impulse of his mind, and whenever there is time law presumes that there has been reflection. The discrimination which law makes between these two cases may be illustrated by the numerous precedents furnished by the provocation given by adulterous intercourse. A person finding his wife and her paramour in *flagrante delicto* admittedly receives the highest provocation and if he kills one[12] or both [13] he is entitled to the benefit of this exception, for, as Parsons and Ranade, JJ., remarked: "It has always been recognized that no higher provocation can be given than that of finding a man's wife in actual intercourse with a paramour."[14] The Court therefore treats such an

(8) *Kelly*, 2 C. & K. 814; to the same effect, *Lal Singh*, 63 I. C. (P.) 610.
(9) *Ghatu Pramanik*, 21 C. 613.
(10) *Ganduva Nayako*, (1881) 1 Weir (305 306).
(11) *Gobadur Bhooyan*, 13 W. R. 55.
(12) *Asha Gopal*, (1897) B. U. C. 932; *Gour Chunder Polee*, 1 W. R. 17; *Bhekye*, 1 W. R. 46; *Gureebollah Maithya Gazee* 6 W. R. 42; *Said Ali*, (1890) P. R. No. 8; *Fasal*, (1899) P. R. No. 9, *Sahib*, (1900) P. R. No. 27; *Maddy*, (1670) 1 Ventr. 158.
(13) *Sheikh Boodhoo*, 8 W. R. 38.
(14) *Asha Gopal*, (1897) B. U. C. 932; *Ram Tahal Kahar*, 3 B. L. R. (A. C.) 33.

offender with special clemency[15] and there are cases in which such offenders have been let off with short terms of imprisonment, for six months,[16] and in the case of a double murder for one year.[17] But there is not the same provocation in a case where the husband does not find his wife holding criminal conversation with another, and still less where his suspicions are groundless.[18]

3099. But all the same the finding of a stranger in one's house late at night is a cause for grave and sudden provocation, though it is not to be compared with the provocation of the other kind.[19] But the case would be otherwise if the accused had seen them committing adultery at some previous occasion, and then saw them both together in which case the accused may well connect the subsequent conduct with the previous act. It may be that the accused did not interfere on the previous occasion when the accused saw his wife committing adultery, but that fact alone would not justify an inference that the act had ceased to rankle in his mind, or that it did not add to the provocation subsequently received.[20] Such provocation may assume a graver aspect if the misconduct was followed up by abduction.[21] The accused's wife had been forcibly taken away to a village physician, who represented that her presence was required to perform certain incantations with which the accused had no concern. She was ravished by the physician and let go, but she was again sent for and on this occasion the accused followed her sword in hand and watched from the roof of the house where his wife was confined. He saw her being ravished by the physician, whereupon he rushed in and gave three or four severe blows with his sword and the physician died. The accused was convicted of homicide and sentenced to imprisonment for eight months which was probably as severe a sentence as could be ever passed under the circumstances.[22]

3100. These were all cases of adultery, but the rule equally applies, and for the same reason, to intercourse had with a person's other female relations, *e.g.*, the sister.[23] In fact the commission of such acts are held to disgrace the whole family, and any member may justifiably feel provoked by an act which disgraces him in common with the rest of his family. Even a paramour may resent the infidelity of his mistress, and it would mitigate the crime if the act was prompted by a provocation both grave as well as sudden.[24] The question how much time must have elapsed between the provocation and the offence, to entitle the accused to mitigation, must depend upon the nature of the case. Indeed, the question in such cases is not, how much time had elapsed but whether it was sufficient to moderate his passion.

(15) *Asha Gopal*, (1897) B. U. C. 932; *Sheikh Boodhoo*, 8 W. R. 38.
(16) *Asha Gopal*, (1897) B. U. C. 932.
(17) *Sheikh Boodhoo*, 8 W. R. 38.
(18) *Teprah Fukeer*, 5 W. R. 78.
(19) *Haneef Fakeer*, 23 W. R. 50, 53, 54 (sentence 3 years).
(20) *Boya Munigadu*, 3 M. 33; *Hussun*, (1872) P. R. 30. In each case the sentence passed was 3 years.
(21) *Hussun*, (1872) P. R. No. 30; *Ram Tahal Kahar*, 3 B. L. R. (A. C.) 33.
(22) *Ram Tahal Kahar*, 3 B. L. R. (A. C.) 33.
(23) *Kaseemooddeen*, 4 W. R. 38; *Chuni*, 18 A. 497; *Jafar*, (1905) 6 P. L. R. 492.
(24) *Ghuntappa*, (1882) 1 Weir 306.

Offence during Loss of Self-control.

3101. This raises the next question referred to in the clause, namely, that the offence must have been committed "whilst the offender is deprived of the power of self-control" in consequence of the grave and sudden provocation. This can only mean that the accused's act must be done while he is still in the paroxysm of passion and out of the restraining influence of reason. It has been sometimes said that if a person had time to reflect he could not avail himself of this exception. But the question is one of degree. A person may suffer from a provocation so grave that he may brood over it, but may refrain from acting. He may, again, receive a provocation which may completely throw him off his balance.

Again, the loss of self-control is not to be invariably measured by the gravity of the provocation. Indeed, the same cause has not the same effect upon all minds. Some will nurse the injury done to them, while others will readily forget it. The Code does not enjoin upon person subject to its control any altruistic form of abnegation. It does not require that men should be more forgiving than they are. It punishes those who transgress its mandates. But in punishing them it takes account of human impulses, passions and feelings, and it recognizes that beyond a certain stage men are so lost to reason and judgment, that they become the involuntary ministers of their own passions. When they are legitimate, the Code recognizes their effect upon men's intention. And this clause prescribes the limits within which it respects this human infirmity. The deprivation of self-control in consequence of grave and sudden provocation is a mitigation, but in order to be so, it must be (*i*) such as naturally and reasonably arises out of the provocation, and is, moreover, (*ii*) such as prompts an irresistible impulse for retaliation, (*iii*) which again must not savour of malignity, cruelty or wanton brutality. For instance, it has been held in the cases already cited, that the killing of a man found holding adulterous intercourse with the wife or other female relation of the accused would only be culpable homicide and not murder by reason of the grave and sudden provocation involving loss of self-control.(25)

3102. But it is said that in such a case the benefit of the exception is lost if some time elapses between the provocation and the assault. So where in a case of adultery, the accused after beating the deceased carried him off still alive and groaning to a river where he cut off his head throwing the severed head and trunk into the river, the act was held to be no longer merely homicide by reason of the time which should have given him time to cool and weigh the precise conseqeunces of his acts.(1) But this depends upon the time that intervened between the provocation and the assault. And in such cases of grave provocation it must not be forgotten that the provocation continues to influence the feelings of the aggrieved for a considerable time, and though some time may elapse, still it does not by any means follow that it is sufficient for the accused to regain self-control.

3103. This was conceded in a case in which, on the same facts, the husband, his brother and his uncle seized the adulterer of their

(25) *Yasin Sheik*, 12 W. R. 68 (69). (1) *Ib.*

relation and carried him off to some distance, broke both his arms and one of his legs, thrust a stick up his *rectum*, and left him in the open not very far from their enclosure. He died three days later on account of his injuries. The Sessions Judge would not admit the plea of provocation, holding that it had ceased to be sudden after the accused had had time to think, but the High Court held that its gravity was such that its effect would last for a considerable time, and in the result the conviction was altered to one under section 304 and the sentence reduced to imprisonment for seven years.(2)

In this view the earlier cases decided by the same Court cannot be held to be authorities for the view they tend to suggest. The facts of the one case have been already set out: those of the other were these. The deceased was found entering the hut in which the accused and his wife were asleep. His object was to visit the latter with whom he had an intrigue. The accused seized and carried him off to another hut where his father was sleeping, the latter fetched a bamboo and entered the hut where the deceased was confined. Next morning his body was discovered half immersed in water with marks of strangulation on the neck. The hut was also found stained with blood. It was held that though the provocation was grave and sudden the carrying off of the deceased to another hut and strangling him with assistance of another man by placing and pressing the bamboo upon his neck rendered his act deliberate and not the result of an irresistible impulse.(3)

3104. It is difficult to discern any difference between this case and the case of *Abalu Das*,(4) and it is submitted that the earlier cases were wrongly decided. Indeed, the rule would be too narrow if it were held that in order to entitle an accused to earn the mitigation here enacted for, the act must immediately follow the provocation.(5) It all depends upon the gravity of the provocation, and its effect upon the mind of the accused. The provocation must, of course, be sudden but the act must not follow *instanter*. At the same time there must not be that interval of time which would assuage the first impulse of revenge. The questions to ask in such cases are: (*i*) what was the nature and gravity of the provocation; (*ii*) was it unexpected and given unawares; (*iii*) what effect did it produce on the mind of the accused; (*iv*) how long did that effect last; (*v*) was the act complained of committed under the influence of that feeling; and (*vi*) was it uncontrollable.

Vindictive Act Excluded.

3105. And in any case provocation must be the cause and not the excuse for the crime. If a person is resolved upon a settled plan of vengeance, carried out as soon as the expected provocation furnished an occasion for it, the act would be ascribed to the vengeance and not the provocation. The prisoner Ghuntappa had a mistress to whom he became attached, and for whom he abandoned his wife and caste. She proved faithless to him. He remonstrated with her, but she refused to return to him. Finding his entreaties unavailing he stabbed her with a dagger which he had

(2) *Abalu Das*, 28 C. 571.
(3) *Bechoo Saont*, 19 W. R. 35; to the same effect, *Rahim Khan*, 7 S. L. R. 118, 24 I. C. 589
(4) 28 C. 571.
(5) *Kadir Baksh*, 2 L. L. J. 406, 63 I. C. 403.

previously purchased on purpose to kill her. It was held that the accused could not plead provocation by way of extenuation, as he had no right to the exclusive possession of his mistress, and the provocation given was neither sudden nor such as evidenced deprivation of self-control.(6)

Premeditation and preparation are acts inconsistent with the assumption of loss of self-control, though hasty preparation is in all cases inevitable. The accused Mohan had entertained well grounded suspicions as to the infidelity of his wife. One night the latter, thinking that her husband was alseep, stealthily left his side to meet her paramour. The accused armed himself with an axe and followed her, and finding her conversing with her paramour in a public place, immediately killed her, and the question was whether the accused could avail himself of this exception. But both Straight, O. C. J., and Broadhurst, J., held that he could not, the former observing that "the state of things was wholly inadequate to the resentment with which it was met on the part of the appellant and his act was altogether out of proportion to the provocation given. The law does not sanction or approve a man taking into his own hands the duty of punishing his wife in the mode adopted by the prisoner, and it would be most dangerous to society if the Court of this country were to adopt the doctrine that he might."(7) Here the provocation given by the assignation was insufficient to make the accused lose his self-control. But the case would have been otherwise, if instead of the woman going to the paramour the paramour had come to his house to meet her(8) (§§ 3130-3133).

3106. In this respect the English rule is identical. So it has been held that if a father were to see a person in the act of committing an unnatural offence with his son, and were instantly to kill him, it would be only manslaugther, but if he only hear of it from others, and go in search of the person afterwards, and kill him, when there has been time for the blood to cool, it would be murder.(9) This view was taken in the Punjab in a case in which the accused had been well aware for many years that his wife had an intrigue with the deceased, and he was, therefore, on a look out for an opportunity to surprise her. One day he had reason to follow her with a knife and seeing her and her paramour in each other's arms he killed the paramour. It was held that the act was too deliberate to be mitigated by this exception.(10)

Other cases illustrate the same rule,(11) which has been thus stated: "In cases of this kind the immediate object of the inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if, from any circumstance whatever, it appears that the party reflected, deliberated or cooled any time before the fatal stroke given; or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty."(12) So it has been held that, where the accused was aware of the purpose for which his wife was leaving the house his

(6) *Ghuntappa*, (1882) 1 Weir 306; *Jodhraj*, 76 I. C. 105.
(7) *Mohan*, 8 A. 622; *Chainu*, 91 I. C. 41, (1926) O. 272.
(8) *Damarna*, (1885) A. W. N. 197.
(9) *Fisher*, 8 C. & P. 182.
(10) *Gohra*, (1890) P. R.
(11) *Lochan*, 8 A. 635.
(12) *Oneby*, 2 Lord Ray 1.

following her to a place where she was having connection with her paramour would be going in search of a provocation which could not then be said to be so grave and sudden as to deprive him of his self-control.[13]

3107. These cases only present one aspect of provocation, but there may be provocation of any kind, and the rule is the same, if its effect is the same. The accused in a case ran up towards an affray, when a woman cried out: "You will not murder the man, will you?" The accused replied: "What is that to you, you bitch?" The woman gave him a box on the ear and the accused struck her on the breast with the pommel of his sword. The woman then fled, but the accused chased her and stabbed her in the back. Holt, C. J., said that it was murder as a single box from a woman on the ear was not a sufficient provocation to kill in such a manner. It, however, subsequently appeared that the woman had struck the accused in the face with an iron patten drawing a good deal of blood, whereupon the offence was held to be no more than manslaughter. The smart of the man's wound, and the effusion of blood might possibly have kept his indignation boiling to the moment of the act.[14] If two persons assault each other and one strangles the other by putting a rope round his neck, after he is overpowered, the act is too wilful and deliberate to be mitigated on the ground of provocation.[15] On the same principle, if one on receiving only a slight provocation cruelly beat another and kill him, it would be murder, despite the provocation.[16]

3108. Death on Provocation and Others by Mistake or Accident.—This exception places on a par the causing of death of the person offering the provocation as well as of one who is killed by "mistake or accident." An act done by mistake[17] or accident[18] may be altogether non-criminal. But the acts here contemplated are *prima facie* criminal, though they are mitigated by reason of provocation and mistake. Illustration (*b*) appended to this exception shows the practical working of the rule. Other examples might be easily multiplied.

3109. Where Provocation is No Mitigation.—The exception is itself subject to three exceptions which have now to be considered. They are in entire harmony with the English rule, and the policy underlying them is obvious. The first exception deals with the case where the accused courts provocation or merely uses it as an excuse for assaulting another. The effect of this proviso read with the exception is that the provocation must come to him; he must not go to the provocation. The rule may be illustrated by reference to the cases of adultery, in some of which the aggrieved husband followed his wicked wife to a place of assignation, away from his house and where he killed either her or her paramour, and those in which the paramour visited her in his house, when he killed him on the spot. In the former case the accused goes deliberately in search of the provocation.[19] In the latter case the provocation comes to him and his act is outside the proviso.[20]

Exception I, Proviso 1.

(13) *Lochan*, 8 A. 635; following *Mohan*, 8 A. 622; to the same effect, *Gohra*, (1889) P. R. No. 7.
(14) Foster 292; Tranter Stra. 49.
(15) *Shaw*, 6 C. & P. 372.
(16) 4 Black. 199.
(17) S. 76.
(18) S. 80, and *see* ill. (*b*).
(19) *Lochan*, 8 A. 635; *Mohan*, 8 A. 622; *Gohra*, (1889) P. R. No. 7.
(20) *Jafar*, (1905) P. L. R. 492; *Damarua*, (1885) A. W. N. 197; and cases cited, *supra*.

This is also the English rule, under which provocation does not avail if it is sought by the party killing, and induced by his own act in order to afford him a pretence for wreaking his malice.(21) Thus, where A and B having fallen out, A said he would not strike, but would give B a pot of ale to strike him; upon which B did strike, and A killed him, it was held to be murder as the provocation given had been courted by the accused.(22) So where A and B were at some difference: A bade B to take a pin out of the former's sleeve, intending to take the occasion to strike or wound B: B accordingly took out the pin and A struck and killed him and it was held to be murder, *first* because there could be no provocation when B's act was done with the consent of A and *secondly*, because it appeared to be a malicious and deliberate artifice by which to take occasion to kill B.(23)

Exception 1, Proviso 2.

3110. The second exception has also been, in a measure, anticipated in the foregoing discussion. Where the act is legal, opposition to it is necessarily illegal and what is illegal may enhance but cannot mitigate a crime. But in order to be excepted from the exception the act must be legal and not illegal. As the Law Commissioners said: "We apprehend that grave provocation given by anything done under *cover* of obedience to the law, or under *cover* of its authority, or by a public servant, or in defence, *in excess* of what is strictly warranted by the law, in point of violence, or as regards the means used, or the manner of using them and the like, would be admissible in extenuation of homicide under this clause. For example, take the case of Wat Tyler referred to in the Chapter. He was a public officer, a tax gatherer who came to exercise his lawful powers, in that capacity, but doing so in a manner unwarranted and highly offensive, Tyler was excited to 'violent passion,' and in his rage killed him on the spot. The Commissioners, upon this say: "So far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a Judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter."(24) A legal act done in an illegal manner is, for the purpose of this section, an illegal act altogether, so that if it offers sufficient provocation, the killing would be only homicide under this section.

3111. Two classes of cases may arise under this proviso: those in which the provocation is given by public servants and others acting in obedience to law, and those in which they receive provocation in the execution of their lawful duty. In both cases the admissibility of provocation as a defence depends upon the illegality of the act, or of the manner of its execution.

Exception 1, Proviso 3.

3112. A person who acts in the exercise of the right of private defence performs a legal act and resistance to him is, therefore, necessarily illegal. A person who lawfully exercises such right may provoke another, but it is no extenuation of his crime if he retaliates on account of the provocation so received. A person may, for instance, forcibly seize a thief and confine him till the arrival of the Police but the thief cannot complain of the inconvenience he thereby suffers. But here, again, the right is strictly limited

(21) 1 East P. C. C. 5, s. 23, p. 239.
(22) 1 Hawk, P. C. C. 31, s. 24.
(23) 1 Hale, P. C. 456.
(24) First Rep., s. 277; reprint, p. 256.

to anything *lawful* done in the exercise of the right. The illegality of resistance must then depend upon the legality of the act, whether that act is done in obedience to law or in the exercise of the right of private defence. Illustration (*e*) furnishes an example of the practical working of this rule, but other examples will be found given in sections 96-106, where the subject of private defence has been fully discussed.

3113. Provocation, a Question of Fact.—The question whether the provocation given in a case was so grave and sudden as to be a mitigation under this exception, is declared by the explanation to be a question of fact. And so it is, though Parke, J., had laid down in a leading precedent[25] that the question was one for the Court and not for the jury. But this view is obviously erroneous, and has been demurred to in England[1] and this explanation has been apparently added to prevent its extension to this country, though Straight, O. C. J., appears to have overlooked it in a case of murder which he had to dispose of in revision, and in which the learned Judge treated the question of provocation as if it had been one of law, which of course, it was not.[2] This was recognised by Clover, J., in a case[3] in which the Sessions Judge had disposed of the case on the strength of certain possibilities, none of which appears to have been proved: "He thinks that the distraint was probably carried out without exact warrant of law, but how or in what point he does not say. He does not believe that the prisoner's field was plundered, although he thinks that some damage may have been done: in short, he gives the prisoner the benefit of various possibilities the existence of which has only been surmised. This does not seem to us the correct way of treating the case. To give an accused person the benefit of exception I, it ought to be shown distinctly not only that the act was done under the influence of some feeling which took away from the person doing it, all control over his actions, but that that feeling had an adequate cause."[4] There is then no room for the applicability of the exception, unless there are facts to support it, the burden of proving which is on the accused who is to profit by them.[5] The inference that those facts and circumstances were sufficient to give the provocation so as to reduce the crime would be then an inference of fact and not one of law. It is then one with which the High Court in the exercise of its revisional jurisdiction will ordinarily interfere.

Exception 1, Explanation.

3114. Causing Death by Exceeding the Right of Private Defence.—The second exception deals with the case where a person exceeds the right of private defence. If the excess is intentional the offence is murder, if unintentional, it is culpable homicide. As to this, the authors wrote: "We have been forced to leave the law on the subject of private defence as we have elsewhere said, in an unsatisfactory state; and, though we hope and believe that it may be greatly improved, we fear that it must always continue to be one of the least precise parts of every system of jurisprudence. That portion of the law of homicide which we are now considering is closely connected with the

Exception 2.

(25) *Fisher*, 8 C. & P. 182.
(1) Roscoe, Cr. Ed., pp. 664, 665.
(2) *Lochan*, 8 A. 635.
(3) *Huri Giree*, 10 W. R. 26.
(4) *Huri Giree*, 10 W. R. 26; *Asiruddin Ahmad*, 8 C. W. N. 714; s. 105, Ill. (*b*), Indian Evidence Act (I of 1872).
(5) S. 105, ill. (*b*), Indian Evidence Act (I of 1872).

law of private defence, and must necessarily partake of the imperfections of the law of private defence. But wherever the limits of the right of private defenc may be placed, and with whatever degree of accuracy they may be marked, we are inclined to think that it will always be expedient to make a separation between murder and what we have designated as voluntary culpable homicide in defence.

"The chief reason for making this separation is that the law itself invites men to the very verge of the crime which we have designated as voluntary culpable homicide in defence.[6] It prohibits such homicide indeed; but it authorizes acts which lie very near to such homicide; and this circumstance, we think, greatly mitigates the guilt of such homicide.

"That a man who deliberately kills another in order to prevent that other from pulling his nose[7] should be allowed to go absolutely unpunished, would be most dangerous. The law punishes and ought to punish such killing, but we cannot think that the law ought to punish such killing as murder; for the law itself has encouraged the slayer to inflict on the assailant any harm short of death which may be necessary for the purpose of repelling the outrage; to give the assailant a cut with a knife across the fingers which may render his right hand useless to him for life, or to hurl him down stairs with such force as to break his leg; and it seems difficult to conceive that circumstances which would be a full justification for any violence short of homicide, should not be a mitigation of the guilt of homicide. That a man should be merely exercising a right by fracturing the skull and knocking out the eye of an assailant, and should be guilty of the highest crime in the Code if he kills the same assailant, that there should be only a single step between perfect innocence and murder, between perfect impunity and liability to capital punishment, seems unreasonable. In a case in which the law itself empowers an individual to inflict any harm short of death, it ought hardly, we think, to visit him with the highest punishment if he inflicts death."

"It is to be considered also that the line between those aggressions which it is lawful to repel by killing and those which it is not lawful so to repel, is in our Code, and must be in every Code, to a great extent an arbitrary line, and that many individual cases will fall on one side of that line which, if we had framed the law with a view to those cases alone, we should place on the other. Thus we allow a man to kill if he has no other means of preventing an incendiary from burning a house; and we do not allow him to kill for the purpose of preventing the commission of a simple theft. But a house may be a wretched heap of mats and thatch, propped by a few bamboos, and not worth altogether twenty rupees. A simple theft may deprive a man of a pocket book which contains bills to a great amount, the saving of a long and laborious life, the sole dependence of a large family. That in these cases the man who kills the incendiary should be pronounced guiltless of any offence, and that the man who kills the thief should be sentenced to the gallows, or, if he is treated with the utmost lenity which the Courts can show, to perpetual transportation or imprisonment, would be generally condemned as a shocking injustice. We

(6) This designation, occurring in clause 299 of the Bill, was subsequently abandoned, and the clause itself recast and converted into this exception.

(7) *See* Illustration.

are, therefore, clearly of opinion that the offence which we have designated as voluntary culpable homicide in defence ought to be distinguished from murder in such a manner that the Courts may have it in their power to inflict a slight or a merely nominal punishment on acts which, though not within the letter of the law which authorizes killing in self-defence, are yet within the reason of that law."(8)

Rule Applies where Act Illegal.

3115. There is, of course, no occasion for applying this clause to cases where the death is otherwise justifiable, as for example under section 103. It is only when the right conferred by sections 96-105 is *exceeded* that there is room for its operation. And even then it does not apply indiscriminately to all cases. For in the first place the rule postulates the exercise in good faith of the right of private defence, which implies that there can be no mitigation under it, if the enforcement of that right is used merely as a pretext for committing murder. This accounts for the other requirement of the clause, namely that the excessive harm caused must be unintentional. The combined effect of these two requisites is that in order to earn the clemency of this rule the harm caused must have been caused solely with the intention of private defence. It must not be maliciously excessive nor vindictively unnecessary. It is unjustifiable, of course, but then it may be so on account of the natural want of judgment which a person cannot be expected to possess at a moment of great excitement, or it may be because of the exaggerated sense of the danger or of the right, out of all proportions to the real requirements of the case. Such a case may be supposed of a man, who being greatly annoyed by trespassers upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length on seeing a trespasser he went home and fetched a pistol and after exchanging some angry words shot him dead. He was convicted of murder and executed.(9)

3116. On this point Holroyd, J., thus observed: "A civil trespass will not excuse the firing a pistol at a trespasser in sudden resentment or anger. If a person take forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters into the dwelling of another; but a man is not authorized to fire a pistol on every intrusion or invasion of his house; he ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity: but the making of an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle: and, therefore, in the eye of the law it is equivalent to an assault; but no words or singing are equivalent to an assault, nor will they authorize an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence; if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person in the heat of blood, kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as, where a party coming up, by way of making an attack, and, without there being any previous apprehension of danger, the party attacked instead of having recourse

(8) Note M, Reprint, pp. 147, 148.

(9) *Moir's case*, stated in Price; 7 C. P. 178.

to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If you are of opinion that the prisoner was really attacked, and that the deceased and his party were on the point of breaking in, or likely to do so, and executed the threats of the day before, he was, perhaps, justified in firing as he did."(10)

3117. Here again, the question is one of fact, and as the burden of proving exoneration is upon the accused,(11) so is also the burden of proving facts in mitigation of the offence.(12) For instance, the right of private defence against a house-breaker, robber and certain other offenders mentioned in section 103 extends to the voluntary causing of death, but that right is subject to the restriction contained in section 99, that the harm caused must not be more than is necessary for the purpose of defence, that is, seizure of the thief and the property taken by him. Where, therefore, the deceased broke into the house of the accused and the latter arrested him, but the thief was endeavouring to escape and was for that purpose struggling with the accused, the latter thereupon felt enraged and called for a *kodali* for the express purpose of killing him, and the *kodali* being brought killed him on the spot accordingly, it was held that the right of private defence ceased as soon as the accused had secured the deceased. His attempt to escape justified the use of force necessary to prevent his escape. That was not the object of the force employed. It was used expressly for killing him. There was therefore neither good faith nor want of intention to do more harm than was absolutely necessary. Nor was it a case of grave and sudden provocation involving deprivation of self-control, for the act done was deliberate and out of the spirit of revenge. It was, therefore, saved neither under this nor the last exception, and the act was consequently murder for which the accused was transported.(13)

3118. The same view was taken in another case, in which the accused had surprised the thief before he had time to possess himself of any of his property. The thief bolted as soon as he was surprised and he was followed by the owner who speared him in the open long after the housetrespass had ceased. It was held that the accused was not entitled to the exception because the right of defence ceased with the housetrespass,(14) and while the accused could have caused death of the house-breaker whilst on the premises, it did not entitle the accused to pursue the thief to cause his death.(15) But the causing of death of such a malefactor is not the privilege of the owner under any circumstance. It must be necessary and subservient to the right of private defence. For instance, a brutal assault resulting in the death of a starved old woman detected stealing the accused's crops could on no account be justified under this exception.(16) But the case would be otherwise, if the owner finding himself confronted by a thief attempting to enter his house through a hole made in his wall, hastily seized a pole with which he battered the thief. Here the violence was excessive, but it was inflicted *bona fide* and while the accused believed

(10) *Meade's case*, 1 Lew. 184; *see* the subject further discussed under s. 99, *ante*, (§§ 927-953).

(11) S. 105, Indian Evidence Act (I of 1872).

(12) *Ib.*; *Asiruddin Ahmad*, 8 C. W. N. 714; 1 Cr. L. J. 708.

(13) *Durwan Geer*, 5 W. R. 73 (*per* Jackson and Macpherson., JJ., Campbell, J., dissenting); *Thekkum The Thil*, 17 I. C. (M.) 414 (sentence not stated).

(14) S. 105, cl. (5).

(15) *Balakee Jalahed*, 10 W. R. 9.

(16) *Gokool Bowree*, 5 W. R. 33.

himself to be at bay.[17] He could, therefore, avail himself of this exception.

3119. A head-constable, making an investigation into a case of house-breaking and theft, searched the tents of certain gipsies for the stolen property, but discovered nothing. After he had completed the search, the gipsies gave him a certain sum of money, which he accepted, but at the same time, not deeming it sufficient, he demanded a further sum from them. They refused to give anything more, on the ground that they were poor, and had no more to give. Thereupon he unlawfully ordered one of them to be bound and taken away. On his subordinates proceeding to execute such order, all the gipsies in the camp, men, women, and children, turned out—some four or five of the men being armed with sticks and stones—and advanced in a threatening manner towards the place the arrested gipsy was being bound and the head-constable was standing. Before any actual violence was used by the crowd of advancing gipsies, the head-constable fired with gun at such crowd, when it was about five paces from him and killed one of the gipsies, after which he ran away. Any apprehension that death or grievous hurt would be the consequence of the acts of such crowd would have ceased, had he released the gipsy he had unlawfully arrested, and withdrawn himself and his subordinates, or had he effected his escape. It was held that the head constable had not a right of private defence against the acts of the gipsies, as those acts did not reasonably cause the apprehension that death or grievous hurt would be their consequence, and the head-constable was, therefore, guilty of culpable homicide not amounting to murder.[18]

The same offence was held to have been committed by the accused against whom a false "cry of thief" had been raised and who was thereupon pursued by certain private persons in whose view he had not committed any non-bailable or cognizable offence, and who were, therefore, incompetent to effect his arrest. The accused turned round upon his pursuers and shot one of them dead. It was held that the accused was entitled to resist the attempt of his pursuers to capture him in the exercise of his right of private defence, but in doing so he had inflicted more harm than was necessary for the purpose of defence. He was, therefore, guilty of homicide under this clause.[19] Where the prosecution rely upon a legal process as justifying an arrest, they are bound to produce it. If they fail to do so the accused is entitled to the benefit of this exception.[20]

3120. Homicide by Public Servant.—The same reason prevails in the case of a public servant acting in the discharge of his lawful duties. But the restrictions in his case are even greater. Public servants possess varying powers of seizure and arrest. As such, they come in close contact with the people. It is, therefore, necessary that they should not prostitute their office for the wreaking of private vengeance upon persons under the cloak of authority. In their case only such excesses are of account in condoning the crime as are unintentional and believed to be necessary for the due discharge of their public functions and are not inspired by malice or malevolence towards the

Exception 3.

(17) *Fukeera Chamar*, 6 W. R. 50.
(18) *Abdul Hakim*, 3 A. 253 (sentence months).
(19) *Sher Baz*, (1880) P. R. No. 1; *Farid*, 9 I. C. (S.) 452.
(20) *Kayambu*, 32 I. C. (M.) 670.

person slain. In this respect, the English rule is identical.(21) In order to be entitled to the mitigation, ministers of justice must act or purport to act in the discharge of their duties. They may not be lawful, but they must have at any rate honestly believed in their legality.

3121. The question whether he did or did not *bona fide* believe in the legality of his powers is a question of fact which will have to be decided upon the proved circumstances of each case. Even if the act be legal, the use of force necessary to perform it is not left solely to his discretion and judgment. In order to justify the use of force it must not exceed the necessity of the case.(22) He may be provoked to the use of violence, but provocation in such a case is no excuse, unless it involves deprivation of self-control so as to bring his case under exception I. In any other case it is on him to show that the force employed was necessary for the due discharge of his duties.

Even where the employment of force is lawful, it must be employed in moderation and having due regard to the purpose for which its use is sanctioned. So, if an officer whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to exceed all bounds of moderation, and thereby cause the criminal's death, he will be guilty at least of manslaughter, and possibly of murder.(23) So if an executioner, ordered to hang a convict, behead him instead, it has been held to be murder.(24) So jailors and others entrusted with the custody of prisiners are under a special obligation to take care of their temporary wards and offences committed by them are visited with condign punishment. So a mere assault upon a jailor by a prisoner would not warrant his killing him, unless he stood in personal danger, or there was a reasonable apprehension of the prisoner escaping which he could not otherwise prevent.(25) So where a jailor wilfully and against his will confined a prisoner into a cell where another prisoner infected with small-pox lodged, and the prisoner caught the disease and of which he died, it was held to be murder.(1)

3122. As regards the use of force by police-officers and others employed in apprehending offenders, the rule is the same. The employment of moderate force, if necessary, is justifiable. But the use of force resulting in death must be supported on the ground of special necessity. So Holroyd, J., told the jury: "An officer must not kill for an escape, where the party is in custody for a misdemeanour; but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of such weapon by the previous violence that he had received, then he was justified. If an affray arises, and blows are received, and weapons used in heat, and death ensues, although the party may have been at the commencement in the prosecution of something unlawful, still it would be manslaughter in the killer. In this case it is admitted that the custody was lawful. The question is,

(21) 1 East P. C. 297; 4 Black. 180, 3 Russ. (6th Ed), 129, 130.

(22) 4 Black, 180; *Goff's case*, 1 Ventr. 216.

(23) 1 Hawk, P. C. C. 29, s. 5.

(24) 1 Hale, P. C. 501; 2 Hale P. C. 411; 3 Inst. 52; 4 Black. 179; 3 Russ. (6th Ed.), 134.

(25) 1 East, P. C. 331; 1 Hawk, P. C. C. 28, s. 13.

(1) Foster, 322; *Castel* v. *Bambridge*, 2 Str. 854.

whether, under all the circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself, as any reasonable man might fairly and naturally be expected to resort to."[2]

In this case the prisoner, an excise officer, having apprehended the deceased for smuggling, the latter at first submitted himself quietly to the arrest; but finding a chance he turned round upon the prisoner and commenced to assault him with an ash stick. The prisoner at first shot him in the legs, and warned him of the consequence if he persisted in his assault, but which he nevertheless continued, upon which he was shot dead. In such cases the amount of violence justifiable in law would, ordinarily, depend upon the violence used and threatened. One Lalooa was a noted outlaw. He had previously shot a policeman dead and then escaped. A reward of Rs. 1,000 was sanctioned for his apprehension. Lalooa asked one Aman for food which the latter gave and then left for the neighbouring village to fetch more. He there informed a police constable and Lambardar of his presence and arranged with them for an ambuscade, his plan being to surround and surprise him while he was at meal. While so, he was attacked by his captors, two of whom were armed with swords and with which they cut him down as he was running away. They were convicted of murder, but the High Court held this exception applicable.[3] But no reasons are given for this view which are, however, obvious. It is true Lalooa had not offered the least resistance to his arrest. He was taken unawares and sought refuge in flight. This justified the use of some force to disable him, and the use of excessive force, therefore, made the offenders liable under this clause.

3123. The *quantum* of justifiable force must be moderated and proportioned to the circumstances of the case and to the end to be obtained. The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed.[4] The plea of *respondent superior* can not avail a subordinate obeying the illegal commands of his superior. In a dispute between two co-widows about the enjoyment of a certain field, the servants of one went to reap the crops which had been sown by the other. The latter reported the matter to the police, who arrived on the scene with a number of constables who were armed. The station-house officer bade the reapers to desist but they did not, whereupon he ordered one of his men to fire in the air which he did, but some of the reapers still persisted and were defiant. The station-house officer without making any arrests, and without warning the reapers that if they persisted in reaping they will be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers. It was found that neither the station-house officer nor the last-named constable believed that it was necessary for the public security to disperse the reapers by firing on them. It was held that the officer and the constables were both guilty of murder inasmuch as neither acted in good

(2) *Foster's case*, 1 Lewin 187.
(3) *Aman*, 5 N. W. P. H. C. R. 130; *Fakirigadu*, (1882) Weir, 3rd Ed., 180.
(4) *Keighley* v. *Bell*, 4 F. and F. 763 (790); *Suddis*, 1 East. 312; *Alexander Broadfoot*, Fost, Cr. L. J. 154.

faith, and the order to shoot was illegal, which the constable could see as he had the same opportunity of observing what the danger was and judging what the necessities of the case required. Both were, therefore, equally guilty and the two accused were sentenced presumably under this clause to 10 and 7 years' rigorous imprisonment respectively.(5)

Exception 4.

3124. Sudden Fight.—This exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is the absence of premeditation, but while in the one case there is the total deprivation of self-control, in this there is only that heat of passion which clouds men's sober reason and urges them to deeds which they could not otherwise do. There is provocation in this case as in the first exception, but the injury done is not the direct consequence of that provocation. In fact, the present exception deals with cases in which, notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. For, a "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side, for if it is so the exception more applicable would then be exception I. The position of combatants under this clause is, in short, this. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to blame. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation and it is difficult to apportion the share of blame which attaches to each fighter. They are, therefore, both equally liable and the only points of discrimination that could arise in their case are (*i*) premeditation; (*ii*) undue advantage; and (*iii*) cruelty.

(1) No Premeditation; and Duelling Excepted.

3125. In the first place then, there should be no premeditation, and this excludes the case of duelling in which there is premeditation on both sides. It may be that the resolution to kill is formed in an instant, but then when the two duellists fight they intend to kill each other. It is, therefore, not an unpremeditated sudden fight which alone is reached by the rule. This is in accordance with the English rule, according to which a meeting of two persons in cold blood to fight on a precedent quarrel can admit of no alleviation due to a unpremeditated sudden fight as in the case of an affray.(6) But if upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into a field and fight and one of them be killed, it will be but manslaughter, because it may be presumed that the blood never cooled.(7) And with

(5) *Subba Naik*, 21 M. 249.

(6) 1 East. P. C. 241; *Young*, 8 C. and P. 644; *Cuddy*, 1 C. & K. 210; *Boronet's case*, 1 E. & B. 1; *Robimuddin*, 5 C. 31; *Nga Thwe*, 4 Bur. L. T. 17, 14 I. C. 656.

(7) 1 Hale 453; 1 Hawk, P. C. C. 31, s. 29; 3 Inst. 51; *Nga Po*, 84 I. C. 1049, (1925) R. 123.

regard to sudden encounters it has been observed that when they are begun, the blood previously too much heated, kindles afresh at each stroke; and in the tumult of the passions in which the instinct of self-preservation has no inconsiderable share, the voice of reason is not heard; therefore, the law, in condescension to the infirmities of human nature has extenuated the offence.(8) Such cases were very common in the last century when men went about armed with swords and drew them at the slightest provocation.

3126. Lord Byron had on one such occasion killed one Chaworth for which he was tried by his peers, who held his offence to amount only to manslaughter. It was a sudden fight at a club where Lord Byron and Chaworth differed as the best means of procuring game and they exchanged words, when Lord Byron drew his sword and asked Chaworth also to draw it. He drew, and thrust at Lord Byron, and after one or two thrusts he himself received a mortal wound of which he died.(9) Lord Byron was indicted for murder, but it was held to be only a case of manslaughter. The same view was taken of the case of one Walters who had a quarrel with a Sir Charles Pym in which both drew swords and Walters ran Sir Charles Pym through the body and he died. There was no evidence of any unfair advantage taken by Walters, and the quarrel was sudden, for the parties did not know each other before. When Pym fell Walters took him by the nape of the neck, dashed his head upon the ground, and said "Damn you, you are dead." Jenner, B., told the jury that the case was only one of manslaughter.(10) Where two factions quarrel over a boundary and a third party interfering, one of them attack and beat him after which his friends come to his rescue, and there is then a stand-up fight between the two parties so formed, and in which two men are killed, the offence committed would be homicide by applying this clause, because the fight with intermeddlers was as sudden as it was unpremediated and in such a case it was immaterial which party offered the provocation or committed the first assault.(11)

3127. In another case there was a feast held at the house of one Fakir Mahomed when a dispute arose in consequence of some of the parties objecting to dine with one Nusuruddee on social grounds. The deceased was one of the objectors, while the accused was one of Nusuruddee's supporters. The two quarrelled and from words they came to blows in which both parties used sticks. The deceased struck the accused on the head so severely that blood flowed from his wound whereupon the accused while smarting from the blow and possibly apprehensive of further violence snatched up a knife lying hard by and with it inflicted wounds on the deceased of which he died. It was held that the case was met by this exception and the accused was sentenced to imprisonment for 7 years.(12) Where two men fight and sticks are freely used, it does not cease to be a fair fight because one of them shouts for help and obtains reinforcement so that the other party is overpowered and killed.(13) In such case all that is required

(8) Foster, 138, 296.
(9) *Lord Byron*, 11 St. Tr. 1117.
(10) *Walters*, 12 St. Tr. 113.
(11) *Talim Rai*, 1 W. R. 33; *Rajoo Ghose*, 7 W. R. 70; *Ameera*, (1866) P. R. No. 12; *Gokula Mala*, (1881) Weir (3rd Ed.) 174; *Nga Shan Gye*, (1885) S. J. L. B. 371.
(12) *Somiruddin*, 24 W. R. 48.
(13) *Kewul Dasad*, (1834) W. R. 36.

is absence of premeditation. There may be knowledge that an act would result in or cause death. Indeed, when two parties rush at each other with drawn swords, they not only know that death would be caused but intend to cause death. But the saving grace of their act is that they did not premeditate it. It was resolved upon suddenly and in the heat of passion, which alleviates their crime.(14)

(2) Fight must be "Sudden."

3128. Again, the fight must not only be unpremeditated, but it must also be sudden, that is to say, it must have been brought about unexpectedly and without pre-arrangement. If people quarrel and part and then meet again to wreak revenge, it is murder, for the second meeting was premeditated and the fight pre-arranged. The interval of time between the quarrel and the fight is, therefore, an important consideration in determining its suddenness.(15) This is emphasised in the English cases and it is regarded as an important discriminating element.(16) But the suddenness of fight is not to be gauged by time alone. For if A draw his sword and make a pass at B, the sword of B being then undrawn, and thereupon B draw his sword, and a combat ensue in which B is killed, this will be murder; for A while making the pass, while his adversary's sword was undrawn, shows that he sought his blood: and A's endeavour to defend himself which he had a right to do, will not excuse B;(17) but if A had foreborne till his adversary had drawn too, it had been no more than manslaughter.(18) But this is probably too fine a distinction and irreconcilable with the case of Lord Byron who had similarly invited his antagonist to draw his sword in accordance with the practice of swordsmen.(19) The invitation of A to B was in the last case dictated by a similar feeling of fair play.

3129. However, it is not perhaps possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. But as Parke, B., told the jury: "If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation; for anger is a passion to which good and bad men are both subject. But the law requires two things: *first*, that there should be that provocation, and *secondly*, that the fatal blow should be clearly traced to the influence of passion arising from that provocation.(20).....If you see that a person denotes by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit which the law terms, 'malice' in the definition of wilful murder, then the offence would not be manslaughter. Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued cruel and repeated blows; then you could not attribute that act to the

(14) *Rajoo Ghose*, 7 W. R. 70.
(15) Foster 296; *Rohimuddin*, 5 C. 31.
(16) 1 Hale 456; Foster 295.
(17) Foster 295, 1 Hawk. P. C. C. 31, s. 27.
(18) Foster 295; 1 Hawk, P. C. C. 31, s. 28.
(19) 11 St. Tr. 1117; see *Oneby*, 2 Str. 766.
(20) *Kirkham*, 8 C. & P. 115.

passion of anger, and the offence would be murder. And so, if you find that before the stroke is given, there is a determination to punish any man who gives a blow, with such an instrument as the one which the prisoner used:[21] because if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving of such wound to the passion of anger excited by that blow; for no man who was under proper feelings, none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument."[22]

So Lord Tenterden, C. J., said in another case: "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter; but it depends upon the time elapsing between the blow and the injury; and also whether the injury was inflicted with an instrument at the moment, in the passion of the party, or whether he went to fetch it from another place....If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious and diabolical mind then you will find him guilty of murder."[23]

(3) Undue Advantage and Cruelty Excepted.

3130. This is what is implied by the closing words of the clause—"without the offender's having taken undue advantage or acted in a cruel or unusual manner." The mere fact that the assault was sudden and unpremediated does not absolve the assailant from his liability for murder, if taking advantage of a sudden quarrel, he wreaks his vengeance by slaying his adversary. The "undue advantage" and unusual manner" savour of the rules of chivalry which required adversaries to deliver a challenge, to measure their swords before deigning to strike, and which scorned the hitting of an adversary unawares and when placed at a disadvantage. So it has been said that malice will be presumed even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature; for the law supposes that a party capable of acting in so outrageous a manner upon a slight provocation must have entertained a general, if not a particular, malice, and have previously determined to inflict such vengeance upon any pretence that offered.[24]

3131. This is the English rule, but it is neither so precise nor so narrow as the clause. The English rule was followed in two cases in which it was held that if on provocation a person at once retaliates with any instrument that may happen to be at hand and causes death, the act is not murder but manslaughter.[25] But this was held to be too

(21) The instrument was a sword-stick.
(22) *Thomas*, 7 C. & P. 817.
(23) *Lynch*, 5 C. & P. 324.
(24) 1 East P. C. C. 5, s. 30, p. 252; cited in 3 Russ. (6th Ed) 57.
(25) *Shan Gyi*, (1885) 1 S. J. L. B. 371; *San Ya*, (1889) 1 S. L. J. B. 463; dissented from, *per* Sir Thirkell White, C. J. and Irwin, J., in *Po Kin*, (1904) 2 L. B. R. 329, 1 Cr. L. J. 1128.

wide, for, it ignores the condition that in such a struggle no one should take an undue advantage of the other. So where the deceased who was Serang of a launch plying between two ports quarrelled with one Po Chon about steering it, some persons including the accused Po Kin interceded and separated them. The deceased said that he would take the launch back and steered round. Thereupon the accused remonstrated with him and kicked the helmsman upon which the deceased struck the accused with his fist and the latter then stabbed him in the chest just below the collar bone from which Serang died. It was held that the accused's act was murder, for "if two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such a weapon must be held to take an undue advantage, and not to be entitled to the benefit of this exception."(1) But having regard to the want of premeditation the Court remitted the death penalty. This view is scarcely reconcilable with that taken in Calcutta, where it has been held that a person snatching up a log of heavy wood in a sudden heat of passion and striking with it another with so much force and vindictiveness as to kill him almost on the spot is met by this exception. In this case, too, the deceased was unarmed, and the accused party had, moreover, held his hands and feet while the deceased was being butchered.(2)

3132. But the facts of another case before cited are somewhat parallel to those of the Burmah case and yet it was held to be covered by this exception. There is a sudden quarrel at a caste-dinner about the readmission of one Nusuruddee, the deceased, and the accused took opposite views. They quarrelled and from words came to blows, in which the deceased struck the accused with a stick which caused him to bleed from the forehead; the latter retaliated by seizing a sacrificial knife lying by and used it on the deceased causing his death.(3) He was held entitled to mitigation. In this case the accused and the deceased were probably not at the same disadvantage as in the Burmah case, and the provocation received was greater. At any rate this exception has no application where a person chases another for a long distance and then kills him.(4) Such was the case of the accused who was convicted of culpable homicide on the following facts. Following a petty quarrel the deceased came out and challenged the accused to fight. He had a knife tucked into his loin cloth. The two were fighting and according to the Sessions Judge the deceased used his knife and with it wounded the accused in three places on his arm, when the accused's father Sanyasi intervened to separate them, whereupon the deceased stabbed him severely on the left side of his chest. The accused then hit him with his knife which caused his death. The Court held that though the accused had not made out a case of private defence his assault was clearly the result of grave and sudden provocation given by the deceased. He was therefore convicted of homicide and sentenced to imprisonment for five years.(5)

(1) *Po Kin*, 2 L. B. R. 320; to the same effect *Nga Shwe Tha U*, (1884) S. J. L. B. 271; *Nga Kaman*, (1903) 9 Bur. L. R. 145.

(2) *Rajoo Ghose*, 7 W. R. 70; *Suraj Prasad*, 95 I. C. 286.

(3) *Somiruddin*, 24 W. R. 48; to the same effect, *Sardarkhan*, 41 B. 27.

(4) *Adil Mahomed*, 8 C. L. J. 561 (563).

(5) *Murugaiya*, (1911) M. W. N. 275, 10 I. C. 262.

3133. In England it has been held that if in such a case after an interchange of blows on equal terms the prisoner snatches up a deadly weapon and kills the other party with it, such killing would be only manslaughter. But if the prisoner had from the beginning the intention to use it, or if he so showed by his conduct that he was from the beginning preparing himself to use it, it is murder. So Baily, J., told the jury in a case: "When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to cause death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws in a heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter but murder. If you are of opinion that the prisoner entered into the contest, being unduly armed with an instrument calculated to produce the effects charged in the indictment, and with the instrument ready in his hand, in order that he might resort to it with any of the alleged intents, then he is guilty. For if death had ensued it would have been murder."(6)

Taylor, a Scotch soldier, visited an ale-house of which the deceased was the owner. He had an altercation with some of the servants who had abused his nation. Taylor struck one of them with a thin rattan cane. The owner thereupon ejected Taylor by shoving him out of the house by the collar in which he was assisted by the servant whom Taylor had previously hit. Taylor got incensed and turning round drew his sword and gave the owner the mortal wound. It was adjudged manslaughter.(7) The question of disadvantage is therefore a question of degree and the Court has to decide in each case whether the parties were on even ground at the time of the act complained of. If there was evidence of previous malice, or design his subsequent act may well be referred to it. If there was no premeditation it will then be considered whether what took place was usual and such as men in the situation of the accused would do.(8)

3134. Death by Consent.—The last exception to murder is causing death by consent. This clause is a departure from the English rule under which homicide is neither justified nor extenuated by consent. But the authors justified it in these words: In the first place, the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honour, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain, the friend who supplies laudanum to a person suffering the torment of a lingering disease, the freed man who in ancient times held out the

Exception 5.

(6) *Whitelay's case*, 1 Lew. 173; 1 East P. C. C. 5, s. 26, p. 243; to the same effect, *Muthumada*, 31 I. C. (M.) 347.

(7) *Taylor*, 5 Burr. 2793; 1 Hawk, P. C. C. 31, s. 39; *Snow*, 1 Leach 151; In a similar case held guilty of murder: *Sher Alam*, 101 I. C. (L.) 191.

(8) Mason's *case*, Foster 132; 1 East P. C. C. 5, s. 23 p. 239.

sword that his master might fall on it, the high-born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a band of marauders, would except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law, as assassins."

"Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not produce terror through society. When we push murder with such signal severity, we have two ends in view: one end is, that people may not be murdered; another end, is, that people may not live in constant dread of being murdered. The second end is perhaps the more important of the two, for if assassination were left unpunished, the murder of persons assassinated would probably bear a very small proportion to the whole population; but the life of every human being would be passed in constant anxiety and alarm. This property of the offence of murder is not found in the voluntary culpable homicide by consent. Every man who has not given his consent to be put to death is perfectly certain that this latter offence cannot at present be committed on him and that it never will be committed unless he shall first be convinced that it is his interest to consent to it. We know that two or three midnight assassinations are sufficient to keep a city of millions of inhabitants in a state of consternation during several weeks, and to cause every private family to lay in arms and watch men's rattle. No number of suicides, or of homicides committed with the unextorted consent of the person killed could possibly produce such alarm among the survivors."(9)

3135. This exception has no reference to duelling, for in duelling the parties do not consent to take the risk of death which they wish to avoid if possible. Their primary object is to kill their adversary. and the only thing they consent to is to fight in accordance with the rules and practice of duelling This exception applies to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or death will be likely to be the result; but it does not refer to the running of a risk of death from something which a man inttends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated.(10)

This view was dissented from by White and Field, JJ., who held the clause wide enough to embrace the case of duelling,(11) but on the whole question going up before the Full Bench, this view was all but overruled by it,(12) the view there taken being in accordance with the earlier case. The view taken by the Full Bench is that such consent as is here contemplated cannot be inferred from a mere agreement to fight together, but at the same time there may be cases where the

(9) Note M. Reprint, pp. 145, 146.
(10) *Per* Ainslee, J., in *Rohimuddin*, 5 C. 31.
(11) *Shamshere Khan*, 6 C. 154; overruled in *Nayamuddin*, 18 C. 484, F. B.
(12) *Nayamuddin*, 18 C. 484, F. B.

risk of death is expressly convenanted for, in which case it would be a question, whether the clause should not be held applicable. But it was a question which that Court was not called upon to decide, and did not decide. At the same time it did decide that such consent cannot be inferred from a general consent to suffer the consequences of a free fight. Indeed, the case before them was of such a kind. There, two factions had pre-arranged and fought a pitched battle, and it was held that each faction was riotous and all members guilty of the offence committed by one of them in prosecution of the common object of the assembly, and that consent to have a free fight did not extenuate their crime under this section.

3136. As is explained by the authors, the clause was really intended to cases in which the deceased courts death at the hands of the accused or where death is the direct result of the consentient act in which the deceased knew of the risk of death and consented to it. Such, for instance, would be the case of a person consenting to undergo dangerous operations, such as emasculation at the hands of the accused, himself an eunuch, and who thereupon performed it by cutting off his private parts with a knife, and which caused his death,[13] or where a person immolates another as in the case of a *suttee*[14] or the car of Juggernath, or where two lovers agree to die together in each other's embrace. The accused and the deceased in a case, who were a married couple, had so resolved to die out of grief for the loss of their only child, a boy 5 years old. The wife requested her husband, the accused, to kill her first and then kill himself. He thereupon killed her by striking her three blows with an adze. But after killing her he did not proceed to kill himself, but called in his brother who seized his adze from him, and the accused reported the facts to the police. It was held that his offence fell under this exception.[15] In another case the accused confessed that he had killed his stepfather, an invalid old man, who consented to his being killed to enable the accused to implicate three of his deadliest enemies of murder. His case was held to fall under this exception.[16]

3137. In such cases it is necessary to prove that the deceased consented to the risk of death and that it was a free consent and not a consent obtained or given under a misconception of facts. The accused was a snake-charmer and he persuaded his audience to believe that if they got themselves bitten by the poisonous snake which he was exhibiting, he possessed the antidote to cure them. The deceased believed in his assurance and submitted himself to be bitten and died. It was held that the case of the accused did not fall under this exception, because the consent given by the deceased was founded on a misconception of facts, which the accused knew[17] (§ 859); otherwise, the evidence of consent which would be sufficient in a civil transaction, must be equally sufficient for mitigation of an offence.[18]

(13) *Baboolun Hijrah*, 5 W. R. 7.
(14) *Sahebloll Reetloll*, (1863) 1 R. J. P. J. 174; *Rohimuddin*, 5 C. 31.
(15) *Anunto Rurnagat*, 6 W. R. 57.
(16) *Ujagat Singh*, (1917) P. R. No. 45, 43 I. C. 413.
(17) S. 90; *Pooni Fattemah*, 12 W. R. 7.
(18) S. 3, "Proved," Indian Evidence Act (I of 1872); *Anunto Rurnagat*, 6 W. R. 57.

301. If a person by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Culpable homicide by causing death of person other than person whose death was intended.

Synopsis.

(1) *Analogous Law* (3138-3139).
(2) *Principle* (3140-3144).
(3) *Meaning of Words* (3145).
(4) *Liability for Homicide by Mistake* (3146-3v48).

3138. Analogous Law.—This section is in accordance with English Law, and, of course, commendable to common sense and reason. The murderer cannot be heard to plead a mistake of fact in that it was the murder of a wrong person by mistake.(19)

3139. In English Law, where malice aforethought is essential to constitute murder, there is said to be a transfer of malice in such a case. Coke calls it coupling the event with the intention, and the end with the cause. But the true reason appears to be that where an act is in itself criminal the doing of the act is an offence irrespective of the individuality of the person harmed. As Lord Coleridge, C. J., said: "It is common knowledge that a man who has an unlawful and malicious intent against another and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the Judges call general malice, and that is enough.(20) This is only true of what are called *mala in se* and not of those delicts called *mala qua prohibita*, that is to say, of statutory offences as distinct from general crimes.(21) In the case supposed, the offender did an act "which he intends or knows to be likely to cause death," he is therefore guilty of culpable homicide, and the fact that he had mistaken the person he had intended to kill would not affect his liability, for his criminality depends upon his intention, act and the effect of his act, and not upon the identity of his victim.

3140. Principle.—The case here presented is an illustration of the rule that where a person does an act which is intrinsically wrong, he is responsible for the natural and probable consequence, though he may not have intended it. "Such was the case of the unnatural son, who exposed his sick father to the air against his will, by reason whereof he died,(22) and of the harlot, who laid her child under leaves

(19) S. 79.
(20) *Latimer*, 17 Q. B. D. 359 (361); *Hunt*, 1 Moo, C. C. 93.
(21) *Pembliton*, L. R. 2 C. C. 119.
(22) 1 Hawk, P. C. 78.

in an orchard, where a kite struck it and killed it.[23] So too, if a man hath a beast that is used to do mischief; and he knowing it, suffers it to go abroad, and it kills a man; even this is manslaughter in the owner; but if he had purposely turned it loose, though merely to frighten people, and make what is called sport, it is as much murder, as if he had incited a bear or a dog to worry them."[24] So far, the rule is in both countries the same.

3141. But in such cases the criminality of the act is judged by the effect produced irrespective of the intention. But it is also possible to view such criminality in the light of intention. The first view would lead to the following consequence. "If one intends to do another felony and undesignedly kills a man, it is murder.[25] Thus if one shoots at A and misses him but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other.[1] But in such a case suppose A was an outlaw or an escaped convict and was shot at to capture him, would killing *B* be also murder? According to the English view *prima facie* it would be murder, because all killing is murder. But such a rule obviously requires qualification, and this has been introduced in the section taking the illustration given by Blackstone: "If one gives a woman with a child a medicine to produce abortion, and it operates so violently as to kill the woman, this is murder in person who gave it"—the authors remark: "Under the provisions of our Code this case would be very differently dealt with according to circumstances. If A kills Z by administering abortives to her with the knowledge that those abortives are likely to cause her death, he is guilty of voluntary culpable homicide which will be voluntary culpable homicide by consent, if Z agreed to run the risk, and murder, if Z did not so agree. If A causes miscarriage to Z not intending to cause Z's death nor thinking it likely that he shall cause Z's death, but so rashly or negligently as to cause her death, A is guilty of culpable homicide not voluntary, and will be liable to the punishment provided for the causing of miscarriage, increased by imprisonment for a term not exceeding two years. Lastly, if A took such precautions that there was no reasonable probability that Z's death would be caused, and if the medicine were rendered deadly by some accident which no human sagacity could have foreseen, or by some peculiarity in Z's constitution, such as there was no ground whatever to apprehend, A will be liable to no punishment whatever on account of her death, but will, of course, be liable to the punishment provided for causing miscarriage."[2]

3142. The authors then go on to support their views, adding: "It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it would be in the highest degree barbarous and absurd. A pilot is navigating the Hooghly, with the utmost care and skill: he directs the vessel against a sand bank which has been recently formed, and of which the existence was altogether unknown till the disaster. Several of his passengers are consequently drowned. To hang the pilot as a murderer on account of this

(23) 1 Hale P. C. 432.
(24) *Ib.*, 431; 4 Black. 197.
(25) 1 Hale P. C. 465.
(1) 4 Black. 200, 201.
(2) Note M, Reprint, p. 148.

misfortune would be universally allowed to be an act of atrocious injustice. But if the voyage of the pilot be itself a high offence, ought that circumstance alone turn his misfortune into a murder? Suppose that he is engaged in conveying an offender beyond the reach of justice; that he has kidnapped some natives, and is carrying them to a ship which is to convey them to some foreign slave-colony; that he is violating the laws of quarantine at a time when it is of the highest importance that those laws should be strictly observed: that he is carrying supplies, deserters and intelligence to the enemies of the state. The offence of such a pilot ought, undoubtedly, to be severely punished. But to pronounce him guilty of one offence, because a misfortune befell him while he was committing another offence—to pronounce him the murderer of people whose lives he never meant to endanger, whom he was doing his best to carry safe to their destination, and whose death has been purely accidental,—is surely to confound all the boundaries of crime.

"Again, A heaps fuel on a fire, not in an imprudent manner, but in such a manner that the chance of harm is not worth considering. Unhappily the flame bursts out more violently than there was reason to expect. At the same moment a sudden puff of wind blows Z's light dress towards the hearth. The dress catches fire, and Z is burned to death. To punish A as a murderer on account of such an unhappy event would be senseless cruelty. But suppose that the fuel which caused the flame to burst forth was a will, which A was fraudulently destroying: ought this circumstance to make the murderer of Z? We think not. For the fraudulent destroying of will, we have provided, in other parts of the Code, punishment which we think sufficient. If not sufficient, they ought to be made so. But we cannot admit that Z's death has, in the smallest degree, aggravated A's offence, or ought to be considered in apportioning A's punishment."(3)

3143. These remarks would seem to suggest some radical line of differentiation in the classification of crime in the two countries. But as a matter of fact, as has been elsewhere observed (§ 3024), the real difference between the standpoints is only a matter of procedure. The English Law views such crimes objectively and presumes all killing to be murder; the Indian Code views them subjectively and so makes the prosecution do what would be proved by the accused under the English system. The net result in each case is approximately the same. (4)

3144. Now applying these principles to this section, it will be observed that the case here supposed is of a person whose act would, having regard to the definition of the term as given in section 299, amount to culpable homicide. The section, in short, declares that the liability, mitigation or justification in such a case would be the same as if the person killed had been the one whom he intended to kill. This is the inheritable consequence of a crime, the quality of which varies according to the criminal's intention.

(3) Note M, Reprint, pp. 148, 149. (4) General Introduction.

3145. Meaning of Words.—"*By doing any thing*": This would include both an act as well as an omission (§ 3024). "Which he *intends or knows to be likely to cause death*," which would include (*i*) the intention of causing death, (*ii*) the intention of causing such bodily injury as is likely to cause death, (*iii*) the knowledge that he is likely by such act to cause death. "*Culpable homicide is of the description*," that is, it varies in the same degree in point of its heinousness.

3146. Liability for Homicide by Mistake.—A person killing a wrong person by mistake is, as regards his criminality, in the same position as if he had killed the person he intended to kill. His offence would then be judged on that assumption. So that if A intending to murder B, strikes at and misses him but kills C, it will be murder in A, though he may never have intended to kill C, who may be his friend.(5) So if A and B fight a duel and C intervene, and A should kill him, the result would be the same as if A had deliberately killed him.(6) And so it has been held that where A had intended to kill D, the master of B, and assaulted him, and upon which B the servant coming to the aid of his master A, killed B, it was murder in A, as much as if he had killed the master.(7) So where A gave a poisoned apple to his wife intending to poison her, and the wife, ignorant of the matter, gave it to a child who took it and died; it was held to be murder in A, though he, being present at the time, endeavoured to dissuade his wife from giving the apple to the child.(8) And the same principle was held to apply where A, mixed poison in an electuary, sent by an apothecary to her husband, with intent to poison him, which did not kill him, but afterwards killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about.(9) In this case it will be observed, the apothecary was unaware of the poison which A had put into the electuary, and it was the cause of the death.

As the Judges said: "If a person prepares poison with intent to kill any reasonable creature, such person is guilty of the murder of whatever reasonable creature is killed thereby. So if A poison wine intending to kill B, and C drinks thereof and dies, A is guilty of the murder of C, and it makes no difference that the wine, unless stirred up, would not have killed C, and that C, thinking there was sugar in it stirred it up.(10) A intending to poison B gave him poisoned sweetmeat to eat. B ate a little and threw the rest away. C picked it up, ate it and died. A was held guilty of the murder of C.(11) The accused scolded her son, who was impertinent to her, which incensed her so, that she took up a poker intending to frighten him, and the son ran towards the door when she threw it at him, but it struck the deceased, who happened to be coming in at the moment, killing him. She was indicted for manslaughter, and Park, J., told the jury: "No doubt this poor woman had no more intention of injuring this particular child than I have, but that makes no difference in law. If a blow is aimed at an individual unlawfully, and this was undoubtedly unlawful, as an improper mode of correction—and strikes another and

(5) 1 East P. C. C. 5, s. 17, p. 230; *Jeoni*, 39 A. 161.
(6) 1 Hale P. C. 441.
(7) 1 Hale P. C. 438.
(8) *Saunder's case*, Plowd. 474; 1 Hawk. P. C. C. 31, s. 45; 1 Hale P. C. 436.
(9) *Gore's case*, 9 Co. 81; 1 Hawk. P. C. C. 31. s. 45; 1 Hale 436.
(10) 9 Co. 81-*b*; *Michael*, 2 Moo. C. C. C. 120: *Jeoni*, 39 A. 161.
(11) *Suryanarayana*, 22 M. L. J. 333; 13 I. C. 833.

kills him, it is manslaughter, and there is no doubt, if the child at whom the blow was aimed had been struck, and died, it would have been manslaughter, and so it is under the present circumstances "[12] (§§ 667-681).

3147. The prisoner, a soldier, and one Chapple quarrelled in a public house kept by one Ellen Rolston. He took out his belt and aimed a blow at Chapple and struck him lightly, but it bounded off and accidentally struck Rolston, who was then standing, talking to Chapple, in the face, cutting her face open and wounding her severely. It was held that the prisoner was doing an unlawful act in assaulting Chapple, and that he was, therefore, liable for the hurt caused to Rolston in the same way as if the blow had been deliberately aimed at her.[13]

3148. Several cases illustrative of the same principle have been decided in this country. In one case decided before the Code on the English rule here enacted, the accused who was carrying on an adulterous intrigue with the wife of one A intending to kill him waylaid him in the dusk, and struck a man as he was coming along the road, mistaking him for A. He was condemned for murder. [14] The accused aimed a blow with a highly lethal weapon like a sharp *dao*, intending to hit A, but which fell and killed her child, it was held to be murder of the child.[15] In another case, the accused prepared poisoned sweets with the intention of giving them to her husband, who ate some of them himself in the company of others one of whom died in consequence. The accused was convicted of murder.[16]

[For a further commentary on the general aspects of the questions here involved, reference should be made to the commentary under section 76, §§ 570-598.]

302. Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine.

Session. Cognizable. Warrant. Not bail. Not comp.

Punishment for murder.

[*Death*—s. 53. *Transportation for life*—s. 53. *Fine*—s 53. *Murder*—s. 309.]

Synopsis.

(1) *Analogous Law* (3149-3150).
(2) *Procedure and Practice* (3151-3152).
(3) *Proof* (3153-3154).
(4) *Charge* (3155-3157).
(5) *Proof of Murder* (3158-3160).
(6) *Onus of Proof is on the Prosecution* (3161-3165).
(7) *Corpus Delicti.* (3166-3168).
(8) *Autopsy of Post Mortem Examination* (3169-3171).
(9) *Poisoning* (3172-3173).
(10) *Personal Violence* (3174).
(11) *In case of Infanticide* (3175).
(12) *Strangulation* (3176).
(13) *Drowning* (3177).
(14) *Rape* (3178).
(15) *Insanity* (3179).
(16) *Miscarriage* (3180).
(17) *Grievous Hurt* (3181).
(18) *Plea of Guilty* (3182-3185).
(19) *Charge to the Jury* (3186-3187).

(12) *Conner*, 2 C. & P. 438.
(13) *Latimer*, 17 Q. B. D. 359.
(14) *Gobind Ballajee*, (1828) Morley's Dig. (N. S.) 125.
(15) *Bhomonee Atum*, 8 W. R. 78.
(16) *Jeoni*, 39 A. 161.

(20) *Circumstantial Evidence* (3188-3191).
(21) *Mitigation of Sentence* (3192-3199).
(22) *Other cases for Mitigation* (3200-3201).
(23) *Killing a Witch* (3202).

3149. Analogous Law.—This section only prescribes a sentence for the offence of murder. It takes for granted knowledge of the characteristics of that offence as defined in sections 299 and 300, to which reference must be made for meaning of the term. The sentence here provided may be supplemented by an order for forfeiture of property of the offender under section 62.

3150. The sentence here prescribed is either the sentence of death or of transportation for life, at the discretion of the Court—that discretion being unhampered by any artificial rules of law. It was contended that such discretion was liable to abuse, but the Commissioners referred to the preexisting law which allowed the alternative sentence under "alleviating circumstances,"[17] and which they said was a discretion "sufficiently arbitrary."[18] Consequently, though the Code advisedly refrained from stating grounds for passing the alternate sentence, they are nevertheless required to be stated by a provision of the Code of Criminal Procedure.[19] There are a number of considerations which may justify the mitigation. The principal ones will be presently considered.

3151. Procedure and Practice.—This offence is, as was to be expected, cognizable and warrant should ordinarily issue in the first instance. It is neither bailable nor compoundable, and is exclusively triable by the Court of Session.

3152. A number of points material to the trial of a case under this section arise. Some of them are matters of procedure, others are those of practice. Such questions, for instance, as the production of the *corpus delicti*, the conduct of *post-mortem* examination, the examination of medical witness, the value of confessions are far too important to be referred to here. At the same time they cannot be ignored. They will therefore be discussed in the sequel.

It is the practice of the Court to see that the accused is not undefended at his trial[19]; where a complaint is laid against a person of the offence of such gravity as murder, it is not open to the Magistrate to dismiss it summarily without examination of the complainant and his witnesses. It may be that the complaint seems false, but it is no reason for its summary rejection.

The sentence of fine cannot[20] be superadded to the sentence of death passed under this section.[21] Nor is there any alternative of the two sentences of death and transportation for this offence;[22] though in a proper case calling for clemency the Court is entitled to add its recommendation for the reduction of sentence for the local Government to con-

(17) Mad. Reg. VIII of 1802, s. 15.
(18) First Rep., 303.
(19) *Mohar Ali*, 19 C. W. N. 556, 29 I. C. 321.
(20) *Fuzlar Rahman*, 23 C. W. N. 392, 49 I. C. 495.
(21) *Chuha*, (1913) P. R. No. 18, 20 I. C. 1002.
(22) *Duraisawmy*, 9 M. L. T. 510, 9 I. C. 885.

sider. Such a case arose where the accused expecting the paramour of his wife lay in wait for him, whom he surprised in the act, killing him on the spot with a single blow of a pole on his head.[23]

3153. Proof.—In a case of murder, the Court has to be satisfied not merely of the probability, but of a reasonable certainty of the guilt of the accused.[24] It is, of course, necessary, that except in cases covered by sections 34 or 149, the complicity of the accused in the offence must be clearly established. Where it is shown that one of two persons must have murdered a deceased person, but it is not clear which, both must be acquitted;[25] unless there is evidence of concert between them.[1] Where two persons are rightly charged of murder, but there is no evidence as to who struck the fatal blow, the Court would sentence both to transportation.[2] The points requiring proof are:—

(1) Death of a human being.
(2) That it was caused by the accused.
(3) That the act, by which the accused caused it, was done—
  (*a*) with the intention of causing death,[3] or
  (*b*) with the intention of causing such bodily injury as the accused knew to be likely to cause the death of the person to whom the harm was caused; or
  (*c*) with the intention of causing bodily injury to the person, and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death; or
  (*d*) with the knowledge that the act was so imminently dangerous that it must in all probability cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

3154. This will *prima facie* establish a case of murder. The accused may then prove facts mitigating his offence.[4] These form the five exceptions to section 300, any one of which would be sufficient to reduce the crime to culpable homicide. But in this case, it is the duty of the Judge to find under which of the exceptions the case of the accused falls.[5] But it does not follow that the offence is necessarily murder because it does not fall into any of the exceptions to section 300. It may be otherwise a case of culpable homicide being one not covered by the exceptions, nor falling within the definition of the offence of murder. In such a case it is for the Judge to decide whether the offence is culpable homicide or less; and in case of doubt, the proper procedure is to convict the accused for the lesser crime.[6]

(23) *Goshain*, 18 A. L. J. 851, 57 I. C. 175.
(24) *Anandi*, 32 I. C. (A.) 838.
(25) *Torap Ali*, 32 C. 638; *Musammat* (1909) P. W. R. 8, 3 I. C. 622; *Bhagwana* 17 A. L. J. 1095; *Maung Gyi*, 1 R. 390; (1923) A. I. R. (R.) 268.
(1) *Bhagwana* 17 A. L. J. 1095; *Bhag Singh*, 69 I. C. 449, *Subappa* 15 Bom. L. R. 303, 12 I. C. 331; *Rasul Khan*, 13 A. L. J. 470, 29 I. C. 91.
(2) *Butari*, 9 M. L. T. 103; 9 I. C. 288.
(3) The charge to the jury is defective in law where it does not sufficiently ask the jury to consider the intention of the accused—*Kya Nyun*, 8 L. B. R. 125, 33 I. C. 634.
(4) S. 105, Indian Evidence Act (I of 1872); *Sheikh Cheollye*, 4 W. R. 35; *Asiruddin Ahmed*, 8 C. W. N. 714.
(5) *Kalika Misser*, 1 Agra 3.
(6) *Nga Po Aung*, (1889) S. J. L. B. 459.

3155. Charge.—It is the duty of the committing Magistrate to see that the charge is properly framed under appropriate sections; and it is for him to see that there are sufficient materials on record to send the accused up for trial to the Court of Sessions. Some Magistrates appear to think that it is not for them to judge of the credibility of witnesses or sufficiency of evidence justifying a committal to the higher Court. But this is the very purpose of a preliminary inquiry held in such cases. It is to see that false and frivolous cases do not occupy the time of the superior Courts. It is the duty of the Magistrate to examine the evidence carefully and to judge of its intrinsic value and worth, and if they find it incredible or insufficient to warrant a conviction, they should feel no hesitation in discharging the accused. At the same time if they feel some hesitancy in the matter,—if the evidence is equivocal or such as is not on the face of it insufficient or incredible, it is then their duty to commit the case to the higher Court. In short, in committing the case for trial, the Magistrate has to see whether having regard to the evidence adduced before it, he feels justified in charging the accused,(7) which depends upon whether the offence has been *prima facie* proved. For this purpose the Magistrate may examine any or all the defence witnesses(8) even after the charge, and he may cancel the charge and discharge the accused, if he comes to the conclusion that there are not sufficient grounds for committing the accused.(9) Such cancellation must, however, be by an order stating that the charge framed has been cancelled with the reasons therefor and that the accused has been discharged.

3156. The duty of the Magistrate in examining the facts proved in an inquiry held by him, is not to see whether the offence is proved but only to see if there are sufficient grounds for commitment. He has necessarily not before him all the *pros* and *cons* of the case, and he cannot, therefore, pronounce a definite judgment in the case. He cannot, therefore, acquit the accused, but the only order he is competent to pass is to discharge him. Sometimes, however, when the determination of an offence depends upon the question of law, it is the duty of the Magistrate not to prejudge the case, but to commit the case to the Court of Session. Such, for instance, would be the case where death appears to have resulted from injuries when voluntarily inflicted by the party accused, in which case the offence may as much be murder, homicide or hurt. If the Magistrates are quite clear that the offence disclosed is not murder or culpable homicide, they are, of course, at liberty to try the case themselves, but on this question they must use their discretion wisely, and they ought to be very careful not to take upon themselves to absolve the accused from the greater charge by convicting him of a minor offence, such as hurt or grievous hurt.(10) A person charged with murder under this section may be convicted under s. 304-A.(11)

3157. The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

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(7) S. 210, Cr. P. C.
(8) S. 212, Cr. P. C.
(9) S. 213 (2), Cr. P. C.
(10) C. H. P. R. & O, Rule 37, c. 1, p. 12; Weir (3rd Ed.), 157; C. P. J. C., No. 8.
(11) *Walker*, 26 Bom. L. R. 610.

"That on or about the——day of—— at——you——committed murder by intentionally (*or* knowingly) causing the death (*name the deceased*). and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3158. Proof of Murder.—This section takes for granted a knowledge of the definition of murder. This knowledge depends upon the combined effect of sections 299 and 300. Assuming that knowledge, the question next arising is, what is necessary to prove it. Ordinarily, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a purdent man ought under the circumstances of the particular case, to act upon the supposition that it exists.(12) "But this is a general definition, and it is enacted in a Act applicable alike to civil as well as criminal proceedings. But it is evident that having regard to the gravity of issue in the two cases the criterion for determining civil liability cannot be the same as for determining criminal responsibility. In the one case the Court decides upon the balance of probabilities and the preponderance of evidence; but in the latter (owing to the serious consequences of an erroneous condemnation both to the accused and to society), the persuasion of guilt must amount so much to a moral certainty as convinces the minds of the tribunal as reasonable men, beyond all reasonable doubt."(13)

3159. This is the utmost law can require, having regard both to the interest of the accused as well as of society, for the physical possibility of the innocence of an accused person can never be excluded. But the Courts, if possible, require even a higher degree of proof in a case where a man is tried for his life, for in such cases the Court especially puts in force the hackneyed but none the less a salutary and sound maxim of law that it is better that ten guilty men should escape than that one innocent person should be punished.(14) So Cockburn, C.J., told the jury: "It is the business of the prosecution to bring home guilt of the accused to the satisfaction of the minds of the jury, but the doubt to the benefit of which the accused is entitled must be such as rational, thinking, sensible men may fairly and reasonably entertain; not the doubts of a vacillating mind that has not the moral courrage to decide, but shelters in itself a vain and idle scepticism. There must be doubts which men may honestly and conscientiously entertain."(15) So Sir Elijah Impey told the jury in Nunkumar's case: "You will consider on which side the weight of evidence lies, always remembering that in criminal, and more especially in capital cases, you must not weigh the evidence in golden scales; there ought to be a great difference of weight in the opposite scale before you find the prisoner guilty. In cases of property, the stake on each side is equal and the

(12) "Proved," s. 3, Indian Evidence Act (I of 1872).

(13) *Per* Parke, B, in *Sterne*, (1843) cited in Best Ed., p. 76; *Anandi*, (1916) 32 I. C. (A.) 838.

(14) *Per* Holroyd, J., in *Sarap Hobson's* case, 1 Lewin C. C. 261; *Cornwallis*, 7 St. Tr. 149; 26 St. Tr. 218; *Mary Blandy*, 18 St. Tr. 1186.

(15) *Castro*, 2 Cockburn 816.

least preponderance of evidence ought to turn the scale; but in a capital case, as there can be nothing of equal value to life, you should be thoroughly convinced that there does not remain a possibility of innocence before you give a verdict against the prisoner."[16]

3160. So far then as regards the offence of murder, the proof required being of the highest degree. But there are no technical rules of proof in this as in other cases. They are all left to the good sense and judgment of the Court. It will be the purpose of this commentary to present only a brief synopsis of the points necessary to establish this offence.

Onus of Proof is on the Prosecution.

3161. In the first place, in all criminal trials the burden of proving all the facts necessary to bring the offence home to the accused is on the prosecution. It is, therefor, their duty to prove them. But they are not bound to prove only facts adverse to the accused. For a public prosecution is not a trial of strength between the Crown and the accused. It is the duty of those appearing for the former to present an unbiased view of the case. They are as much bound to prove facts against the accused as those in his favour. As Nelson, J., observed in a case: "The only legitimate object of a prosecution is to secure, not a conviction, but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour, directly bearing upon the charge. It is *prima facie* his duty, accordingly, to call those witnesses who prove their connection with the transactions in question, and also must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called, without sufficient reason being shown (and the mere facts of their being summoned for the evidence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution. "There is no corresponding inference against the accused. He is merely on the defensive, and owes no duty to any one but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the witnesses of the case for the prosecution, or to call witnesses, or to meet the charge in any other way he chooses: and no inference unfavourable to him can properly be drawn because he takes one course rather than another."[17] On the other hand, it is not for the prosecution to eke out their case by a statement made by the accused. Properly speaking, his duty, when examined under s 342 of the Procedure Code, is to explain any circumstance appearing in the evidence against him, and not to fill up a gap in the prosecution evidence.[18] It is an abuse of that section to require him to incriminate himself when there is no independant evidence on the point.

3162. The points that constitute this offence must, therefore, be all clearly established by the prosecution. It is not sufficient to prove that

(16) Stephen's Story of Nuncumar, I, p. 168.

(17) *Dhunno Kasi*, 8 C. 121, followed in *Stanton*, 14 A. 521 (523); *Hurry Charn Chuckerbutty*, 10 C. 140 (149).

(18) *Basanta Kumar Ghattak*, 26 C. 49.

the deceased died at the hands of the accused, but it is further necessary to prove that the latter had caused his death under circumstances amounting to murder. Of these the most essential points required to be proved are his intention and knowledge. But intention being an inward determination of the mind can only be proved by its external manifestation, as disclosed in the speech, act and conduct of the actor, and these are therefore, the essential *media* for determining his intention and knowledge upon which his criminality and its nature and degree depend. Of course every intention to kill is prompted by a motive, which is even a more hidden spring of human action. It is not legally necessary to prove it; but whenever it can be proved it greatly adds to the strength of the prosecution.(19).

3163. Now, so far as speech is concerned, all statements prior or subsequent to the act made by the accused are relevant for the purpose of shedding a light upon his intention. Such statements must, however, have a bearing on his act.(20) Such statements may be relevant both against himself as well as against those who are being jointly tried with him for the same offence.(21) Not only the statement of the accused but a statement of the deceased as to the cause of his death, such for example, as his dying declaration is admissable in evidence against the accused.(22) So on a question arising whether A was murdered by B, the statement made by A as to the cause of his death, or of a transaction, such as rape, in the course of which she received injuries to which she succumbed are both relevant.(23)

3164. Statements of the accused made after the fact as to his complicity in the crime are called confessions, and they may be proved if made to a person other than a police-officer. A confessional statement made to a police-officer or while in his custody is not admissible in evidence against the accused, the reason being that if such statements are permitted, they would be the sheet anchor of a forlorn hope, and thus lead to the abuse of justice.(24) If, however, such confession is corroborated by the discovery of any fact, in consequence thereof, that portion of the confession may be proved.(25) A confession made by the accused may be recorded by a Magistrate,(1) and if it is duly recorded, it then becomes admissible in evidence against the confessor, and he may be convicted thereon,(2) though the tendency of the Courts is not to convict thereon if it is subsequently retracted and remains uncorroborated, but there is nothing illegal in convicting thereupon if it is believed.(3) The question of confession has assumed such an intricacy and importance in the law of criminal evidence, that the Courts would rather do without it if they could. But there is no reason why if properly made

(19) *Tajoo*, (1916) P. W. R. 22, 34 I. C. 999.

(20) S. 6, ill. (*a*), and s. 8, ill. (*a*), Indian Evidence Act (I of 1872).

(21) Indian Evidence Act (I of 1872), s. 30, ill (*a*).

(22) *Ib.*, s. 32.

(23) *Ib.*, ill. (a).

(24) Indian Evidence Act (I of 1872), s. 30, ill, (*a*); ss. 25, 26, 162, Cr. P. C. But in Upper Burma a police officer, being also a Magistrate, may prove confessions [Upper Burma Laws Act, (XX of 1886), s. 7 (1)].

(25) *Ib.* s. 27.

(1) S. 164 Cr. P. C.

(2) *Gharya*, 19 B. 728; *Bhultun Rujwun*, 12 W. R. 49; *Balya Dagdu*, (1898) B. U. C. 952.

(3) *Bhultun Rujwun*, 12 W. R. 49; *Raman*, 21 M. 83.

and duly recorded it should not be a valuable piece of evidence in the case.

3165. Next to speech, the evidence of the act of the accused is admissible and material. Such evidence may consist of eye-witnesses or of persons falling into the category of approvers. In the latter case, the evidence, though admissible, is not by itself regarded as conclusive, it being the practice of the Courts not to rely upon it without corroboration on material particulars.(4)

Where the admissibility of any evidence is in question, it is the duty of the Judge to decide the point forthwith. He cannot allow the evidence to go on the record, and reserve his decision till the conclusion of the case.(5)

3166. Corpus Delicti.—In the old books the finding of the body of the deceased was held to be a necessary precaution against unjust convictions ending in executions. And so Lord Hale said: "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body be found dead."(6) But this has been held to be a rule of caution and not of law,(7) and indeed, it could scarcely be anything else. For cases are easily conceivable where the discovery of the dead body is from the very nature of the case impossible. Such, for instance, was the case of the mariner who was indicted for the murder of his Captain at sea, and then throwing him overboard, and as to which there was an eye-witness whose testimony was corroborated by the prisoner's dress being found stained with blood, and in which case the Judges unanimously accepted the verdict of the jury and the prisoner was executed.(8) But the Judges were constrained to admit the rule, though they justified a departure therefrom for a sufficient cause.

The term "*corpus delicti*" is an invention of the middle ages, and was used by them to denote the whole of the facts which constituted the crime of killing, when the body of the killed had been found. A mixture of German and Roman views led to the proposition (which has found its way into English penal law) that the proof of the aggregate of facts constituting the offence failed when the body was not found. The expression was then extended to other offences, and was used to denote that the qualities necessary to bring a fact within the operation of a rule of criminal law had been shown to attach to that fact. The jurists of the middle ages, however, never conceived the dead body in murder, or the object stolen in theft, to be that "*corpus.*" The expression itself has many vices, but in the sense in which its authors used it, it is at least intelligible.(9)

3167. But, of course, having regard to the definition of "proved" given in the Indian Evidence Act, there is no room for the "body" doc-

(4) S. 114 (*b*), Indian Evidence Act (I of 1872.)
(5) *Kapur Singh*, (1918) P. L. R. 98, 50 I. C. 481; *Vaithinatha*, 36 M. 501 P. C.
(6) 2 Hale P. C. 290.
(7) *Per* Maule, J., in *R.* v. *Burton*, Dears C. C. 282.
(8) *Hindmarsh*, 2 *Leach* 569.
(9) 7 M. H. C. R. App. 19.

trine. The existence of the body is no doubt a proof positive of the death; but its absence is not fatal to the trial of the accused for murder. It is no doubt a material circumstance which the Court or the jury have to bear in mind in arriving at their verdict, but that is all.[10] Indeed, any other view would place in the hands of the accused an incentive to destroy the body after committing murder and thus secure immunity for their crime. To recognize such a principle, would in some instances, under the administration of justice be impossible.[11] Of course, in such cases there may remain a doubt as to the actual death of the victim, but if such doubt is reasonable, the prisoner is entitled to an acquittal. If it is only a doubt, the Court may regard it as sufficient not to justify the passing of the extreme penalty,[12] but it can never by itself be a ground for acquittal.

In some cases, however, the learned Judges appear to have regarded the rule with the same sanctity which it has obtained in the criminal jurisprudence of the West. Norris, J., referred to it with approval in one case[13] and said: "I will not go so far as to say that, under no circumstances, in this country, could a charge of murder be sustained without proof of the finding of the dead body; but, considering the well authenticated instances of the subsequent appearance in the flesh of persons said to have been murdered, and whose death has been deposed to by eye-witnesses, the production of bones alleged to be those of a man, and discovered to be those of a woman, and the numerous false charges which are brought against innocent people, I should require the strongest possible evidence as to the fact of the murder if the dead body were not forthcoming."[14] These observations were made in a case in which the prisoner was charged for the murder of one Ram Kristo. The evidence against him was that the deceased had been last seen in his company. It was given in evidence that the accused had murdered the deceased and thrown his body into the river. But this evidence was disbelieved, and the Court held the other fact wholly insufficient to convict him of murder. The rule again influenced the decision of Jarine and Ranade, JJ., in a case in which they believed the prisoner's confession that he had two years since thrown the girl, of the murder of whom he was charged, into a canal, where the water was deep swollen by the monsoon. The body not being found and there being no evidence of the death of the girl, the learned Judges followed the English precedents,[15] and contented themselves by convicting him of only attempt to murder.[16]

3168. So far as this country is concerned, it may then be taken to be now settled, that there is no rule of law that no person shall be convicted of murder unless the body of the murdered person has been

(10) Jagannath, 66 I. C. 422, (1922) A. 30 (*corpus delicti* is a first element of conviction); *Bandhu*, 81 I. C. 436, (1924) A. 662, explained in *Ram Nath*, 99 I. C. 252, (1926) O. 234; *Raggha*, 23 A. L. J. 821, 89 I. C. 903, (1925) A. 627, F. B.

(11) *Bhagiroth*, 3 A. 383; *Rogi*, (1881) A. W. N. 112; *Sedhu*, (1882) A. W. N. 160; *Petta Gasi*, 4 W. R. 19; *Poorusoo Mah Sikdar*, 7 W. R. 14.

(12) *Bhagirath*, 3 A. 383; *Budruddeen*, 11 W. R. 20.

(13) *Adu Shikdar*, 11 C. 635.

(14) *Adu Shikdar*, 11 C. 635; *Biru*, (1890) P. R. No. 15.

(15) 2 Hale P. C. 290; *Hopkins*, 8 C. and P. 591; Cleverton, 2 F. and F. 833; *Hindmarsh*, 2 Leach 571.

(16) *Kashna*, (1894) B. U. C. 687.

found. When the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was so committed is as safe as any other such inference[17]; so Glover, J., upheld the conviction of the accused for murder on their confession corroborated in some particulars by circumstantial evidence. The accused confessed that the deceased had an intrigue with the accused Pettah's wife. He plotted with the other two accused to lie in wait for him on his next visit; they then attacked him and killed him outright with *lathies*, and afterwards buried him in a grave close by a pond. Their confession led to the discovery of a grave, which was, however, empty, but in which there were found two pieces of cloth belonging to the deceased on the night of his disappearance, and strong smell of decomposed matter pointing to the recent removal of the body. There were marks on the earth close by, as if a body had been dragged along. Their confession was most circumstantial, and the Court held it to be sufficient to support their conviction notwithstanding the non-discovery of the body.[18]

3169. Autopsy or Post Mortem Examination.—The discovery of the body presents, however, one great advantage, besides affording indisputable evidence of death. It enables the Court to determine the nature and sufficiency of the injury and the cause of death. This may sometimes aggravate the offence of the accused, at other times it may be entirely to his advantage. The conduct of autopsy is a matter left to a qualified medical man. His careful cross-examination may often bring out facts putting a new complexion upon the whole case. It is, however, a delicate task in the hands of an untrained cross-examiner. For, unless skilfully handled, the witness may make disclosure which it may sometimes be difficult or even impossible to refuse. The certificate of a medical man is, of course, not *per se* admissible, being hearsay evidence. To make it admissible in evidence the author of the certificate must be examined and tendered for cross-examination.[19]

3170. In the case of the medical witness the object of the prosecution should be to establish facts and circumstances favourable to or consistent only with the offence they wish to establish. If, for instance, the death was the result of personal injury, the witness should be examined with the view of ascertaining whether injury inflicted is such as is ordinarily fatal or sufficient or likely to cause death; is it imminently so dangerous that it must in all probability cause death, and questions to that effect. It should be the object of the defence to rebut these facts by proving the existence of some latent malady, such as an enlarged liver or spleen, infliction of the injury from a position inconsistent with the case of the prosecution or the like.

3171. In cases of homicide, evidence should be taken to identify the body of the person killed; to prove its custody from the moment it is discovered to the time of its delivery to the medical officer for autopsy and to show that it has not been tampered with in the interval. In the case of murder by poisoning, there should be evidence of identification of every single article that is suspected to contain any poison. The evi-

(17) *Mehr Khan*, (1886) P. R. No. 6.
(18) *Petta Gazi*, 4 W. R. 19.
(19) *Ahilya*, 47 B 47, (1923) A. I. R. (B.) 183.

dence should be complete as to the history of such articles, and it should be shown that they were kept in proper custody throughout if they are to be relied on as supporting a conviction, and there should be no possibility of any question being raised as to the identity of any such article.[20] Where death or grievous hurt has been caused by a blow from a stick or other weapon, the weight and dimensions of the weapon should be stated in the proceedings of the Sessions Court.

3172. No. I. Poisoning.—*The following are some of the questions that may be put to a medical witness:*—

1. Did you examine the body of———late a resident of———— and, if so, what did you observe?

2. What do you consider to have been the cause of death? State your reasons.

3. Did you find any external marks of violence on the body? If so, describe them.

4. Did you observe any unusual appearances on further examination of the body? if so, describe them.

5. To what do you attribute those appearances—to disease, poison or other cause?

6. If to poison, then to what class of poisons?

7. Have you formed an opinion as to what particular poison was used?

8. Did you find any morbid appearances in the body besides those which are usually found in cases of poisoning by————If so, describe them.

9. Do you know of any disease in which the *post mortem* appearances resemble those which you observed in this case?

10. In what respect do the *post mortem* appearances of that disease differ from those which you observed in the present case?

11. What are the symptoms of that disease in the living body?

12. Are there any *post mortem* appearences usual in cases of poisoning by————, but which you did not discover in this instance?

13. Might not appearances you mention have been the result of spontaneous changes in the stomach after death?

14. Was the state of the stomach and bowels compatible or incompatible with vomiting and purging?

15. What are the usual symptoms of poisoning by————?

16. What is the usual interval between the time of taking the poison and the commencement of the symptoms?

17. In what time does———generally prove fatal?

18. Did you send the contents of the stomach and bowels (*or* other matters) to the Chemical Examiner?

(20) *Shridhar Nana*, 7 Bom. L. R. 640.

19. Were the contents of the stomach (*or* other matters) sealed up in your presence immediately on removal from the body?

20. Describe the vessel in which they were sealed up; and what impression did the seal bear?

21. Have you received a reply from the Chemical Examiner, if so, is the report now produced that which you received?

22. (*If a female adult*) What was the state of the uterus?

3173. No. II. Poisoning.—*Questions that may be put to a non-professional witness*:—

1. Did you know—— ——late a resident of————, if so, did you see him during his last illness and previously?

2. What were the symptoms from which he suffered?

3. Was he in good health previous to the attack?

4. Did the symptoms appear suddenly?

5. What was the interval between the last time of eating or drinking and the commencement of the symptoms?

6. (*If death occurred*) What was the interval between the commencement of the symptoms and death?

7. What did the last meal consist of?

8. Did any one partake of this meal with————?

9. Were any of them affected in the same way?

10. Had————ever suffered from a similar attack before?

If any of the following symptoms have been omitted in answer to question 1, special questions may be asked regarding them as follows:—

11. Did vomiting occur?

12. Was there any purging?

13. Was there any pain in the stomach?

14. Was————very thirsty?

15. Did he become faint?

16. Did he complain of headache or giddiness?

17. Did he appear to have lost the use of his limbs?

18. Did he sleep heavily?

19. Had he any delirium?

20. Did convulsions occur?

21. Did he complain of any peculiar taste in the mouth?

22. Did he notice any peculiar taste in his food or or water?

23. Was he sensible in the intervals between the convulsions? (*This is with reference to* Nux Vomica.).

24. Did he complain of burning or tingling in the mouth and throat, or of numbness and tingling in the limbs? (*This is with reference to* Aconite.)

3174. No. III. Personal Violence.

1. Did you examine the body of————late a resident of ————and, if so, what did you observe?

2. What do you consider to have been the cause of death? State your reasons.

3. Did you find any external marks of violence on the body? If so, describe them.

4. Are you of opinion that these injuries were inflicted before or after death? Give your reasons.

5. Did you examine the body internally? Describe any unnatural appearance which you observed.

6. You say that in your opinion ————was the cause of death; in what immediate way did it prove fatal?

7. Did you find any appearance of disease in the body?

8. If so, do you consider that if the deceased had been free from this disease, the injures would still have proved fatal?

9. Do you believe that the fact of his suffering from this disease lessened his chance of recovery from the injuries sustained?

10. Are these injuries taken collectively (or is any one of them) ordinarily and directly dangerous to life?

11. Have they been caused by manual force or with a weapon?

12. Did you find any foreign body or foreign matter in the wound?

13. By what sort of weapon had the wound been inflicted?

14. Could the injuries have been inflicted by the weapon now before you (Article No.————in Evidence)?

15. Could the deceased have walked (*so far*) or spoken, etc., after the receipt of such an injury?

16. Have you chemically or otherwise examined the stains (on the weapon, clothes, etc.), now before you (Article No.————in Evidence)?

17. Do you believe the stains to be those of blood?

18. What time do you think elapsed between the receipt of the injuries and death?

19. What was the direction of the wound, and can you form an opinion as to the position of the person inflicting such a wound with respect to the person receiving it?

20. Is it possible for such a wound to have been inflicted by any one on his own person? Give your reasons?

21. (*In gunshot wounds*) Give the precise direction of the wound.

22. Did the appearances of the wound indicate that the gun had been discharged close to the body or at some distance from it.?

23. Did you find any slug, bullet, wadding, etc., in the wound or had————made its exit?

24. Do you think it possible that you could have mistaken the aperture of entrance for that of exit?

3175. No. IV. Infanticide.

1. Did you examine the body of a male (*or* female) child sent to you by the District Superintendent of Police on the———of——— -, and if so, what did you observe?

2. Can you state whether the child was completely born alive, partially born alive, or born dead? State the reasons for your opinion.

3. What do you consider to have been the cause of death? Give your reasons.

4. What do you believe to have been the uterine age of the child? State your reasons.

5. What do you believe to have been the extra-uterine age of the child? Give reasons.

6. Did you find any marks of violence or other unusual appearances externally? If so, describe them accurately.

7. Did you find any morbid or unusual appearances on examination of the body internally? If so, describe them accurately.

8. Do you believe the injuries you observed to have been inflicted before or after death? Give reasons.

9. Can you state how they were inflicted? Give reasons.

10. Do you consider that they were accidental or not? Give reasons.

11. Had the infant respired fully, partially, or not at all?

12. Did you examine the person of———the alleged mother of the infant? If so, have you reason to suppose that she was recently delivered of a child? Can you state approximately the date of her delivery? Give reasons.

3176. No. V. Strangulation.

1. Did you examine the body of————————late a resident of————and if so, what did you observe?

2. What do you consider to have been the cause of death? State the reasons for you opinion?

3. Did you observe any external marks of violence upon the body?

4. Did you observe any unnatural appearances on examination of the body internally?

5. Was there any rope or other such article round the neck when you saw the body?

6. Can you state whether the mark (*or* marks) you observed were caused before or after death?

7. By what sort of articles do you consider the deceased to have been hanged (*or* strangled)?

8. Could the mark you observed have been caused by the rope or other article now before you (Article No.——in Evidence)?

9. Do you think that this rope could have supported the weight of the body?

10. *(If strangulation)* Would great violence be necessary to produce the injuries you describe?

3177. No. VI. Drowning.

1. Did you examine the body of————————————late a resident of————————and if so, what did you observe?

2. What do you consider to have been the cause of death? State your reasons.

3. Were there any external marks of violence upon the body? If so, describe them.

4. Describe any unnatural appearances which you observed on further examination of the body.

5. Did you find any foreign matters, such as weeds, straw, etc., in the hair, or clenched in the hands of the deceased or in the air passages, or attached to any part of the body?

6. Did you find any water in the stomach?

3178. No. VII. Rape.

1. Did you examine the person of Mussamut————? If so, how many days after the alleged rape did you make the examination, and what did you observe?

2. Did you observe any marks of violence about the vulva or adjacent parts.

3. Are these injuries such as might have been occasioned by the commission of rape?

4. Was the hymen ruptured?

5. Did you observe any further marks of violence upon the person of the woman?

6. Had she passed the age of puberty?

7. Can you state approximately what her age is? *(N.B—This question to be asked only in the case of the rape of a girl of tender years.)*

8. Did you find her to be a strong healthy woman, or so weakly as to be unable to resist an attempt at rape?

9. Did you examine the person of the accused?

10. Did you observe any marks of violence upon his body?

11. Was he suffering from any veneral disease?

12. Did you find the woman to be suffering from a similar or other venereal disease?

13. Had a sufficient time elapsed, when you examined the person of the woman, for venereal disease to have made its appearance, in case of her having been infected?

14. Can you state approximately how long the defendant had been suffering from this complaint?

15. Can you state approximately how long the woman has been suffering from this (venereal) complaint?

16. Have you examined the stained articles forwarded to you and now in Court (Article No.——in Evidence)?

17. What is the result of your examination?

18. Do you believe that a rape has been committed or not? State your reasons.

3179. No. VIII. Insanity.

1. Have you examined————?

2. Have you done so on several different occasions, so as to preclude the possibility of your examinations having been made during lucid intervals of insanity?

3. Do you consider him to be capable of managing himself and his personal affairs?

4. Do you consider him to be of "*unsound mind,*" or in other words, "*intellectually insane*"?

5. If so, do you consider his mental disorder to be complete or partial?

6. Do you think he understands the obligation of an oath?

7. Do you consider him, in his present condition, competent to give evidence in a Court of Law?

8. Do you consider that he is capable of pleading to the offence of which he now stands accused?

9. Do you happen to know how he was treated by his friends (whether as a lunatic, an imbecile, or otherwise), prior to the present investigation and the occurrences that have led to it?

10. What, as far as you can ascertain, were the general characteristics of his previous disposition?

11. Does he appear to have had any *previous* attacks of insanity?

12. Is he subject to insane *delusion*?

13. If so, what is the general character of these? Are they harmless or dangerous? How do they manifest themselves?

14. Might such delusion or delusions have led to the criminal act of which he is accused?

15. Can you discover the *cause* of his reason having become affected? In your opinion, was it *congenital* or *accidental*?

16. If the latter, does it appear to have come on suddenly or by slow degrees?

17. Have you any reason for believing that his insanity is of *hereditary* origin? If so, please specify the grounds for such an opinion, and all the particulars bearing on it; as to the insane parent or rela-

tives of the accused; the exciting cause of his attack; his age when it set in; and the type which it assumed.

18. Have you any reason to suspect that he is, in any degree, *feigning* insanity? If so, what are the grounds for this belief?

19. Is it possible, in your opinion, that his insanity may have followed the actual commission of his offence, or been caused by it?

20. Have you any reason to suppose that the offence could have been committed during a *lucid interval*, during which he could be held responsible for his act? If so, what appears to have been the duration of such lucid interval? Or, on the contrary, do you believe his condition to have been such as altogether to absolve him from legal responsibility?

21. Does he now display any signs of *homicidal* or of *suicidal* mania, or has he ever done so to your knowledge?

22. Do you consider it absolutely necessary, from his present condition, that he should be confined in a Lunatic Asylum? or again :

23. Do you think that judicious and unremitting supervision *out of an Asylum* might be sufficient to prevent him from endangering his own life, or property or of others?

3180. No. IX. Miscarriage.

1. Did you examine the person of Musammat———? If so, when and what did you observe?

2. Are you of opinion that a miscarriage has occurred or not? Give your reasons.

3. In what mode do you consider the miscarriage to have been produced—whether by violence per vaginam, or by external violence, or by the use of irritants *internally*? Give your reasons.

4. It is alleged that a drug called———was used; state the symptoms and effects which the administration internally of this drug would produce. Do you consider that it would produce miscarriage?

5. Can you state whether the woman was quick with child when the miscarriage was produced? State your reasons.

6. Did you see the fœtus? If so, at what period of gestation do you consider the woman to have arrived?

3181. No. X. Grievous Hurt.—*Questions that may be put to a medical witness*:—

1. Have you examined———? If so, state what you observed.

2. Describe carefully the marks of violence which you observed.

3. By what do you consider the injuries to have been inflicted? If by a weapon, what sort of a weapon do you think was used?

4. Do you consider that the injuries inflicted could have been caused by the weapon now shown to you (Article No.——in Evidence)?

5. What was the direction of the wound; and can you form an opinion as to the position of the person inflicting such a wound, with respect to the person receiving it?

6. Is it possible for such a wound to have been inflicted by any one on his own person? Give your reasons.

7. Do you consider, that the injuries inflicted constitute any of the grievous hurts defined in section 320 of the Indian Penal Code? If so, which of them? Give your reasons. (*The Magistrate in putting these questions will show the I. P. Code to the witness; or the Magistrate may vary the form of the question so as to elicit the required information without calling the witness's attention to the I. P. Code.*)

8. Do you consider that the person injured is now out of danger?

9. It is alleged that the injuries were caused by———: could they have been caused in the manner indicated?

10. Have you chemically or otherwise examined the stains (on the weapon, cloths, etc.), now before you (Article No.——in Evidence)?

11. Do you believe the stains to be those of blood?

[*N. B.*—In case of the injuries being gunshot wounds, questions 21 to 24 under the head of No. III (Death by wounds, § 3174) may be put to the witness.]

3182. Plea of Guilty.—On a charge so grave as that of murder it is the duty of the Judge to strictly follow all the requirements of law. Now section 271 of the Procedure Code requires that when the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and *explained* to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried. If the accused pleads guilty, the plea shall be recorded, and he *may be* convicted thereon.(21) Two things are then essential at this stage. First, the charge must not be read but explained to the accused, and secondly, he should then be asked if he pleads guilty to the charge so framed.

3183. Now the explanation of the charge implies not merely its reading over to the accused, but also a statement of the precise grounds of which it is a compendious expression. For instance, on the trial of A for murder of B, the charge need only set out the fact that A had murdered B. But it conveys no idea of the facts upon which that charge is framed. In such a case to ask the accused, "Did you murder B?" to which the accused replies, "Yes, I did kill him," is scarcely such an explanation as the law requires, and the fact that the Court was dissatisfied with the vagueness of the reply and asked him to plead in definite terms "Guilty" or "Non-guilty," on which the accused pleads "Guilty," does not do away with the necessity of explanation, all the more so, if the accused had added that he had killed B in a struggle, the said B having first attacked

(21) S 271, Cr. P. C.

him.[22] Here there was a clear indication of the fact that all that the accused did plead to was the killing of B and not his *murder*, a word which in popular parlance has that meaning, but which has in the Code a technical meaning as implying killing under the circumstances mentioned in s. 300, that is to say, killing with a certain criminal intention or consciousness.

The explanation of the charge must then be to bring home to the accused the intention or knowledge imputed to him, which is an essential element of the composition of the crime. It is the duty of the Court to explain to him the fact that he stands charged of the offence of murder, because he is alleged to have killed a certain person intending to cause his death by doing a certain act, or by doing any other act mentioned in s. 300 which constitutes the offence. The plea of the accused should then be recorded precisely in the words used by him. The Court *may* then convict on such a plea, but it is not bound to do so. So where the Court asked, "Did you commit murder?" to which the accused replied, "Yes, I was moved by jealousy," it is not the plea of guilty.[23]

3184. Indeed, in a case in which a person is being tried for his life it is only in very clear cases of murder that the Court would be content to accept a plea of guilty. In a case where the offence may conceivably be murder or culpable homicide, the Court is loath to shorten its trial by accepting the plea, especially if it has any doubt as to whether an accused person fully understands the meaning and effect of a plea of guilty[24] to a charge which is after all a mixed question of fact and law.[25] In England, the practice of the Courts in such cases is to advise the accused to plead not guilty and stand his trial.[1] In this country the same technical rule of pleading is not necessary, but the Court is not bound to convict upon a mere plea of guilty; and as Sir Lawrence Jenkins, C. J., remarked: "It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death."[2] And the High Court would scrutinize the evidence on record to satisfy itself as to the correctness of the verdict even where a conviction is bad on such plea.[3] In any case, it is not a plea of guilty, merely because the accused says so, if he couples his plea with a statement which if proved may mitigate his offence.

For instance, where the accused being asked, "Did you murder your wife?" he replied, "Yes, because I discovered her in the act of adultery with another and was therefore unable to control myself. I did not kill her then, but did so the next day as soon as I got the chance." Such a statement even if proved may or may not amount to murder, for it depends upon a consideration of the effect of the provocation pleaded upon the mind of the accused, which being

(22) *Vaimbilee*, 5 C. 826; *Gopal Dharuk*, 7 C. 86; *Aiyabu*, 9 M. 61.
(23) *Lahori*, 23 A. L. J. 587, 89 I. C. 260, (1925) A. 647.
(24) *Bhadu*, 19 A. 119.
(25) *Dalli*, 20 A. L. J. 326, 66 I. C. 427, (1922) A. 233.
(1) *Bhadu*, 19 A. 119.
(2) *Chinia Bhika Koli*, 8 Bom. L. R. 240 (241).
(3) *Ib.*, at p. 241.

a question of fact, it was for the jury to decide if conviction on such a plea could not therefore be sustained.(4) The same view was taken in another case in which the accused had said: "I have killed my wife and child. I quarrelled with the former as she would not consent to my leaving this place and so I killed her. I killed my child as he then began to cry." The Court held this statement not to amount to the plea of guilty, and it observed that the case was in any case one which should have been tried out, to ascertain whether the provocation was grave and sudden enough to prevent the offence from amounting to murder.(5)

3185. Of course in explaining the charge, it is neither the duty of the Court nor indeed is it necessary to explain to the accused that his case does not fall within any of the exceptions to s. 300. It is the duty of the accused to plead and prove circumstances bringing his case within the mitigating provisions of section 300.(6) All the same there is no strict rule of pleading applicable to criminal cases, and the Court must use its discretion in favour of the accused, whenever its attention is drawn to facts the existence of which may have a bearing on the nature and degree of the offence. For instance, if the accused admits the fact but adds that he was drunk,(7) or pleads any other circumstance which mitigates the offence or would entitle him to the lesser sentence, it is the duty of the judge to try him and inquire into the plea.

3186. Charge to the Jury.—The procedure applicable to the trial of murder cases is the same as is applicable to all cases triable by the Court of Session or the High Court.(8) One of the most important functions of the Court in cases tried by jury is the charge in which the Court sums up the evidence for the prosecution and defence, and lays down the law by which the jury are to be guided.(9) The Judge's charge to the jury is a fair impartial summary of the whole case with such advice as the legal bearing of the evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest.(10) In a murder case, it is the duty of the Judge to point out to them the legal definition of the offence charged, and of those under which they may possibly find the accused guilty. The jury should be asked to find as to the intention and knowledge of the accused, and in case of conspiracy their attention should be specially directed to the law, such as sections 34, 35, 36, 37 and 38 of the Code. A charge such as this: "Section 302.—The murder of Mahar Mallya—Murder defined—Punishment.—The only question here in view of the statement made by the prisoners is, did the prisoners, any or all of them, inflict these injuries on the deceased? If they did, they are guilty of murder"(11)—is as perfunctory as it is legally defective. Where more accused than one is tried, the charge should be a summary of evidence against each of them and if it is a case of conspiracy, their legal liability as defined in the Code should be clearly pointed out.

(4) *Netai Luskar*, 11 C. 410; *Sakharam*, 14 B. 564.
(5) *Per* Jardine and Candy, JJ., in *Sakharam*, 14 B. 564.
(6) *Sheikh Choolleye*, 4 W. C. 35; *Asiruddin Ahmad*, 1 C. W. N. 714.
(7) *Nga Han*, (1919) 3 U. B. R. 137. 51 I. C. 780.
(8) Ch. XXIII (ss. 266, 336), Cr. P. C.
(9) S. 207, Cr. P. C.
(10) *Fatte Chand*, 5 B. H. R. 85.
(11) *Babya*, 1 Bom. L. R. 784.

So in charging the jury on the point of provocation, the Judge should tell the jury that to bring the case within the exception to s. 300, the prisoner must have been deprived of the power of self-control by grave and sudden provocation, that there ought to have been sufficient cause for such loss of self-control, and that the provocation was not voluntarily provoked by the prisoner as an excuse for doing harm.(12) In such cases, it is the duty of the Judge to explain the distinctions between murder and culpable homicide, and what distinguishing features they each possess, and then the jury as judges of facts have to decide the issue about provocation.(13) It was held to be a misdirection where the Judge told the jury that the confession of the accused was admissible because it was not made to a person in authority, whereas as a matter of fact, it was made to the *punches* who were persons in authority within the meaning of s. 24 of the Indian Evidence Act.(14)

3187. The Court must not be too particular about the absence of a legal plea on the part of the accused, especially if he is undefended. If he has made out a case for extenuation or exoneration the facts should be stated in the charge.(15)

3188. Circumstantial Evidence.—The evidence to justify a conviction of an offence so serious as murder, which involves the forfeiture of life, must be, as already observed, of the best kind obtainable. But this is not always possible. If there are eye-witnesses to the crime, the question is then one of their credibility. But if direct evidence be lacking, the Court may still possess indirect or circumstantial evidence, which, though legally sufficient to warrant a conviction, nevertheless calls for the greatest scrutiny and circumspection; for while it is true that witnesses may lie but circumstances cannot, still it cannot be forgotten that the connection between the act and its causation is sometimes so subtle as to baffle that most analytical mind. When the case is tried by the jury, it is the duty of the Judge to lay before them the several circumstances in their logical sequence and call upon them to decide whether their existence has been proved, and then to decide how they are interrelated and what their probative value, is singly or collectively. If they unmistakbly implicate the accused, excluding the possibility that the offence might have been committed by some one else, then the accused should be found guilty; otherwise, he is entitled to have the benefit of a doubt.(16) Such was the case of one Chuhar Singh who was alleged to have joined one Khem Singh in waylaying the latter's wife whom they placed on a camel and carried towards a canal in which the headless trunk of a female was afterwards found. There was a strong motive for the murder. It was also possible, though not proved, that the body was that of the wife; but the Court held those facts insufficient to uphold the conviction for murder.(17)

3189. So the possession of jewels or clothes of the deceased immediately after the murder raises a strong suspicion that the

(12) *Gunesh Luskar*, 9 W. R. 72.
(13) *Dadubhai*, (1895) B. U. C. 766 (768).
(14) *Aushi Bibi*, 20 C. W. N. 512, 33 I. C. 828.
(15) *Barendra*, 28 C. W. N. 170 F. B.
(16) *Bhagwan Kaur*, (1911) P. W. R. 16, 11 I. C. 596 F. B.; *Browning*, 39 I. C. 322; *Madyar*, 4 L. L. J. 235; (1922) L. 263; *Mirza*, 96 I. C. (L.) 849; *Mhd. Khasim*, (1914) M. W. N. 718, 27 I. C. 755.
(17) *Chuhar Singh*, (1914) P. W. R. 40, 26 I. C. 1001.

accused was concered in it, but it does not warrant a conviction for murder.[18] Nor does the fact that the accused was seen near the deceased and that later on he gave information which led to the discovery of some ornaments belonging to the deceased,[19] or that the deceased had been killed by a gunshot wound, and that a gun had been recovered from the hut of the accused which had been burnt by fire, and when the accused was apprised of it, he was suspiciously calm. There was some evidence that the accused and the deceased had both quarrelled over his nephew, with whom the deceased had been intimate but the Court held the evidence inconclusive to sustain the conviction.[20]

3190. Case for Conviction.—In the following cases circumstantial evidence was held to warrant a conviction for murder. The deceased, a creditor to the accused, had rendered the latter destitute by selling up his house. Two days later he was alleged to have waylaid the deceased, struck him a stunning blow with a stick, carried his body some distance, strangled him and buried his corpse in a manure heap. The evidence only proved the motive, the *corpus delicti* which the accused pointed out. He also showed a spot where he had rested the body which place was marked by some blood-stained leaves; and there was evidence of the ornaments he had stolen from the person of the deceased when he was killed. It was held that the concatenation of the circumstances left no reasonable doubt as to the guilt of the accused.[21] The accused were found in possession of ornaments belonging to the deceased, a lovely widow. It was proved that they had entered the house at 3 P.M. and left it some time after. At 6 P. M. she was discovered dead with her head and face battered with a mallet. It was held that they were guilty of murder, but on appeal in view of their previous acquittal by the Sessions Judge they were sentenced only to transportation.[22]

But the extreme penalty is held justifiable where the crime of that character is rampant and needs to be suppressed.[23]

3191. In one case there was the following circumstantial evidence against the accused: (1) A blood-stained shirt was found in his house in which he and his two brothers lived; (2) following tracks from the scene of the murder to his house which corresponded with shoes worn by him; (3) he pointed out a blood-stained knife concealed in a bush on the way from the murdered man's house to his own. Against this there were (1) the absence of a strong motive for committing the murder, (2) and absence of his name in the first report to the police. The Court held that the force of the circumstantial evidence was minimized by these facts and that it could not convict the accused in the absence of direct evidence.[24]

(18) *Sundar Singh*, 66 I. C. (P.) 187; *Ahmed*, (1913) P. L. R. 220, 19 I. C. 707; *Sogiamuthu*, 93 I. C. 42; (1926) M. 638; *Mirza*, 96 I. C. (L.) 849; *Gauns*, 7 L. 561.

(19) *Gauns*, 7 L. 561 (563).

(20) *Abdul Ghani*, 99 I. C. 324; (1927) L. 51.

(21) *Matu*, (1917) P. R. No. 18, 36 I. C. 838.

(22) *Public Prosecutor* v. *Chiareddi*, 21 M. L. J. 1071, 12 I. C. 652; *Nainamalai*, 14 M. L. W. 18.

(23) *Kadir Bux*, 5 S. L. R. 256, 15 I. C. 807 (wife murder held common in Sindh).

(24) *Tajoo*, (1916) P. W. R. 22, 34 I. C. 999; *Kala Singh*, (1911) P. W. R. 25, 12 I. C. 92.

Motive, though not necessary to prove an offence is nevertheless a most weighty circumstance, the presence of which materially influences judgment,[25] and the absence of which is often fatal to the prosecution. Suspicion, however grave, is not proof, and a person cannot be convicted upon suspicion, unless there is cogent evidence in proof of the crime.[1] If the evidence is conflicting and the prosecution witnesses are relatives of the deceased, such evidence is not strengthened by the fact that the name of the accused was reported to the police.[2] The fact that a bundle of clothes of the deceased was found in possession of the accused is a good ground for his conviction under s. 411, but not for murder.[3]

The accused was charged with murder on the following facts. The complainant's son who was alleged to have been kidnapped by the accused was seen in the arms of the accused just before the murder of the boy. On that day or very shortly afterwards, the accused disposed of his jewellery. The remains of the boy were found in a bush, but there was no direct evidence as to how he came by his death. It was held that while the accused could be convicted under s. 369, the evidence did not warrant his conviction for murder.[4] Where a witness made a statement incriminating the accused three days after he had the first opportunity of making it, the Court treated it with suspicion.[5]

3192. It is very unsafe to rely upon a witness who has materially improved on his previous statement. So where an eye-witness to the murder first stated that he was in a lane from where he saw the accused pass and two days later he changed and said he was present at the entrance of the house where the murder was being committed and out of which he saw the accused emerge, the Court held the witness false and it acquitted the accused, holding that though the ground was muddy, his footprints were not found. There remained the blood-stains on the accused's nail parings which the Court held to be a circumstance against the accused but by itself insufficient to bring the crime to him.[6] The Court is loth to convict a person of murder upon the uncorroborated testimony of a single witness who is shown to have lied as regards some of the accused, or who has otherwise been discredited.[7] Such is also the value of the confession of a co-accused.[8] The fact that the accused points out the spot where the body of the deceased was buried,[9] or the spot where the murder was committed and where blood-stained earth was found[10] is material but not sufficient to

(25) *Toraf Ali*, 35 I. C. (C.) 818; *Meyila*, (1913) M. W. N. 145, 18 I. C. 337; *Aishen*, (1920) P. L. R. 107 (murder by a girl of 10 of an infant to rob it to purchase sweets of which she was very fond, held motive inadequate).

(1) *Nga Po Thein*, 8 Bur. L. J. 35, 25 I. C. 329.

(2) *Teli Khaja Hussain*, (1911) M. W. N. 14, 12 I. C. 217.

(3) *Ahmad*, (1913) P. L. R. 220, 19 I. C. 707; *contra* in *Ramji*, 53 I. C. (N.) 481.

(4) *Vuppalapu*, 14 I. C. 601, *contra* in *Wadhawa Singh*, (1915) P. W. R. 16, 27 I. C. 551.

(5) *Ahmad*, (1915) P. L. R. 4, 27 I. C. 219; *Kheri*, 3 L. L. J. 147.

(6) *Nadir*, (1914) P. W. R. 43, 26 I. C. 667.

(7) *Narayana*, (1911) 2 M. W. N. 6, 12 I. C. 96; *Kehri*, 3 L. L. J. 147.

(8) *Mure Venkata*, (1911) 2 M. W. N. 375, 12 I. C. 650; *Sher Khan*, 5 L. L. J. 124, (1923) A. I. R. (L.) 59.

(9) *Gulab*, 75 I. C. 693, (1923) A. I. R. (L.) 315; *Matu*, (1917) P. R. No. 18, 36 I. C. 838.

(10) *Jagtu*, 5 L. L. J. 417.

convict him of murder. There is, of course, no value in a discovery which is obvious and could have been made by any one without any knowledge of murder.[11]

3193. The accused and the deceased were rival claimants to a mahantship. The latter died of morphine poisoning. The deceased was not in the habit of eating opium. He took ill soon after drinking some milk from a vessel to which the accused was stated to have added sugar and which he had stirred with his finger. It was held that the evidence was both incredible, and insufficient to warrant the accused's conviction.[12]

Two Pathans of Attock were in love with a boy. One night both of them (say A and B) each with two of their companions were going towards a well where they were to meet the boy. Both were armed with knives as usual. A being overcome by jealousy attacked B with a *lathi* and ordered his two companions to draw the knife, and the three wounded B who struck A with a dagger in consequence of which A died. It was held that B was protected by s. 100.[13] The villagers had arrested a gang of dacoits whereupon a dacoit, at large, fired a gun and killed one of the villagers. All the dacoits were charged with the murder. It was held that only the dacoit who had fired the shot was guilty, the rest having no common object in committing the murder.[14]

3194. Mitigation of Sentence.—Lastly comes the sentence. Now the only sentences possible in a case of murder are those of death or of transportation for life. Of these two, death is the ordinary and usual sentence prescribed by the law,[15] and where crime of a particular character is rife it is the only appropriate sentence.[16] But in cases of alleviation, the Court is empowered to substitute the alternative sentence, but has to assign reason therefor.[17] But the discretion to be exercised by the Court is a judicial discretion, it is not arbitrary but must follow accepted principles. There are many circumstances which weigh with the Court in refraining from sending the accused convict to his doom. Extreme youth[18] or old age justly excite its compassion,[19] and there is a reason for it. For a youthful murderer may still reform and a senile convict can scarcely do much harm to society. So while it has been held that the fact that conviction of the accused would have been impossible without his confes-

(11) *Aishen*, 5 L. L. J. 78.

(12) *Kala Singh*, (1911) P. W. R. 25, 12 I. C. 92; to the same effect, *Hussainan*, 4 L. L. J. 445.

(13) *Usaf Khan*, (1920) P. W. R. 1, 55 I. C. 607.

(14) *Hari Bijal*, 17 Bom. L. R. 906, 31 I. C. 345.

(15) *Ma Shwe Yi*, 1 R. 751; *Shwe Hla U*, 11 L. B. R. 323, 67 I. C. 613; *Waryan Singh*, 75 I. C. (P.) 359, (1923) A. I. R. (L.) 598; *Abdurrahman*, (1896) B. U. C. 852, reference from Ugandda, in which the sentence had to be passed according to English Law); to the same effect, *Kamal*, (1873) P. R. No. 13; *Nga Tha Sin*, (1902) 1 L. B. R. 216; *Nga Shwe Gon*, (1903) 10 Bur. L. R. 123; *Shwecho*, (1905) 3 L. B. R. 111; *Nga Myat Kaing*, 37 I. C. (R.) 465.

(16) *E.g.*, murder of adulterous wife in Sindh; *Kadir Bux*, 5 S. L. R. 256, 15 I. C. 807.

(17) S. 367 (5), Cr. P. C.

(18) *Jasha Bewa*, 11 C. W. N. 904; *Ram Newaz*, 35 A. 506; *Chit Tha*, 9 L. B. R. 165, 45 I. C. 840; *Nga Tha Kin*, (1911) 12 B. R. 87, 11 I. C. 792, followed in *Muniandi*, 16 M. L. T. 535, 26 I. C. 332; *Pirthi* (accused No. 20), 84 I. C. 653; (1924) L. 654, *contra* in *Kachria Mahar*, 18 N. L. R. 101, 64 I. C. 27, (1922) A. I. R. (N.) 65; *Sukhwaria*, 76 I. C. (N.) 291.

(19) *Rasammal*, 36 I. C. (M.) 324; *Muniandi*, 16 M. L. T. 535, 26 I. C. 332; *Nga Tha Kin*, (1911) 1 U. B. R. 87, 11 I. C. 792; *Jasha Bewa*, 11 C. W. N. 904.

sion is no ground for leniency,[20] but it at any rate shows contrition; and the Court will have no compunction to condemn a woman who has committed murder,[21] but it is loath to condemn a pregnant female to the gallows, and even if she has to be comdemned the Government is ordinarily moved to reprieve that sentence. Persons who commit murder on provocation, but which is insufficient to mitigate the crime are as a rule never condemned to death.[22] So those who have been driven to the crime at the instigation of others, and have not taken a principal part in committing the murder, or those who are held constructively guilty by being members of a conspiracy are held fit objects of such judicial clemency.[23]

3195. There are other circumstances, which though not recognized as fit subjects of mitigation, are nevertheless taken into consideration in determining the sentence. Such circumstances are (*i*) absence of intention, as where the case falls under clause (4) of s. 300;[24] (*ii*) absence of premeditation or deliberation, in which case the murder though intentional is committed in the heat of passion without special brutality;[25] (*iii*) where the offence is committed under provocation serious, though not sudden[1]; (*iv*) where there is a doubt as to the sanity of the accused at the time of the offence, actual sanity not being proved;[2] (*v*), where the *corpus delicti* is wanting (§§ 3166-3168); (*vi*) where there is no motive disclosed for the crime[3] or the motive is to conceal one's share, *e.g.*, murder of a new-born illegitmate child[4] (*vii*) where the offence was committed in a state of intoxication;[5] (*viii*) where the offence was committed from a sense of false pride or honour, to avenge a wrong, *e.g.*, duelling; (*ix*) where there was provocation grave, though not sudden[6]; (*x*) where death was caused in a scuffle[7] in all of which cases the Court seldom visits the offender with the extreme penalty of law.[8] The same consideration is shown to offenders deserving of moral as distinguished from legal sympathy. Such are persons who deliberately shoot down thieves and other similar pests of society caught red-handed. So comparative leniency to women is a commonly accepted rule of practice, though not of law.[9]

3196. There are of course numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation, in which such a sentence would be an example of misplaced clemency. For example, murder attended with robbery or rape or any other serious crime, murder committed in cold blood and with marked brutality displayed before or after death, murder of a defenceless

(20) *Neki*, 76 I. C. (L.) 180, 25 Cr. L. J. 116.
(21) *Ma Shwe Yi*, 1 R. 751.
(22) *Kamal*, (1878) P. R. No. 13; *Mammun*, (1916) P. R. No. 35, 38 I. C. 751; *Abdul Alim*, (1927) A. 105; *Fajjoo*, 99 I. C. 56; *Sennimalai*, 97 I. C. (M.) 952.
(23) *Mi Shabi*, (1899) P. J. L. B. 564.
(24) *Ghutali*, 31 A. 48.
(25) *Mummun*, 38 I. C. 751; *Po Kin*, 2 L. B. R. 320; *contra* in *Nga Myat Kaing*, 37 I. C. 465.
(1) *Puhan*, 33 I. C. (Oudh) 830.
(2) *Maung U*, (1894) P. J. L. B. 112.
(3) *Mulla*, 5 L. L. J. 528; *Samand Singh*, (1919) P. R. No. 3, 49 I. C. 349; *Naja* 1 L. L. J. 247.
(4) *Dhania Kunbi*, 75 I. C. (N.) 767, 25 Cr. L. J. 63.
(5) *See* ss. 85, 86, *ante*; *Director* v. *Beard*, (1920) A. C. 479; *Waryam Singh*, 7 I. 141 (145-147); *Batcha*, (1913) M. W. N. 556; 18 I. C. 675; *Nga Po Lu*, 4 Bur. L. T. 246, 12 I. C. 292; *Nga Tun Baw*, 17 I. C. (R.) 800 F. B.
(6) *Puran*, 33 I. C. (Oudh) 830.
(7) *Rama Singh*, 42 A. 302.
(8) *Rakhia*, (1911) P. L. R. 157, 10 I. C. 119.
(9) *Basammal*, 26 I. C. 324.

man found in peaceful possession of his property and from which the accused forcibly wanted to eject him, murderers who were hired for the occasion, and who went with the resolve to do or die. Again, persons who murder those to whom they owed a duty, such as master and servant, parent and child, are specially singled out as deserving this penalty. Persons who murdered for the love of lucre, or those who inveigle their victims into their confidence and then murder them are other instances of execrable beings whom the Court considers its duty to society to rid them from. In many such cases the Court not only sentences the offender to the extreme penalty, but it also orders the forfeiture of his property on a principle already set out (§§ 456-461). It is sometimes said that the accused, if convicted merely upon circumstantial evidence, should not be visited with a sentence which is irrevocable;[10] but though this is held to be a factor which should *per se* affect the sentence[11] yet the Court is reluctant to launch a person into eternity except in a case of exceptional strength.

3197. The four circumstances specified in s. 300 and aggravating the offence of culpable homicide into one of murder have already been set out in the foregoing discussion. The question is in its essence one of intention and knowledge, and every fact relevant for that purpose is equally relevant under this section. But even after the accused is convicted of murder, there still remains the question of sentence, which is one of discretion, but which the Court exercises after due regard being had to the circumstances of each case. But there is no uniformity of practice in this respect. For instance, the Court may infer an intention to murder from the brutal nature of the assault, though the weapon used be a common stick. Such was the case of the two accused who with several others waylaid their enemy and struck him all over inflicting no less than sixteen wounds, injuring his healthy spleen in several places. It was argued for them that the accused intended to give no more than a thrashing, but the Court held that the brutal nature of the assault left no room for doubt that they either intended to kill the deceased or knew that they were likely to do so. They were, however, sentenced to transportation for life.[12] Under which clause of s. 300, it might be asked, would this offence fall? The Court did not advert to it, though perhaps the fourth clause would be regarded as more applicable than any other. But this clause could scarcely apply to a case in which the two accused had beaten their enemy with sticks to death. The deceased had no less than 14 of his ribs fractured and both his lungs and the spleen were ruptured. The Sessions Judge had resorted to clause 4 and sentenced the accused to transportation. But though the sentence was maintained the Court was not prepared to hold this clause applicable in a case of such extreme violence.[13]

3198. Such cases of beating one's enemy are of frequent occurrence in the country, and the only thing special about them is the divergence

(10) *Abdul Wahab*, 76 I. C. (K.) 97.

(11) *Muniandi*, 10 M. L. T. 535, 26 I. C. 332; *Paramandi*, 44 M. 443.

(12) *Elem Molla*, 37 C. 315; to the same effect, *Piare*, 17 A. L. J. 866, 52 I. C. 224; *Garib*, 17 A. L. J. 985, 53 I. C. 495; *Kanbai*, 35 A. 329: *Ram Newaz*, 35 A. 506; *Hanuman*, 35 A. 560; *Sipahi Singh*, 45 A. 130; *Umed*, 45 A. 727; *Sipahi*, 20 A. L. J. 900; *Jaipal*, 66 I. C. (N.) 665; (1922) A. I. R. (N.) 141; *contra* in *Dhian Singh*, 9 A. L. J. 180, 14 I. C. 649; *Sardar Khan*, 41 B. 27; *Hashim*, 7 S. L. R. 29, 20 I. C. 619; *Saidino*, 9 S. L. R. 99, 30 I. C. 998.

(13) *Nawab*, (1914) P. R. No. 31, 25 I. C. 522.

of views of the Courts as to the offence and the sentence. For instance, where in a similar case the accused waylaid his enemy, and beat him so severely that he died of his wounds 18 days later and the medical witness certified that all the injuries were sufficient in the ordinary course of nature to cause death, but this evidence was held to amount to the degree of probability referred to in s. 299 only and fell short of that defined in s. 300. Consequently the Court altered the conviction to one under s. 304 and substituted transportation for life for the sentence of death awarded by the trial Judge.(14) And in other cases the Courts have refused to subscribe to the Calcutta and the Allahabad view that a brutal assault with *lathis* resulting in death must be presumed to have intentionally caused death, it being held that, apart from the special case contemplated in s. 300 (2), brutal assaults with *lathis* do not ordinarily amount to murder unless the accused intended to cause death, or to cause such bodily injury as is sufficient in the ordinary course of nature to cause death.(15) This may be of easy inference where one fell blow given on the head with a bamboo stick six feet long weighing 116 tolas immediately kills the victim.(16)

On the other hand, where the blow is given in the course of a quarrel and in a heat of passion it is possible to assume that the blow struck by the accused exceeded in violence the injury he had in view at the moment of striking it.(17) The motive may at times afford a solution. The accused made a murderous attack on his wife who ran up to the deceased and clasped her arms round her waist. The accused thereupon gave a fatal stroke to the deceased with the sole object of making her let go his wife; so that he might glut his ire. The accused had no quarrel with the deceased and had no intention of killing her. He was held guilty of homicide.(18) The Court is, of course, free to disregard the medical opinion where it is not in consonance with the evidence. Where, therefore, the injuries inflicted, described as not serious, were one inch deep and they pierced the pleura which, in the ordinary course of events, is sufficient to cause death, the Court convicted the accused of murder, though he was spared the extreme penalty.(19)

3199. The accused, who appears to have been a thug, ingratiated himself with a passer-by whom he invited to partake of his meal, which he had drugged, probably with a large quantity of *dhatura*, from the effects of which he died. The object of the accused was merely to stupify the deceased with a view to rob him of his personal effects which he did; but he was held to be guilty of murder, though he too was sentenced to transportation for life.(20) It is sometimes curious how some delinquents bear charmed lives and escape the gallows, though they tempt them by every means within their power. The three accused, who were brothers, were litigating with the complainant about a field in which the latter was about to worst them, the Magistrate having declared his case true; but the

(14) *Darhoon*, 8 S. L. R. 337, 29 I. C. 104.
(15) *Saidino*, 9 S. L. R. 99, 30 I. C. 998; dissenting from *Elem Molla*, 37 C. 315; *Hanuman*, 35 A. 500; following *Hashim*, 7 S. L. R. 29, 20 I. C. 619.
(16) *Nga Khan*, 65 I. C. (Bur.) 495.
(17) *Sardar Khan*, 41 B. 27.
(18) *Perumal*, (1912) M. W. N. 193, 13 I. C. 817.
(19) *Public Prosecutor* v. *Thandavan*, 29 I. C. (M.) 671.
(20) *Ghutali*, 31 A. 48; *Lala*, (1911) P. L. R. 32, 9 I. C. 731; *see* also *Tulsha*, 20 A. 143; *Bhagwan Din*, 30 A. 568; *Gauri Shankar* 40 A. 360 (arsenical poisoning); but in *Kesar Din*, (1920) P. W. R. 3, 55 I. C. 479, intention held to be the test.

case was still pending. The accused thereupon surprised the deceased one morning at dawn in his threshing floor where the accused had been sleeping and begged him to compromise the case by failing to attend the Court that day, which the deceased refused to do. The deceased had received 20 injuries on his person but the evidence for the prosecution was tainted and the Court held it to convict only one of the three accused who though convicted of murder, was still held entitled to leniency.[21]

3200. Other Cases for Mitigation.—The Court sometimes visit with such leniency the perpetrators of crime who have received some provocation, though it cannot receive legal recognition. Such cases as the killing of thieves and other malefactors have been already considered (§§ 3195-3196). There remain cases of marital tyranny which the Court considers as sometimes sufficient to justify the sparing of the accused's life. Such was the case of the accused who killed his wife—a woman of depraved character—because she refused to have sexual intercourse with him on the night of the occurrence and also rebuked him. She had done so before. It was held that it was a fit case for the lesser sentence.[22] In another case, the wife used to run away from her husband. The latter was persuading her to return; but she abused him foully which provoked the husband to kill her with a chopper which he happened to carry in his hand. It was held that the provocation justified the reduction of the crime to one of culpable homicide.[23] Provocation received from other causes has sometimes led the Courts to prefer the lesser sentence.[24]

Drunkenness has been held to justify the passing of the sentence of transportation, on the ground that while section 86 attributes to a drunken man the knowledge of a sober man, it does not impute to him the same intention.[25]

3201. Where there are several persons accused of murder, and there is no reliable evidence as to who struck the fatal blow, the Court would ordinarily sentence all of them to transportation[1]; *a fortiori*, where it is known that one struck while the other did not[2]; or the accused, though armed with a pistol, was constructively guilty of murder.[3] Where in a sudden fight between certain persons blows of ordinary sticks are exchanged, in the course of which a chance blow fractures the skull of one of the persons engaged in the fight, and the person who struck the fatal blow cannot be ascertained, the liability of all the assailants for the resultant act depends upon whether there was any indication that originally the accused or any member of his party intended or knew it to be likely that any such serious injury would be caused, in the absence of which, as where the fight was sudden, the only conviction possible is one for simple hurt.[4] Delay in the execution of a capital sentence, say of six months or over, has been held to justify

(21) *Gayan Singh*, (1915) P. L. R. 232, 29 I. C. 49.
(22) *Ghasi*, (1922) P. W. R. 65 I. C. 572.
(23) *Mahadeo*, 9 O. L. J. 597, 74 I. C. 712, (1923) A. I. R. (Oudh) 112.
(24) *Puran*, 3 O. L. J. 19, 33 I. C. 330.
(25) *Pal Singh*, (1917) P. R. 28; 41 I. C. 980; *Syed Batcha*, (1913) M. W. N. 556; 18 I. C. 675; but see *Nga Po Lu*, 4 Bur. L. J. 253; 12 I. C. 292.
(1) *Butari*, 9 M. L. J. 103, 9 I. C. 288.
(2) *Gulab*, 88 I. C. 365, (1925) L. 584.
(3) *Mansha Singh*, 86 I. C. 347, (1925) L. 371.
(4) *Dhani Ram*, (1913) P. L. R. 162, 18 I. C. 664; *Langar*, (1912) P. L. R. 11, 16 I. C. 526.

its commutation.(5) The fact that the conviction is based merely on circumstantial evidence, has been held to justify the mitigation of sentence.(6)

3202. Killing a Witch.—Law does not recognize witch-craft and he who kills a witch commits murder. But if he is a superstitious rustic, the Court views his failing with some leniency and awards him the lesser punishment.(7)

Punishment for murder by life convict.

303. Whoever, being under sentence of transportation for life, commits murder, shall be punished with death.

Session. Cognizable. Warrant. Not bail. Not comp.

Synopsis.

(1) *Analogous Law* (3203-3204). (2) *Procedure and Practice* (3205-3206).

3203. Analogous Law.—This section prescribes the sentence to one convicted of murder while being under the sentence of transportation for life. No other sentence is possible in such a case.(8) Indeed any punishment short of death would be no punishment at all.

The section does not apply to all life-prisoners but only to those under the sentence of transportation for life. Consequently it is inapplicable to Europeans and Americans upon whom the only sentence that may be legitimately passed is that of penal servitude, but not for life.(9) The same remarks apply to a person whose sentence has been committed under s. 55 of the Code or s. 402 of the Procedure Code, or whose sentence has been suspended or remitted under s. 401 of the Procedure Code.

3204. The term "being under sentence of transportation for life" means a person upon whom the sentence of transportation has been passed and which sentence is subsisting, though the convict may not have been actually transported. A person undergoing imprisonment in lieu of transportation would thus be included within the rule.

3205. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

3206. The points requiring proof are the same as those mentioned under s. 302, in addition to which it must be proved that the accused was at the time of the commission of murder under the sentence of transportation.

In other respects the offence is the same as an offence under s. 302.

(5) *Aufar Singh*, 17 C. W. N. 1213; *Abdulla (Nawab)* (1914) P. R. No. 31, 25 I. C. 522 (524).

(6) *Sami*, 13 M. 426, *Vemulacla*, 2 Weir 736; *Adalut*, (1866) P. R. No. 69; *Jai Ram*, (1887) P. R. No. 28; but see *Munlandi*, (1915) M. W. N. 34, 26 I. C. 332.

(7) *Mato Ho* (1921) Pat. 76, 57 I. C. 171; *Seat Ali*, 3 Pat. L. W. 356, 41 I. C. 142.

(8) *Doorjodhun Shamonto*, 19 W. R. 45.

(9) S. 56.

Session. Cognizable. Warrant. Not bail. Not comp.

Punishment for culpable homicide not amounting to murder.

304. Whoever commits culpable homicide not amounting to murder, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

[*Transportation for life*—s. 53. *Intention of causing of death*—s. 299 (§§ 2805-2915). *As is likely to cause death*—s. 299 (§§ 2916-2917.) *Culpable homicide*—s. 299.]

Synopsis.

(1) *Analogous Law* (3207).
(2) *Procedure and Practice* (3208-3210).
(3) *Proof* (3211-3212).
(4) *Form of Charge* (3213).
(5) *Principle* (3214-3216).
(6) *Meaning of Words* (3217).
(7) *Culpable Homicide* (3218-3222).
(8) *Killing Adulterer* (3219).
(9) *Killing Offenders* (3222-3223).
(10) *Act done with Knowledge of Likelihood of Death* (3224-3226).
(11) *Killing in Anger* (3227).
(12) *Killing by Consent* (3228).
(13) *Case for Minor Offence* (3232).

3207. Analogous Law.—This section prescribes the sentence for the offence of culpable homicide not amounting to murder, the sentence varying according to the offender's intention or knowledge. This section provides a sentence for an offence which is termed "manslaughter" in English Law. But the English term is wider and would embrace cases now comprised in the next section (s. 304-A).

3208. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable and is exclusively triable by the Court of Session. The offence may be tried both where the injury was inflicted as well as where the injured died.(10) Some general remarks have already been made as to the duty and powers of the committing Magistrates in respect of murder and culpable homicide. As regards their power of committal, it has been said that in cases of serious injury resulting in death, the Magistrate should only convict of a minor offence, when he is clearly of opinion that the facts do not conceivably disclose an offence, under this section. In case of death resulting from a violent attack, the only course commendable

(10) S. 179, ills. (*a*) and (*d*), Cr. P.C.

is to commit the case to the Court of Session.[11] But this does not divest the Magistrate of his discretion. He should examine all the facts and while he should not perfunctorily commit cases which he could have disposed of himself, he should not hastily take upon himself jurisdiction in cases which should have been tried by the Sessions Judge.

3209. It is the duty of the prosecution to prove all facts essential to establish the offence of the accused. Where, for instance, he is charged for murdering a police officer whilst he was lawfully arresting him as a proclaimed offender, it is his duty to produce the papers justifying the arrest, failing which the accused would be entitled to the benefit of exception 2 to section 300.[12] The fact that the offender is convicted of this offence does not entitle him to receive less than a deterrent sentence.[13]

It will be noted that the sentence allowable under the first clause of this section is transportation for life or imprisonment for ten years. It does not warrant transportation for a longer period than the maximum of term of imprisonment to which the offender is liable.[14]

Charge to the Jury.

3210. In charging a jury in a case of culpable homicide under this section, the Judge should call upon the jury to state under which of the two clauses they find the accused guilty, as the two clauses provide for distinct cases and prescribe different punishments. In case the Judge omits to require the jury to do this, the High Court would feel justified in convicting only under the second clause.[15]

3211. Proof.—The points requiring proof are:—

(1) The death of a human being.

(2) That it was caused by the accused by doing an act—

(*a*) with the intention of causing death, when the case does not fall under any of the clauses of s. 300; or

(*b*) with the intention of causing such bodily injury as is likely to cause death; or

(*c*) with the knowledge that he is likely by such act to cause death.

3212. Having regard to the varying sentences to which the offender is liable according to the "intention" or "knowledge" of the offender, it is necessary that facts proving mental consciousness of the offender should be clearly proved. This may be done by one of the modes pointed out under s. 298 where the subject will be found generally discussed.

3213. Charge.—The charge should run thus:—

(11) *Gopinath Shah*, 1 C. L. R. 141, (1881) H. C. P. 1 Weir 288 (289).
(12) *Kayambu*, 32 I. C. (M.) 670.
(13) *Hiralal*, 61 I. C. (A.) 165.
(14) S. 59; *Satyapureddi*, 40 M. L. J 194 P. C., 59 I. C. 926 P. C.
(15) *Ameer Khan*, 12 W. R. 35.

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you——committed culpable homicide not amounting to murder [by causing the death of——with the intention of causing his death on a grave and sudden provocation (*or as the case may be*)] and thereby committed an offence punishable under s. 304, clause 1 [*or* clause 2 (*as the case may be*)] of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).(16)

"And I hereby direct that you be tried by the said Court on the said charge."

3214. Principle.—Of offences involving loss of human life, culpable homicide ranks, in point of gravity, next only to murder, but the punishment prescribed therefor varies within a wide range from transportation for life to a mere fine. It will thus be seen that in the eye of the law culpable homicide may proportionately vary in its gravity and criminality from an offence approaching almost a murder to a delict in which a small fine may be an adequate punishment. But though the offence is so comprehensive, it is not necessarily so simple, and the question whether an offence is this offence depends as much upon whether it is not more or less as upon the exact definition of the term as given in s. 299. But as this offence has been defined in the Code, other considerations are subordinate to those of the offender's knowledge or intention at the time of the commission of the offence. That question is paramount, both for the purpose of determining the nature of the offence, as well as for determining the measure of sentence to be passed on the accused. Indeed, it is a part of the Code that there can be no crime without criminal consciousness, and it is therefore the first thing that the prosecution are called upon to establish in a case of culpable homicide whether it does or does not amount to murder. Under English Law, the first ingredient of such a crime is "malice"; but the question of "malice" has only a subordinate place in the Code. It is not even a part of the accepted definition of the offence. And the framers have wisely steered clear of that word the legal significance of which is somewhat at variance with its popular significance.(17)

3215. In law malice may be express or implied, the former expression meaning a sedate deliberate mind and formed design, the latter implying no definite state of the mind but as may be assumed from a deliberate cruel act committed by one person against another.(18)

The word "malice" has had a long history, but in its present legal sense it denotes a wrongful act done intentionally without just or lawful excuse.(19) In this sense, it closely approaches the terms employed by the Code in the definitions of murder and culpable homicide. But whatever may be their close analogy, the offence here defined must be

(16) Words enclosed within crochets in the above form are not required by the form set out in Sch. V, Form XXVIII. But it is submitted that they are necessary to give the accused notice of the case he is called upon to meet.

(17) *Per* Best, J., in *Harvey*, 2 B. and C. 268.

(18) 1 Hale P. C. 451; 4 Black. 199.

(19) *Per* Littledale, J., in *MacPherson* v. *Daniels*, 10 B. & C. 272, approved by Cresswell, J. in *Noon*, 6 Cox. 137.

judged by the light of intention and knowledge apart from motive or malice. Motive may, no doubt, be referred to for the purpose of establishing the existence of criminal consciousness, for motive is the main spring of human action, but motives of men are many and varied and they often lie hidden deep in the bosoms of men and cannot be conjectured. All that law can do is to go as far as his knowledge and intention. It could not do less, for, to punish a man for an act neither intended nor known would be as meaningless as it may be mischievous. It would deter none from the commission of crime, nor purge society of its pests. On the other hand, by making persons responsible for their irresponsible acts it will bring law into contempt and defeat the very purpose for which it is promulgated.

3216. Criminality has thus been rightly grounded on knowledge and intention, but how are they to be proved? Only external and visible acts, which are the outward symbols of innate consciousness, observation and experience, enable us to judge of the connection between men's conduct and their intentions. But such generalizations though necessary have their due limits. As Lord Bacon said in his *Novum Organum*: "The human mind has this property that it readily supposes a greater order and conformity in things than it finds; and although many things in nature are singular and entirely dissimilar, yet the mind is still imagining parallelled correspondence, and relations between them which have no existence."(20) This natural propensity cannot be too closely watched. It leads to misinterpretations and misunderstandings which, in an offence so comprehensive as homicide, may lead to serious failure of justice.

3217. Meaning of Words.—"*With the intention of causing death*": To begin with, the offence must fall under s. 299. Then if the death was caused intentionally, the graver sentence prescribed in the first paragraph applies. "*Knowledge that it is likely to cause death*" ordinarily implies that the offender had no intention of injuring any one in particular.(21)

3218. Culpable Homicide.—The offence of culpable homicide not amounting to murder is a highly technical offence, the elements of which are not all to be found in the definition of the term in s. 299, nor, indeed, is that definition complete or conclusive so far as it goes. For as is pointed out in the very next section, all culpable homicide committed under the special circumstances detailed therein is murder—the result then is that only those offences which are not murder are culpable homicide. This term is thus a *genus* of which the offence of murder is a *species;* what constitutes homicide must then be taken with reference to which homicide constitutes murder, for which purpose it is necessary to examine both the sections in each case of homicide or murder presenting itself for analysis. This must be done having regard to what is common to the offences and what is special to each of them.

The offence of culpable homicide is thus an offence which may or may not be murder. If it is murder, it is culpable homicide amounting to murder, for which the punishment is that prescribed in s.

(20) Aphorism, 45; *cf.* Bacon's Advancement of Learning, Bk. 2.

(21) *Shee Ein*, 3 L. B. R. 122; *Nga Tun*, 35 I. C. 511.

302. This section deals with cases not covered by that section, and it divides the offence into two distinct classes, that is (*a*) those in which the death is *intentionally* caused; and (*b*) those in which the death is caused *unintentionally* but *knowingly*. In the former case the sentence of imprisonment is compulsory, and the maximum sentence admissible is transportation for life. In the latter case, imprisonment is only optional, and the maximum sentence extends only to imprisonment for ten years. The first clause of the section includes only those cases in which the offence is really murder, but it is mitigated by the presence of circumstances recognized in the exceptions to s. 300[22]; the second clause deals only with cases in which the accused has no intention of injuring any one in particular.[23]

Killing the Adulterer.

3219. In awarding sentence under the last section, the same considerations do not necessarily weigh with the Court. But at the same time, the absence of intention (as in clause 4 of s. 300) is a consideration which the Courts regard in practice as sufficient to justify the passing of the alternative sentence prescribed for that offence (s. 302). The discrimination here given is thus based upon a consideration which may as well be extended to the capital crime. But there are cases in which the intention to cause death receives even a more sympathetic mitigation than death caused without intention, but with knowledge. For instance, the Courts have unexceptionally treated with compassionate consideration the intentional causing of death of an adulterer of his wife found *flagrante delicto*, and which has sometimes resulted in the infliction of a nominal sentence when the provocation was aggravated by the presence of the adulterer in the accused's own house and after repeated warnings. On the other hand, a person unintentionally causing the death of another by a dastardly or brutal assault has always deserved the utmost severity of law. Legal punishment has therefore often to be varied according to notions of social morality. In England, adultery is no crime—in India it is a crime almost justifying homicide.

3220. In cases of homicide falling under any of the exceptions to s. 300, the *quantum* of punishment must vary with the *quantum* of mitigation. So again, a homicide whose offence falls under any of the explanations to s. 299 is, comparatively speaking, entitled to more consideration than another. In such cases the Court takes into consideration the absence of intention, the nature of the act and the cause which impelled it to the amount of violence actually used, the nature of the weapon used and the mode of using it. A person, who killed with a single blow of his *dao* a midnight intruder into his house for the purpose of having criminal intercourse with his wife, was held to have been guilty only of grievous hurt on grave and sudden provocation, and was let off with an imprisonment for a term of one year only. But the result would have been very different, indeed, if the same treatment had been meted out to, say, a tax-collector or a bailiff of Court entering his house to execute a decree, or an officer of police to apprehend a proclaimed offender.[24] The prisoner had caught his

(22) *Masti*, (1911) P. R. No. 3, 10 I. C. 852.

(23) *Nga Tun*, 35 I. C. (R.) 511.

(24) *Ditta*, (1869) P. R. No. 31.

wife in the act of adultery with her paramour and killed them both with a single blow, after which he went on dealing further severe blows. In doing so he was held to have acted in a cruel and brutal manner, and he was, therefore, transported by the Sessions Judge, but on appeal, his sentence was reduced on the ground that it would not be just to apply the ordinary stand-point of reason to the conduct of a man infuriated by grave provocation and deprived of self-control.(25)

3221. The same view was taken in another case in which the accused was the donkey-driver of one J with whom he and his wife lived. Accused knew that J had an intrigue with his wife. One morning J ordered the accused to go out with the donkey, which he did, but suspecting that J's real object was to get rid of him and to have sexual intercourse with his wife, he left the donkeys in charge of another, and returned himself to the house. Finding the door of his room shut, he pushed it open and discovered J having intercourse with his wife. He fetched a chopper from another room and dealt his wife several savage blows about the head and killed her. J meanwhile contrived to escape. His case was held to be covered by Exception 1 to s. 300, and he was convicted under the first clause of this section.(1) The case would have been scarcely any different even if the accused had caught him immediately after the act.(2)

That such provocation is the gravest of provocations which mortal man can receive is universally acknowledged, and the Courts are, therefore, specially lenient with an offender who avenges such insult by slaying the adulterer or fornicator of his female relative. But if the means employed for taking such revenge are cruel and brutal, the Court does not regard the accused entitled to the same commiseration. Such was the case of the accused who having caught the deceased in the act of adultery killed him by strangulation, and upon which the accused killed the deceased in an unusually brutal and determined manner, and the sentence could only be reduced to three years under the first part of this section,(3) though the sentence of one year's rigorous imprisonment was held to be sufficient in a similar case in which the accused had caught the deceased in the act of adultery with his married sister, and killed him by striking him one blow with a stick, fracturing his skull.(4)

Killing Offenders.

3222. The same sentence was meted out to another who had caught the deceased stealing his crop on a dark night, and who thereupon pursued the thief who tried to run away and ran his head against a tree and fell. The prisoner hit him recklessly with a stick not of a very formidable dimension, while on the ground, and fractured his skull in two places, causing death. It was held that the accused had exceeded the right of private defence, but inasmuch as the accused's

(25) *Said Ali*, (1890) P. R. No. 8; *Ajudhi*, 2 O. L. J. 463, 30 I. C. 449.

(1) *Fazal*, (1899) P. R. No. 8; *Mahadeo*, 9 O. L. J. 597, 74 I. C. 712, (1923) A. I. R. (Oudh) 112.

(2) *Sharif*, 11 I. C. (R.) 993; *Balla*, (1913) P. R. No. 3, 9 I. C. 208.

(3) *Sahib*, (1900) P. R. No. 27; *Hiralal*, 61 I. C. (A.) 165 (sentence 5 years); *Muhammad Yar*, 3 L. L. J. 40, (1924) A. I. R. (L.) 62; *Marimuthu*, (1923) M. W. N. 769, 73 I. C. 961 (case of wife murder).

(4) *Fazal Dad*, (1904) P. R. No. 4.

crop had been previously stolen, and he was naturally incensed, his offence was committed under extenuating circumstances not calling for more than a lenient sentence.(5) In another case on the same facts the accused was altogether exonerated,(6) and it was thrown out that even if the accused exceeded the right of private defence, a very light punishment would have had sufficed to meet the ends of justice.(7) Similarly death caused in the heat of passion in a sudden fight is viewed with some lenity.(8)

3223. A was ill-treating his wife, and was consequently pursued by a number of villagers including the village-headman. The accused met A and tried to stop him. A hit the accused on the head with a bamboo, and the accused in return gave A a fatal blow on the neck which severed his carotid artery and caused his death. The accused was convicted under the first part of this section.(9)

3224. Act Done with Knowledge of Likelihood of Death.— Again, there is the recognized difference in criminality between an intentional act and an unintentional act done with the knowledge of the consequences. Such an inference may be drawn from an act negativing an intention to cause death, as where a police-officer tortures a prisoner in his custody with a view to extorting his confession, in which case there can be no intention to cause death, but there may be knowledge of the likelihood of death. The accused, who had committed lurking house trespass by night, in trying to make good his escape, struck out wildly with a dangerous weapon his pursuers, killing one of them, and the Court convicted him under this section.(10) The same view was taken in a converse case, where the accused and the deceased had quarrelled over the stealing by the deceased of some crops, whom the accused strangled to death with his hands.(11) So it was held to be homicide falling short of murder, where the dacoits had stuffed a cloth into the deceased's mouth with a view to silence him, but of which he died.(12)

Clause (2).

3225. The same view would probably be taken of a person who hits another taking care not to hit him in a vital part. Accused went to shoot in the jungles; an altercation arose between him and the deceased, the former interfering to prevent the latter from committing real or supposed cattle trespass; the deceased thereupon attacked the accused with a large club, who fired without any aim, but lowering the muzzle of his gun, so as not to hit a vital part, but death ultimately resulted from the wound inflicted. It was held that the act of the accused was not a legal exercise of the right of private defence, as it was not necessary for his defence that he should fire, as he had only to stand back and let the deceased alone, and he was safe; but at the same time the

(5) *Bag*, (1902) P. R. 29, distinguishing *Mokee*, 12 W. R. 15; to the same effect, *Kallu*, 64 I. C. (A) 133; *Sundar Singh*, (1912) P. W. R. 6, 19 I. C. 318.
(6) *Mokee*, 12 W. R. 15.
(7) *Mokee*, 12 W. R. 15 (16).
(8) *Sowaroo*, (1866) P. R. No. 105: *Karm*, (1893) P. R. No. 5; *Rahmat*, (1902) P. R. No. 30.
(9) *Nga Tun Nyein*, 38 I. C. 316.
(10) *Gujjar*, (1911) P. R. No. 12, 12 I. C. 967.
(11) *Sundar Singh*, (1912) P. L. R. 68, 15 I. C. 318.
(12) *Sengoda*, 18 M. L. T. 103, 30 I. C. 438.

offence committed was one which was only punishable under this clause.[13]

The same view was taken of the two accused who went out armed with sticks and lay in wait for a man who had enticed away their relation, and when he came up, beat him on the chest and back, but avoided hitting him on the head. The deceased died of the injuries inflicted. The Sessions Judge convicted the accused of murder, but on appeal it was modified to one under this clause having regard to the fact that they had avoided hitting him on the head.[14] The accused Hussein had for some time suspected his wife of criminal intrigue with the deceased. His friend K gave him information that the deceased had made an assignation with Hussein's wife. Hussein and K went to the appointed place, the former armed with a stick. They caught the deceased in the act of committing adultery with his wife. He pursued the deceased for 50 paes and than struck and killed him, after wards turning upon his wife, who had been held by K, wounded her severely. Hussein was convicted of murder, and K of its abetment.

3226. In the course of a quarrel which arose out of the felling of a tree, the accused Gujan struck the deceased with sticks causing his death. The Court held that it did not appear that in attacking the deceased there was present in the mind of the accused anything more than a knowledge that he was likely to cause grievous hurt, and the accused was consequently sentenced to two years' rigorous imprisonment.[15] A similar view has been taken in other cases.[16] The same view was taken of the two accused whose father had a quarrel with the deceased as a result of which he was discharged from the mill in which the accused were also employed. The deceased was proved to have entered the mill and threatened the accused, whereupon they lost their temper, but after the deceased had withdrawn followed him and struck him on his head from behind a violent blow with a ferruled stick, killing him within a few hours. The Court convicted the accused under this section, holding their act to have been prompted by a sudden passion due to the provocation given by the deceased.[17] Where death is caused by blows struck to the deceased by several accused persons and it cannot be made certain which blow was struck by any individual accused, the conviction of any of them under this part cannot be maintained.[18]

Killing in Anger.

3227. In cases where death is caused by a single blow, given in anger on the impulse of the moment with a weapon not lethal in its nature, the question whether the injury was inflicted with the intention or knowledge of

(13) *Kureem Buksh*, (1868) P. R. No. 13; *Nga Tun*, 35 I. C. (R.) 511.

(14) *Faqir Muhammad*, (1890) P. R. No. 10; *Bakhshish Singh*, 86 I. C. 826; (1925) L. 549; *Beli*, 7 L. L. J. 524, (1925) L. 621.

(15) *Gujan*, (1893) P. R. 18.

(16) *Chandan Singh*, 40 A. 103; *Deik Singh*, 17 A. L. J. 56, 49 I. C. 169; *Ramzan*, (1920) P. W. R. 2, 54 I. C. 51; *Waryam Singh*, 72 I. C. 611; *Dayal Singh*, 5 L. L. J. 228, 71 I. C. 52, (1914) A. I. R. (L.) 47; *Jahana*, (1916) P. L. R. 109, 36 I. C. 131; *Dalip Singh*, L. L. J 44, 86 I. C. 341; (1925) L. 318.

(17) *Sardar Khan*, 41 B. 27; *Maung Aung Tun*, 36 I. C. 592; *Kunda Singh*, (1914) P. L. R. 3, 22 I. C. 754.

(18) *Jahana*, (1916) P. L. R. 109, 38 I. C. 131; *Niamat*, 86 I. C. 337, (1925) L. 117.

causing death is one of fact and not of law, and the finding must, therefore, depend upon a consideration of all the facts and circumstances of each case. The accused had two wives one of whom was reduced to a poor condition of health owing to his ill-treatment. She was one day found suffering from a serious injury of which she died. It was held that being in the house of the accused it was on him to account for the injury and his failure to do so was sufficient to incriminate him of this offence for which he was sentenced to imprisonment for 10 years.(19) The deceased had a domestic quarrel with his wife about her having given away in marriage one of their daughters to a man of whom the accused disapproved, in consequence of which he struck her a blow with a pole on her head of which she died. The Sessions Judge held that having regard to the deadly instrument and the violence of the blow the case of the accused fell under clause 3 of s. 300 and he was accordingly convicted of murder, but on appeal his conviction was altered to one under this clause.(20)

In another case the prisoner quarrelled with his wife who was dilatory in the performance of her household duties. He exchanged abuses with her, and acting on the spur of the moment he seized a heavy hammer lying hard by and with it gave her a blow on the side of her head from which she died. He was convicted under this clause.(21) These cases were no doubt decided in the way they were on account of the trifling nature of the quarrel and the absence of any motive for causing death. Such was the case of the followers of a Rajput zemindar who being assaulted by a mahar tenant could not restrain their passion, set upon him and beat him with lathis which caused his death.(22) In the course of a faction fight the accused inflicted a fatal wound on the deceased, who was not actually engaged in the fight, and who had cried out that he was unarmed. It was held that in the heat of passion it is possible that the accused may not have heard, and if heard, not believed that the deceased was unarmed and that therefore his case was entitled to the benefit of the fourth exception to s. 300 and the sentence of death passed on him was consequently reduced to transportation for seven years.(23)

Killing by Consent.

3228. Incredible though it may seem, the accused had himself confessed that he had killed his stepfather, an invalid old man, who agreed to his being so killed, because the accused wanted to implicate three or his deadliest enemies of his murder. The case was held to be covered by Exception 5 to s. 300 and the accused was awarded transportation for life.(24)

3229. The accused, an adult, tried to have sexual intercourse with his immature child-wife. In doing so he ruptured her vagina and destroyed the partition between the vagina and the rectum in consequence

(19) *Rahim Dad*, (1913) P. W. R. 3, 19 I. C. 715.

(20) *Karm*, (1893) P. R. No. 5; *Sardar Khan*, 41 B. 27, but see *Mammum*, (1916) P. R. No. 35.

(21) *Rahmat*, (1902) P. R. No. 30, following *Karm*, (1893) P. R. No. 5.

(22) *Jaipal Kunbi*, 66 I. C. (N.) 665, (1922) A. I. R. (N.) 141.

(23) *Nga Thwe*, 4 Bur. L. T. 17, 11 I. C. 656.

(24) *Ujagat Singh*, (1917) P. R. No. 45, 42 I. C. 413.

of which she died. He was held to have brought himself under the provision of this section in that he did a dangerous act with wanton disregard as to the consequence to his wife and so caused her death.(25)

3230. It is said that in cases of death caused by reckless violence but without premeditation, a safer criterion to determine the question whether the accused is guilty of the offence of murder or of culpable homicide is to look to the nature of the weapon more than to the nature of the injuries inflicted.(1) But in such cases the nature of weapon is but an accident. The nature of the weapon used is no doubt relevant, but what is more relevant is the frame of the accused's mind, the number and nature of the injuries(2) and the part of the body selected for inflicting them. Where, for example, in a sudden quarrel with the deceased, the accused seized him by the testicles and squeezed them with considerable force for a considerable time from the effect of which he died. It however, appeared that the injury was not in the ordinary course sufficient to cause death; but it had that effect because the deceased was "in an unsound bodily condition." The accused was convicted of hurt.(3)

3231. Lastly come acts causing death, but in which there is neither intention nor knowledge. They are now provided for by the next section to be presently considered.

3232. Case for Minor Offence.—From what has been stated before, it will be obvious that where there is neither intention, knowledge, nor likelihood that the injury will or can result in death, the offence would be neither murder, nor culpable homicide not amounting to murder, though it might amount to the voluntary causing of grievous hurt with or without dangerous instrument, punishable either under s. 325 or s. 326. Such was the case of one Mohiuddin, a young man aged 21, who had stabbed, one Dina with a pen-knife four inches long. It appeared that while the accused was having a petty quarrel with another, Dina came along and asked the accused to desist, whereupon the latter turned round upon the peacemaker, who being a wrestler threw the accused down and gave him a beating. In the fight Dina's shirt was torn, and he in turn snatched away the accused's turban. Dina asked the accused to mend his shirt and the accused is said to have replied that he would finish him by the evening, when they met again. Accused again demanded the return of his turban, caught him by the neck and stabbed him in the abdomen with a pen-knife of which he died. The Court found that the injury was "only one, and it was a matter of pure accident that the blow was struck in a tender region, the result of which could not ordinarily have been foreseen by anyone not fully conversant with the anatomy of the human body." In the result the accused was convicted under s. 326 and sentenced to imprisonment for three years.(4)

(25) *Shahu*, 11 S. L. R. 76, 42 I. C. 731.

(1) *Hashim*, 7 S. L. R. 29, 20 I. C. 619.

(2) *Kya Nyan*, 8 L. B. R. 125, 33 I. C. 834.

(3) *Bai Jiba*, 19 Bom. L. R. 823, 42 I. C. 754.

(4) *Ghulam Muhiuddin*, 3 L. L. J. 581. 53 I. C. 450; see *also Ram Asre*, 26 O. C. 18, 73 I. C. 49, (1923) A. I. R. (Oudh) 97.

In another case where the deceased had been struck several blows with a piece of firewood and the injuries inflicted were: (1) a contused wound on the head which was not of a dangerous character, and had nothing to do with the man's death, (2) bruises and abrasions, (3) fractures of two ribs, and (4) rupture of the spleen; and according to the medical evidence the spleen was not that of a healthy man, and the injuries inflicted and even the fracture of the ribs, would probably not have ruptured the spleen if it had been healthy, or caused the man's death in the ordinary course of nature, the conviction was altered from one under this section to one under s. 325.(5)

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Bailable. Not comp.

Causing death by negligence.

304-A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis.

(1) *Analogous Law* (3233-3234).
(2) *Procedure and Practice* (3235).
(3) *Proof* (3236).
(4) *Form of Charge* (3237).
(5) *Principle* (3238).
(6) *Meaning of Words* (3239).
(7) *Causing Death by Rash and Negligent Act* (3240-3241).
(8) *What is Rash or Negligent Act* (3241).
(9) *Direct Violence Excluded* (3242).
(10) *There must be Absence of Intention or Knowledge of Consequence* (3243-3244).
(11) *Rash or Negligent Act must Cause Death* (3245).
(12) *Only Gross Negligence Culpable* (3246-3248).
(13) *Death by Coercion or Fraud* (3249).
(14) *Care in Shooting and Driving* (3253).
(15) *Negligent Use of the Public Way* (3254).
(16) *Case for Special Care* (3255-3256).
(17) *Lawful Acts Improperly Done* (3257).
(18) *Killing by Improper Medicine or Surgery* (3258-3259).
(19) *Death by Love Potion or Charm* (3260).
(20) *Negligence only Criminal If Diligence would have Saved* (3261-3262).
(21) *Negligence by Illegal Omission* (3263-3264).
(22) *Where Consequence is Too Remote* (3265-3271).
(23) *Contributory Negligence Why Relevant* (3272-3273).
(24) *Contributory Negligence How Far Irrelevant* (3274-3276).

3233. Analogous Law.—The offence here described has no corresponding name in English Law. It no doubt falls under the more comprehensive category of "manslaughter," but that term is used in

(5) *Mahabir*, 19 A. L. J. 295.

English Law to designate offences which are not only comprised in this section but those which are punishable as culpable homicide not amounting to murder. In the view of English Law manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature.(6) Murder is unlawful homicide with malice aforethought, manslaughter is unlawful homicide without malice aforethought,(7) as such.

3234. This section was added to the Code by the Amending Act of 1870(8) which extends to it Chapters IV (General Exceptions, ss. 76-106), v. (Abetment, ss. 107-120) and XXIII (Attempts, s. 511).(9) This supplies an omission providing for the offence of manslaughter by negligence, and which was provided for by the following clauses in the draft Code, but which appears to have been unaccountably omitted from the Code when it was finally enacted:—

"304. Whoever causes the death of any person by any act or any illegal omission, which act or omission was so rash or negligent, as to indicate a want of due regard for human life, shall be punished with imprisonment of either description for a term which may extend to two years, or fine, or both.

"305. If the act or illegal omission, whereby death is caused in the manner described in the last preceding clause, be apart from the circumstance of its having caused death, an offence other than the offence defined in clause 327 or an attempt to commit an offence, the offender shall be liable to the punishment of the offence so committed or attempted, in addition to the punishment provided by the last preceding clause.

"*Explanation.*—In cases in which the doing of a certain thing and the attempting to do that thing are distinct offences, if the offence defined in the last preceding clause be committed in the attempting to do that thing, the additional punishment to which the offender is liable is the punishment not of attempting to do that thing, but of doing that thing.

"*Illustration.*

"*A* uses force to *Z*, a woman, intending to ravish her. He does not ravish her but commits the offence defined in clause 304. Here the term of imprisonment to which *A* has made himself liable is to be regulated not by the term of imprisonment assigned to the offence of attempting to ravish, but by the term of imprisonment assigned to actual rape, that is to say, *A* is liable to rigorous imprisonment for a term of not more than sixteen nor less than two years."

3235. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first class. Where an accused was charged with culpable homicide and the evidence showed that the deceased had an enlarged spleen, and that his death was caused by rupture of the spleen occasioned by blows inflicted by the accused on the body of the deceased, it was held that it was not sufficient in order to find the accused guilty of a rash act under s. 304-A of the Code, that the jury should be satisfied only of the prevalence of the disease of enlargment of the spleen in the district, and infer therefrom criminal

(6) 1 East P. C. 218; Foster Cr. L. 290.
(7) *Doherty*, 16 Cox. 306.
(8) Indian Penal Code Amendment Act (XXVII of 1870), s. 12.
(9) *Ib.*, s. 13.

rashness in beating the deceased; but that they should also be satisfied that the accused was aware of the prevalence of such disease in the district, and also aware of the risk to life involved in striking a person afflicted with that disease.(10)

3236. Proof.—The points requiring proof are:—

(1) That death of a human being.

(2) That the accused caused his death.

(3) That the death was caused by the doing of a rash or negligent act.

(4) That the said act did not amount to culpable homicide.

3237. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you——caused the death of——by doing an act to wit——which was a rash (*or* negligent) act not amounting to culpable homicide, and thereby committed an offence punishable under s. 304-A of the Indian Penal Code, and within my cognizance (*or* of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) for the said offence."

3238. Principle.—This section presents in an attenuated form the offence of homicide, which is designated in English Law manslaughter by negligence. Taking this section with those punishing homicide, the Code punishes three classes of homicide, that is murder, culpable homicide and homicide by negligence. The last belongs to the class of offences which, when not causing death, are also otherwise punishable as public nuisances.(11) The degree of criminality in each case depends solely upon the mentality of the accused, and not upon the nature and effect of the act; death is caused in each case but the nature of criminality in each case differs. In the first case where there is sedate deliberation, law esteems it a murder; in the second case where that deliberation is not wholly unreasonable, law esteems it a crime of a lower order, and where there is no deliberation at all, the offence is viewed with still greater leniency. This section applies to all acts, which are not criminal in themselves, but are punishable by reason of death being caused.(12)

3239. Meaning of Words.—"*Whoever causes death*," for the meaning of which *see* s. 299. "*Any rash or negligent act*" includes any act done rashly or negligently,(13) but not intentionally or designedly.(14) A rash act is primarily an over-hasty act, and is thus opposed to a deliberate act, but it also includes an act which, though it may be said to

(10) *Safatulla*, 4 C. 815.
(11) Ss. 279-289.
(12) *Mehri Ilahi*, (1911) P. W. R. 26, 12 I. C. 93.
(13) *Morgan*, 36 C. 302.
(14) *Istlingappa*, 14 Bom. L. R. 887, 17 I. C. 542; *Kure*, 16 A. L. J. 615, 51 I. C. 677; *Gajar*, (1911) P. R. No. 12, I. C. 967; *Pal Singh*, (1917) P. R. No. 28, 41 I. C. 980.

be deliberate, is yet done without due deliberation and caution.[15] Negligence is the breach of a duty caused by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do[16] (§ 2756).

3240. Causing Death by Rash or Negligent Act.—In the last chapter dealing with rash or negligent act constituting public nuisances[17] a general view of the doctrine of criminal negligence has been presented. In this section the offence is the same but it is aggravated by the fatal result, and in consequence of which the Code has treated it as a distinct offence. It corresponds exactly to what is designated in English Law as manslaughter by negligence. According to Stephen, J., "Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished. Suppose a man performed a surgical operation, whether from losing his head, or from forgetfulness, or from some other reason, omitted to do something he ought to have done, or did something he ought not to have done, in such a case there would be negligence. But if there was only the kind of forgetfulness which is common to everybody or if there was slight want of skill, any injury which resulted might furnish a ground for claiming civil damages, but it would be wrong to proceed against a man criminally in respect of such injuries. But if a surgeon was engaged in attending a woman during her confinement, and went to the engagement drunk, and through his drunkenness neglected his duty, and the woman's life was in consequence sacrificed, there would be culpable negligence of a grave kind. It is not given to every one to be a skilful surgeon, but it is given to every one to keep sober when such a duty has to be performed."[18]

(1) What is a Rash or Negligent Act.

3241. So Holloway, J., pointed out the distinction between culpable rashness and culpable negligence. "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness *(luxuria)*. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death. To say that because in the opinion

(15) *Nga Myat Thin*, (1898) P. J. L. B. 426.
(16) *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 784.
(17) Ss. 279-289.
(18) *Doherty*, (1887) 15 Cox 306 (309).

of the operator, the sufferer could have borne a little more without death following, the act amounts merely to rashness because he has carried the experiment too far, results from an obvious and dangerous misconception."[19]

(2) Direct Violence Excluded.

3242. Where therefore, in a quarrel with his wife the accused struck her one or more blows on the left side with a heavy stick, which ruptured her spleen, causing her death within an hour, the accused could not be said to have caused it by doing a rash or negligent act within the meaning of this section. In such an act the hurt caused was voluntary and its severity made it grievous. The rupture of the spleen was an accident. The accused was therefore guilty of voluntarily causing grievous hurt under s. 325 and not of an offence under this section.[20] Speaking of this case Straight, J., said: "Now, it is to be observed that s. 304-A is directed at offences outside the range of sections 299 and 300, and obviously contemplates those cases into which neither intention nor knowledge of the kind already mentioned enters. For, the rash or negligent act which is declared to be a crime is one 'not amounting to culpable homicide,' and it must, therefore, be taken that intentionally or knowingly inflicted violence, directly and wilfully caused, is excluded. Section 304-A does not say every unjustifiable or inexcusable act of killing not hereinbefore mentioned shall be punishable under the provisions of this section, but it specifically and in terms limits itself to those rash or negligent acts which cause death, but fall short of culpable homicide of either description. According to English Law, offences of this kind would come within the category of manslaughter, but the authors of our Penal Code appear to have thought it more convenient to give them a separate *status* in a section to themselves, with narrower range of punishment proportionated to their culpability. It appears to me impossible to hold that cases of direct violence, wilfully inflicted, can be regarded as either rash or negligent acts. There may be in the act an absence of intention to kill, to cause such bodily injury as is likely to cause death, or of knowledge that death will be the most probable result, or even of intention to cause grievous hurt, or of knowledge that grievous hurt is likely to be caused. But the inference seems irresistible that hurt at the very least must be presumed to have been intended, or to have been known to be likely to be caused. If such intention or knowledge is present, it is a misapplication of the term to say that the act itself, which is the real test of the criminality, amounts to no more than rashness or negligence. In the present case the evidence is clear that the blow was wilfully and consciously given to the deceased woman by the accused; and he obviously, therefore, committed an assault at the very least. The consequences that resulted from it could not change a wilful and conscious act into a rash or negligent one; but their relevancy and importance, as indicating the amount of violence used, bore upon the question as to the character of the intention or knowledge to be presumed against the accused. Although I do not pretend for a moment to exhaust the category of cases that fall within section 304-A

(19) *Nidamarti Nagabhushanam*, 7 M. H. C. R. 119.

(20) *Idu Beg*, 3 A. 776.

I may remark that criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury, or knowing that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences, criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally, or to an individual in particular, which having regard to all the circumstances, out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."(21)

(3) There must be Absence of Intention or Knowledge of Consequence.

3243. This section then does not apply to cases in which there has been the voluntary commission of an offence against the person.(22) If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely, by such act, to cause the actual result. If such knowledge can be imputed, the result cannot be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unforeseen. Acts probably or possibly involving danger to others, but which in themselves are not offences, may be offences under sections 336, 337, 338, or this section, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender, and placed in their appropriate places in the class of offences of the same character.(23) This section must be then held to exclude all cases of voluntary hurt or offences in which there is an intention to cause hurt, and other acts which are offences in themselves.(24) The section rather applies to acts which, though not in themselves criminal, assume that character by reason of the serious consequence they entail. It would not, for instance, be a rash act for the husband to kick his wife on her back, with a severity causing rupture of the anterior coat of her stomach in consequence of which she died almost immediately.(25)

3244. The same remarks apply to a drunken squabble between the deceased and the accused in which the latter threw the former down and sat upon him, dealing blows about the neck and body, and from which he was released by the arrival of the deceased's wife who seized the accused by the hair of his head and dragged him off her husband. Death was due to the curvature of the spine, probably due to jerking the deceased's head backwards. The High Court held the case to be one of culpable homicide and not of rash act under this section.(1) The offence was certainly not punishable under this section, but it was probably not also a case of homi-

(21) *Idu Begli*, 3 A. 776; To the same effect *per* Ainslie, J., in *Ketabdi Mundul*, 4 C. 764; *Sukaroo Kobiraj*, 14 C. 566; *Hasan*, 2 Bom. L. R. 613; *O'Brien*, 2 A. 766; *Saifulla*, (1882) P. R. No. 15.

(22) *Istlingapa*, 14 Bom. L. R. 887, 17 I C. 542; *Nashkir*, (1913) P. L. R. 259; *Mhd. Ali*, (1913) P. L. R. 187.

(23) *Per* Ainslie, J., in *Ketabdi Mundul*, 14 C. 764.

(24) *Damodaran*, 12 M. 56.

(25) *Ketabdi Mundal*, 14 C. 764; *Bawaji*, (1872) B. U. C. 63; *Randhir Singh*, 3 A. 597.

(1) *Damodaran*, 12 M. 56.

cide, but of hurt, as was held in Bombay on the same facts.[2] The accused, a lad 11 years old, asked his mother to cook some *juari* for him as he was going to the fields. His mother declined and told him to get his wife to do it. He therefore threw a *lota*, which he was then using for cleaning his teeth, and struck her on the side of the head causing a fracture of the left temporal bone from the effects of which she died immediately. It was held that this section was inapplicable, though having regard to the nature of the act the Court refused to annul the conviction and the fine of Rs. 5 inflicted upon the accused.[3] The case was, of course, one of simple hurt.[4]

It was said that this section does not apply to cases where the death occurred, not from the negligent or rash mode of doing the act, but from some result supervening upon the act which could not have been anticipated. As, for instance, where the accused, finding his field being grazed upon by the pigs of the deceased, threw a brick at him which struck him in the stomach rupturing his enlarged spleen causing his death. The blow was not a violent one, as it left no mark on the skin. The only act here done was the throwing of the brick-bat, the contact of which with the accused constituted hurt. His enlarged spleen was an unseen danger. Its effect was to cause, death, but which the accused could not have possibly anticipated or guarded against. It was therefore neither culpable homicide nor any other offence but hurt.[5] And the voluntary causing of hurt ending in death for an unforeseen reason cannot be called a rash or negligent act, nor can the offender be charged with having *caused* death by such act (§§ 3007-3022).

Rash or Negligent Act must Cause Death.

3245. This places emphasis on the word "*causes*" death, a term which has been sufficiently explained before, but which may be once more explained in the sense it has been used in this connection. The word "cause" has of course a wide variety of meaning. Anything contributing to the effect, and but for which the effect would not happen, is the cause of it. But the word, as here used, necessarily means the immediate, proximate and efficient cause, the *causa causans*, and not merely the *causa sine qua non*.[6] Certain women were powdering sulphur in a building hired by the accused. There were some gunny bags used for drying gunpowder lying in the building. Owing to some unknown cause they caught fire and exploded, and three of the women employed there were so seriously burnt that they died, whereupon the accused was convicted under this section, probably on the assumption that he had stacked gonpowder on the premises, but the High Court found no evidence to support this finding. It held that the more probable theory was the catching fire of the gunny bags from a spark from somewhere. But the Court observed that even if it were the case that the accused had stacked gunpowder in the building, the fact that it caught fire in an unknown way would not expose him to the penalty of this section. For "to impose criminal liability on the accused it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must have been the proximate and efficient cause without the intervention of another negligence. It must have been

(2) *Radhika Badru*, (1872) B. U. C. 67. Cf. *Randhir Singh*, 3 A. 597.
(3) *Heera Jeeta*, 3 Bom. L. R. 395.
(4) *Randhir Singh*, 3 A. 597.
(5) *Randhir Singh*, 3 A. 597.
(6) *Omkar*, 4 Bom. L. R. 679.

the *causa causans*, it is not enough that it may have been the *causa sine qua non*."(7)

Only Gross Negligence Culpable.

3246. The negligence in such cases must be what is designated "gross." There must be such an amount of recklessness or negligence as to be something more than normal or ordinary, it must be something which men would at once declare, "Here is a man riding for a fall." It must be something to the danger of which if one drew the accused's attention, this latter might exclaim, "I don't care." It must at once bring into view the possibility of danger—the happening of some catastrophe. It must be something more than a mere omission or neglect of duty, as for instance, the non-repair of a road by the trustees, in consequence of which a person using it got accidentally killed.(8) In order to render a person liable for criminal negligence, there must be something more than mere negligence, for law distinguishes between negligence which originates a civil liability and one the consequence of which is a criminal prosecution. There is, however, no radical difference between the two—the difference is only one of degree, and in many cases it is as difficult to say where the civil liability ends and the criminal liability begins, as, where criminal negligence ends and the wilful mischief begins.(9) So Brett, J., said: "There must be negligence so great as to satisfy a jury that the offender had a wicked mind in the sense of being reckless and careless whether death occurred or not."(10)

3247. There is, moreover, this difference between the two cases, that while the plea of contributory negligence is a good defence to a suit based on civil negligence, it is no answer to a liability for criminal negligence. So Pollock, C. B., told the jury: "The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct; and if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceeding. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view; for, there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life that it admits of no justification wherever life has been lost and the carelessness or negligence of any one person has contributed to the death of another person."(11)

In this case the two accused Swindall and Osborne, were indicted for the manslaughter of one Durose. They were each furiously driving a cart in company, the carts being loaded with pots from the potteries. They appeared to be intoxicated. One or both of them ran over the deceased, for which they were indicted. The autopsy held showed that death was due to a

(7) *Omkar*, 4 Bom. L. R. 679 (682).
(8) *Finney*, 12 Cox 625.
(9) So Denman, C. J., said: "Between wilful mischief and gross negligence the boundary line is hard to trace; I should rather say, impossible. The law runs them to each other, considering such a degree of negligence as some proof of malice."—*Lynch* v. *Nurdin*, 1 Q. B. 29.
(10) *Nicholls*, 13 Cox 75.
(11) *Swindall*, 2 C. & K. 230.

cart wheel having run over the body, but it was not clear whether one cart wheel passed or both. It was contended for the prisoners that in that state of uncertainty neither could be indicted for the offence; but the prosecution maintained that it was perfectly immaterial in law whether one or both carts had passed over the deceased. The prisoners were in company, and had concurred in jointly driving furiously along the road, which being an unlawful act, and as both had joined in it, each was responsible for the consequences, though they might arise from the act of the other. And this view was concurred in by Pollock, C. B., who said: "I think the Counsel for the Crown is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man, whether he be the first or the last, he would be equally liable. The person who runs over a man would be a principal in the first degree, and the other a principal in the second degree."(12)

3248. The accused was indicted for manslaughter in that he was the manager of a coal mine, and as such it was his duty to cause the coal mine in his charge to be ventilated, but that he neglected to cause it to be so ventilated, and in consequence there was an accumulation of noxious gases which exploded, killing the deceased. It was pleaded in defence that it was the duty of one of the persons killed to have reported to the prisoner that an air-heading was required, and that he had not done so. But Maule, J., held this to be no answer, and told the jury: "The questions for you to consider are, whether it was the duty of the prisoner to have directed an air-heading to be made in this mine; and whether, by his omitting to do so, he was guilty of a want of reasonable and ordinary precaution. If you are satisfied that it was the plain and ordinary duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have done it, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter. It has been contended that some other persons were, on this occasion, also guilty of neglect; still, assuming that to be so, their neglect will not excuse the prisoner; for, if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one, who was negligent, to say that another was negligent also, and thus, as it were, to try to divide the negligence among them."(13) There is then no room for the plea of contributory negligence in an offence under this section, the sole question for the jury being—did the negligence of the prisoner materially contribute to the death of the deceased.(14)

3249. Death by Coercion or Fraud.—The fact that the death was the immediate result of an act on the part of the deceased is no answer to the charge of murder, if the act done was involuntary, or such as he was driven to do from a well-grounded apprehension of death. So if a person throw himself into a river to escape the fury of a murderer or robber, and get drowned, the accused would as much be liable for his death as if he

(12) *Swindall*, 2 C. & K. 230.

(13) *Haines*, 2 C. and K. 368. Opposed to this view as to the immateriality of contributory negligence in criminal cases, is that of Willes, J., in *Birchall*, 4 F. & F. 1087, who said that a man could not be prosecuted for negligence if he was not civilly liable for it; but citing this case in *Jones*, 11 Cox 544, Lush, J., said that it was quite at variance with what he had always heard, *see* § 549.

(14) *Swindall*, 2 C. & K. 230; *Haines* 2 C. & K. 368; *Walker*, 1 C. & P. 320; *Kew*, 12 Cox. 355; *Hutchinson*, 9 Cox 555; *Jones*, 11 Cox 544.

had himself slayed him. So Erskine, J., told the jury in such a case that a man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force applied either to the body or the mind; and it then became the guilty act of him who compelled the deceased to take the step.

But the apprehension must be of immediate violence, and well grounded from the circumstances by which the deceased was surrounded; not that the jury must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take.(15) If, for instance, a number of persons were to surround a man and so threaten and frighten him as to make him believe that his life was in danger, and he were to back away from them and tumble over a precipice to avoid them, they will be guilty of murder.(16) Such a case is not incomparable to that of a lady travelling alone in a railway carriage, who upon being surprised by men bent upon robbing or ravishing her, jumps out of the train to escape their fury and is killed. The act in each case is an involuntary act on the part of the deceased, but it is an act rendered necessary to escape from a threatened violence. So the principle in such cases is the same as in the one where the accused knowingly induces another to take poison giving it out to be an elixir and the latter is thereby killed. In each case there is no free consent. In the one case it is brought about by coercion, in the other case by fraud.

3250. The prisoner, a boatman, had overloaded his boat. It was carried by the swell of a steamer against the bows of another steamer which it struck, upon which the passengers in the boat jumped up and tried to lay hold of the steamer, and as a consequence the boat was upset. One witness attributed the catastrophe not to the overloading but to the accused having stood up at the time instead of remaining seated and having the command of the skulls. William, J., told the jury: "If the circumstance of the passengers jumping up really caused the accident, the overloading of the boat was immediately productive of such a result, and thus the prisoner is answerable; for he should have contemplated the danger of such a thing happening. If the fact of the prisoner standing up in the boat was the cause of the catastrophe, then it may be gross negligence on his part to have done so; because he is supposed to be acquainted with the force and velocity of the tide, and the danger of crossing it under the circumstances; on the whole, it is a question for the jury whether the deceased met his death either by the gross carelessness of the prisoner in the management of the boat, or in taking on board a greater number of passengers than it was capable of safely carrying."(17) The boatman who plied an unsound ferry across a river, which got drowned, drowning with it 25 of the passengers, was held to be in the same predicament.(18) But though the ferry boat in another case was found to be overcrowded at the time it overturned and sank causing loss of life, still the ferry-man was acquitted upon its being shown that the boat was seaworthy, and the accident was due to high wind which commenced blowing after it had left its moorings.(19)

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(15) *Pitts*, C. & M. 284; *Hallid*, (1889) L. T. 702; *Martin*, 8 Q. B. D. 54. *Hickman*, 5 C. & P. 151.

(16) *Per* Denman, J., in *Towers*, 12 Cox 530 (533).

(17) *Williamson*, 1 Cox 97.

(18) *Bhutan*, 16 A. 472.

(19) *Raghu*, 1 O. L. J. 711, 26 I. C. 664.

3251. Of course, rashness and negligence are both comparative terms, for, there is no such thing as culpable rashness or culpable negligence in the abstract. They become criminal by reason of their associations and when taken along with other circumstances. For example, there is no rashness in furiously driving on a deserted road where there are no men passing or likely to pass, but such driving in a crowded street would be highly criminal. So also with negligence. The amount of diligence necessary to be used on a particular occasion varies with the necessity of the case. Beyond that, some negligence would be tolerated as due to the frailty of human nature. But if it imperils human life, it would be deemed criminal, for *sic uteri two of alienum non laedas*[20] is a maxim which is of wider applicability than being confined to the civil law.

3252. Persons handling dangerous weapons have therefore need to be specially careful. They must not leave the gun loaded in a place where it is likely to be handled by others ignorant of its nature.

These cases have been already considered (§§ 3130-3133). They all illustrate the same rule, namely, that the amount of care which a person is bound to take must have regard to the safety of others. And this applies to all acts whether lawful or unlawful. But there is this difference in the doing of an unlawful act, that law allows no margin of negligence, which it does in the other case.

3253. Care in Shooting and Driving.—The accused went out shooting in a jungle with the deceased who separated from him. He saw something moving, and taking it to be game fired, without waiting to see what it was, and shot the deceased. He was held guilty under the section.[21] Where two persons were practising at target shooting by the roadside, and a shot from their rifles wounded a man resulting in his death, the Court convicted both of them under this section.[22] The accused, a cart-driver, drove his cart on the south side near to the edge in order the better to see preparations for a festival made on the grounds adjoining the road. In doing so he neglected to look ahead, and as a child finding the cart approaching it attempted to cross it, it was run over and killed, whereupon the accused was convicted under this section, and it was affirmed by the High Court which said: "If the child's death was due to its having attempted to cross the road in front of the cart when to make such an attempt was in itself dangerous, and no necessity to run such risk existed, or if it did exist, was not due to any act or omission on the part of the accused amounting to criminal negligence, then the mere fact that by the exercise of greater promptitude or more caution, the cart might have been stopped in time, would not be sufficient to support a conviction; it is for the prosecution to prove negligence, and to show that the acts of omission of the accused contributed to the result." But there was evidence that in attempting to cross the road the child was attempting to get away from the advancing cart. Hence as he was killed trying to avoid a danger or in reasonable fear of the danger resulting from the negligence of the accused, the latter was respon-

(20) "Use your own property in such a manner as not to injure that of another."

(21) *Nga Pan Gyi*, (1885) S. J. L. B. 308.

(22) *Morgan*, 36 C. 302; following *R. v. Salmon*, 6 Q. B. D. 79.

sible for his death.[23] This view is supported by an English case, in which the prisoner, a driver, sat inside a cart instead of attending to the horses driven, and it crushed a child on the road who was gathering up flowers there. Bayley, J., held that the prisoner by being in the cart instead of at the horses' head, or by its side, was guilty of negligence; and death having been caused by such negligence, he was guilty of manslaughter.[24]

3254. Negligent Use of the Public Way.—The public road is not a race-course whereon to run races, and persons who offend in that respect are naturally held responsible for any mishap that their illegal act may cause. No one has the right to urge his animals on a public road so that they get beyond his control, and it is no defence afterwards to say that the horses had become unmanageable when the accident occurred. Two competing omnibuses were trying to outstrip each other, and the prisoner was seen whipping up his horses just before his omnibus upset. The defence was that the horses took fright and ran away. But Patterson, J., told the jury: "The question is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses; and that depends upon whether the horses were unruly, or whether you believe that they had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however, he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act, he would be answerable; for a man is not to say 'I will race along a road, and when I am beyond another carriage I will pull up.' If the prisoner did really race, and only when he had got past the other omnibus endeavoured to pull up, he must be found guilty; but if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace, that he could not control them? If you are of that opinion you ought to convict him."[25] And which they did. The fact that in such a case the driver had called out to the wayfarers to move out of the way cannot justify the killing of some who lingered behind and got killed, even though he may have been in a state of intoxication. As Garrow, B., told the jury: "If a man drives a cart at an unusually rapid pace, whereby a person is killed, though he called repeatedly such person to get out of the way, if from the rapidity of the driving, or any other cause, the person cannot get out of the way in time, but is killed, the driver is guilty of manslaughter."[1] He added that it is the duty of every man who drives any carriage to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur.[2]

3255. Case for Special Care.—Persons who exercise the right of way have a right which they share with the rest of the community. They are, therefore, bound to see that in exercising it they do not

(23) *Per* Brandt, J., in *Intru Sousa*, (1886) 1 Weir 327 (328).
(24) *Knight's case*, 1 Lew. 168.
(25) *Timmins*, 7 C. & P. 499.
(1) *Walker*, 1 C. & P. 320.
(2) *Ib.*

trench upon the rights of others by incommoding them. They have, therefore, to obey the rule of the road and pace and orders passed to regulate traffic. A person using a road is bound to observe the rule of the road, but if he does not do so, it is all the more necessary for him to use more care and diligence by keeping a better look-out to guard himself against the greater chance of accidents.(3) A person using the road is bound to modulate his pace to suit the traffic, and if he is rash or negligent in this respect and death is thereby caused, he could not be heard to plead that the road was overcrowded.

So, referring to such a plea Perrin, J., told the jury, that this unusual concourse of people, instead of offering any extenuation for the prisoner, or diminishing the criminality of his careless driving, if they found it to have been such, would but be a circumstance to add to it, and that it was his duty as well as of all driving upon such occasions, to take more than ordinary precautions against accidents, and to use more than ordinary diligence for the safety of the public.(4) So if a person breaking an unruly horse, ride him amongst a crowd of people, and the horse kicks and causes death, the rider would be guilty of manslaughter, if it appears that he was heedless and incautious, it being unnecessary to show that he had any intention to do mischief.(5)

3256. Indeed, intention or knowledge is no part of the crime here described. With intention and knowledge there may be murder or culpable homicide, but not this offence.(6) It may then be generally asserted that this offence is applicable only to cases when the death caused is without intention and knowledge, and it is for this reason that the cases draw a distinction between a wilful act and a negligent act, the latter alone being punishable under this section. So if a person, knowing that people are passing along the streets, throw a stone, or shoot an arrow over a house or wall, and a person is thereby killed, it will be manslaughter, though there was no intention to harm any one because the act itself was unlawful.(7) So, where a person came to town in a chaise, and before he got out, wantonly fired his pistols in the street intending no harm, but accidentally a woman got thereby killed, it was held to be manslaughter on account of the act being improper and dangerous.(8) An unmarried girl gave birth to a child, to conceal which she wrapped it up in a cloth, with the result that the child was suffocated and died. It was held that the mother was guilty of an offence under s. 304, and not one under this section, inasmuch as the accused must have known that the way in which she tried to conceal the child was likely to result in its death.(9)

3257. Lawful Acts Improperly Done.—The degree of diligence necessary must then depend upon the necessity of the case. No inflexible rule can be laid down or standard prescribed as to what shall

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(3) *Per* Alderson, B., in *Pluckwell* v. *Wilson*, 5 C. & P. 375. The rule of the road is "Keep to the left," *Leame* v. *Bray*, 3 East R. 593.

(4) *Murray*, 5 Cox 509.

(5) 1 East P. C. 231; *Dant*, (1865) L. & C. 567.

(6) *Pika Bewa*, 39 C. 855; *Istilingapa*. 14 Bom. L. R. 867; 17 I. C. 542.

(7) 1 Hale 475; 1 Hawk, c. 29, s. 9.

(8) *Burton's case*, 1 Str. 481.

(9) *Ammaniammal*, 7 Cr. L. R. 200.

be held to be criminal negligence and what not. The fact that the act or occupation was itself lawful will not excuse its being improperly executed so as to imperil the lives of others. A workman employed in the dismantling of a house has a perfect right to throw down its *debris*, but if a person happens to be killed, because he threw them down without looking out or giving a timely warning, it will be manslaughter. So a workman who, while so employed, threw down a piece of timber crying aloud, "Stand clear" which was heard by all labourers working below, but one, on whom it fell killing him, was held to be guilty of manslaughter.(10)

3258. Killing by Improper Medicine or Surgery.—Persons who practise medicine or surgery may be guilty of rash or negligent acts in the performance of their duties. In this respect there is no difference between qualified surgeons and quacks. As Bayley, J., said: "It matters not whether a man has received a medical education or not. The thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying, that if a man be guilty of gross negligence in attending to his patient, after he has supplied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter."(11) So Lord Hales wrote: "If a physician gives a person a potion without any intent of doing him any bodily hurt, but with intent to cure or prevent a disease and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like, of a surgeon. And I hold their opinion to be erroneous that think, if it be no licensed surgeon or physician that occasions this nuisance, then it is a felony, for physic and salves were before licensed physicians and surgeons, and, therefore, if they be not licensed according to the Statutes, they are subject to the penalties in the Statutes."(12) This view has now become established by the consensus of authorities, and the only question arising in such cases is: Did the accused show "such a gross want of care or such a gross and culpable want of skill,"(13) in the treatment of the case as to make him criminally responsible for the death of his patient. For this purpose the fact that a person totally ignorant of the science of medicine or practice of surgery undertakes the treatment or the performance of an operation, would be material as showing his gross ignorance, from which the jury would be justified in inferring his gross rashness in undertaking to treat or perform the operation.(14) Such inference would be legitimate where the accused had acted from mercenary motive and not a motive of mercy.

3259. So where a person having been discharged from a hospital was recommended to go to the prisoner to get the mercury out of his

(10) *Hull*, Kel. 40.
(11) *Long*, 4 C. and P. 423.
(12) 1 Hale, P. C. 429; approved in 4 Black 14; *Van Butchell*, 3 C. & P. 632; *Long*, 4 C. & P. 423; *Senior*, 1 Moo. C. C. 346; *Simpson*, 1 Lewin C. C. 172; *Spiller*, 5 C. & P. 333; *Ferguson*, 1 Lewin C. C. 181; *Webb*, 1 Moo. & Rob. 405.
(13) *Per* Tindal, C. J. in *Ferguson*, 1 Lewin C. C. 181.
(14) *Webb*, 1 Moo. & Rob. 405; *Murkuss*, 4 F. & F. 356.

bones, and the latter, an old woman, who occasionally dealt in medicine gave him a solution of corrosive sublimate, on taking one dose of which he died, Bayley, J., told the jury "I take it to be perfectly clear, that if a person, not of medical education, in a case where professional aid ought to be obtained, undertakes to administer medicines which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one, but he has no right to hazard the consequences in a case where medical assistance may be obtained. If he does so, it is at his own peril. It is immaterial whether the person administering the medicine prepares it, or gets it from another."(15)

3260. Death by Love Potion or Charm.—The enemy of one Lal Singh gave the accused a white powder, which he instructed her to mix in his food, explaining that by so doing she should become rich and make Lal Singh correspondingly poor. She did as she had been told, with the result that four persons died and several others became seriously ill. The white powder was arsenic. The accused was convicted of this offence.(16) The same view was taken of the wife who administered to her husband a love potion or charm given to her by her mother to stimulate his passion. It turned out to be oxide of arsenic which had the effect of killing him.(17)

Akin to this is the case of a person who professed to secure immunity from snake-bite by tattooing another, whom he caused to be bitten by a snake from which he died. He was convicted of this offence.(18) Such was also the fate of the accused who professed to cure a sick person, whom he pronounced as possessed, by beating the ghost out of her in consequence of which she gave up the ghost.(19) The accused believed that immunity for his child would be obtained by offering it to a crocodile which he honestly believed would take it away and then return uninjured, which, however, it failed to do. He was convicted under the last clause of this section.(20)

3261. Negligence Only Criminal If Diligence would have Saved.—From the preceding discussion it necessarily follows that negligence could not be said to have materially contributed to the death of a person if death could not have been averted even if there had been no negligence. It was so laid down by Erle, J., in a case in which the prisoner was driving a cart down a hill, without reins which were lying on the horse's back, when a child about three years old ran across the road before the horse and the wheel of the cart knocked it down and killed it. It did not appear that the accused saw the prisoner before the accident and Erle, J., told the jury that if the prisoner had had the reins, and by using them could have saved the child, he was guilty of manslaughter; but if they thought he could not have saved the child

(15) *Simpson*, 1 Lewin C. C. 172.

(16) *Jamna*, 31 A. 290; following *Bakhan* (1887) P. R. 60; distinguishing *Nagawa*, 4 Bom. L. R. 425, in which the applicability of this section was not considered.

(17) *Ramava*, 17 Bom. L. R. 217; *Pika Bewa*, 39 C. 855. *Phulmani*, 77 I. C. (Pat.) 801; 25 C. R. L. J. 449.

(18) *Nga Ba Tu*, 11 L. B. R. 56; 64 I. C. 843.

(19) *Nga Po Tha*, (1917) U. B. R. 54; 44 I. C. 679.

(20) *Bharat Bipuri*, 25 C. W. N. 670; 62 I. C. 414.

by pulling the reins or otherwise by their assistance, they must acquit him.(21) A stationmaster gave a line-clear to a passenger train, while a goods train was blocking the line. It was found that before the passenger could get to the goods train it had to pass a signal which stood at danger, but the night was foggy and there was the chance of the guard failing to see the signal. It was expected that the goods train would move out of the way by the time the passenger reached that spot. As it failed to do so, there was a collision. The Stationmaster was held guilty of this offence in that he rashly gave the line clear in contravention of the rules, and brought about a collision.(22)

3262. The accused was a doctor in charge of a hospital attached to a mill. He was generally careless in his management of the hospital, and mixed up non-poisonous with poisonous medicines which he should have kept apart in a locked cupboard. He had to give quinine mixed with quinine hydrochloride. He took up a bottle enclosed in its original wrapper on which was printed the word "Poison." He tore up the wrapper apparently without noticing the word and poured out its contents to make the mixture which he dispensed to 8 persons of whom 7 died, as the bottle he had taken for quinine hydrochloride contained strychnine hydrochloride, which was printed on the label. He was convicted of this offence and sentenced to three months' simple imprisonment and a fine.(23)

The accused, a girl of 17, being harassed and ill-treated by her husband, jumped into a well. She had even forgotten that she was then carrying her child tied to her back. The child died but she was rescued. The Court altered her conviction under s. 302 to one under this section.(24) But upon the finding she should have been acquitted. Such was the case of a motor driver who, while cautiously driving his car at night along a road under repair, ran over two coolies who were sleeping thereon.(25)

3263. Negligence by Illegal Omission.—Having regard to the definition of the term "act"(1) the section is wide enough to apply to death caused no less by a positive act than by an illegal omission. But in the first place the omission must be *illegal*, that is to say, it must be an omission which is either in itself an offence, or is prohibited by law, or furnishes ground for a civil action.(2) A person cannot be held liable for proffering no assistance when the giving of such assistance is not enjoined by law, though it may create ever so strong a moral obligation.(3) So where the mother omitted to provide a midwife to the daughter, who was taken in labour in her house during the absence of her father, in consequence of which she died, it was urged for the prosecution that the mother bore great ill-will towards the deceased, that she had re-married, but it was held that ill-will may be a good ground for charging the prisoner of murder, but she could not be convicted of manslaughter, as she was under no legal obligation to provide medical aid to her daughter in her confinement.(4)

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(21) *Dolloway*, 2 Cox 273.
(22) *Tapti Prasad* 15 A. L. J. 590; 41 I. C. 335.
(23) *De Sousa*, 42 A. 272.
(24) *Supadi*, 27 Bom. L. R. 604, 87 I. C. 840, (1925) B. 310; *Fimon*, 26 Punj. L. R. 581.
(25) *Smith* (H. W.), 30 C. W. N. 66.
(1) S. 32.
(2) S. 42.
(3) *Instan*, (1893) 1 Q. B. 450.
(4) *Shepherd*, 1 L. & C. 147.

Such an obligation necessarily exists in the case of infants, and the mother may rightly be convicted of negligently causing their death, if it is shown to be due to it.[5] No such obligation arises if a person, undertaking to provide for the maintenance of another who from age and infirmity becomes dependent upon him for support, omits to supply him with ordinary nourishment. Such an obligation may not have been enforceable during the lifetime of the deceased, but it creates an obligation for which a person may be held criminally liable for causing the other's death.[6] But if a person had undertaken to pay another a fixed maintenance, it does not carry with it the obligation to provide him also with shelter and clothing, even in case of illness. The prisoner had separated from his wife under an agreement, by which he was to allow her a fixed sum for maintenance. The wife fell very ill and was wandering in the streets for a shelter. A policeman took her to the prisoner and explained to him her condition, but he refused to give her shelter, saying that she was a nasty beast, and he could not live with her. She died within two days and the surgeon certified that her existence had been abridged by her exposure. It was held that the husband was under no legal obligation to provide her with shelter after the agreement.[7]

3264. Even when there is a clear legal obligation, it does not necessarily follow that all omission resulting in death exposes the person guilty of omission to the penalties of this section. For, as in the case of acts, so in the case of omissions—probably more so in the case of omissions—there is room for mistake and error of judgment,[8] and even when there is neither mistake nor error of judgment, every dereliction of duty cannot be regarded as criminal. So Park, J., and Alderson, B., held that to make the captain of a vessel guilty of manslaughter in causing a person to be drowned in running down a boat, the prosecution must show some act done by the captain, and a mere omission on his part in not doing the whole of his duty is not sufficient.[9]

3265. Killing by Accident.—A person who kills another by accident does not do so intentionally or knowingly, though he may be held liable for the quantum of harm caused with that intention or knowledge. A aimed a blow with a stick at B, but which accidentally hit and killed the baby which a woman C had in her arms as she intervened to separate them. It was held that the harm which A intended to cause to B was hurt and it would have been the result if the blow had fallen on him, and that the death of the baby was a misadventure for which A was not liable. He was convicted of hurt.[10]

3266. Where Consequence is Too Remote.—The fact that the negligence must have *materially* contributed to the death makes it criminal. The accused Hutchinson was commandant of the forces at Plymouth. A target was placed in the sound, and artillery men were accustomed

(5) *Middleship*, 5 Cox 275; *Edwards*, 8 C. & P. 611.
(6) *Pelham*, 8 Q. B. 959; *Marriot*, 8 C. & P. 425.
(7) *Plummer*, 1 C. & K. 600.
(8) *Elliott*, 16 Cox 710.
(9) *Green*, 7 C. & P. 156.
(10) *Ghafur Natha*, 21 Bom. L. R. 1101; 54 I. C. 485; *Kaku*, 4 L. L. J. 487, 63 I. C. 822, *Jageshar*, 74 I. C. (O.) 533.

to practice by firing at it with ball. One day one such ball missed the target, and striking the waves recochetted and killed a boatman who was at a place in the lawful discharge of his calling. Hutchinson was indicted for manslaughter, upon which Byles, J., told the grand jury "that manslaughter was when one man was killed by the culpable negligence of another. A slight act of negligence was not sufficient—all men and women were negligent at some time; it would depend upon the degree of negligence. By way of illustration: suppose a man were to fire a gun in a field where he saw no one, and as he fired another man suddenly raised his head from a ditch; he could not say that man would be guilty of manslaughter; it would be held not to be culpable negligence.(11)

3267. "But supposing a man were to fire down the High Street of Exeter because he saw no one, and some one was suddenly to appear and was killed, that would be culpable negligence in the man who fired the gun. It would seem—and the results showed it—that the boat was within the range of fire; but that was no defence. If the man had not been killed, and had brought an action for damages, or if his wife and family had brought an action, if he had in any degree contributed to the result an action could not be maintained. But in a criminal case it was different. The Queen was the prosecutrix, and could be guilty of no negligence; and if both the parties were negligent, the survivor was guilty; and therefore it was no defence that the boat was within the danger. He could only speculate upon the negligence imputed in this case. First, he did not know that it would be said that it was an improper place whether to fire from or to fire over. The gun was fired from one of the batteries kept on purpose for practice. It was said that this battery was too low; but that was not the point of the defence. Therefore, subject to that better judgment, nothing could be imputed to the defendant as to the place whence the gun was fired. Had the defendant the selection of it? Then in using the place, although an improper one, was he obeying military orders? If so, he would not be guilty.(12) Common danger did not make the place improper. He was a man performing a most improtant duty.

"Supposing, therefore, that the defendant had been personally engaged in the firing; if he thought that the place from which the gun was fired was not improper, and the place to which the firing was directed was not improper, assisted by additional precautions, which might be used, he would not be responsible, because acting under the direction of superior authority. It seemed that complaint had been made by a great many persons residing in Plymouth and Devonport, and he must beg their attention to the orders the defendant had given. The Major-General (accused) would impress upon the officers in command to see with the utmost diligence that the range was free

(11) It would be no negligence at all. For negligence implies duty, and how can there be a duty towards any one in such a case?

(12) But this appears to be erroneous. For *Respondeat superior* is no answer to an offence, whether committed by a soldier or a civilian; *see* s. 76; and Tindal, C. J., in his charge to the Bristol Grand Jury, 5 C. & P. 26; see *ante*, §§ 593-597, and *cf.* § 2652.

from the firing. Then there was a second order. The Major-General impresses upon the officers the necessity of seeing that all was free, as he should hold them personally responsible. He had hitherto presumed that the defendant had personally to do with the firing; and, if he had, he would not be guilty of manslaughter.

3268. "But the next question was, did he superintend the firing, or did he not? They would see whether he did or not, was he guilty of a breach of duty in not personally superintending the firing? He could not see that he was. Again, it might be said that if he issued orders it was his duty to see that proper persons were appointed to keep a proper look-out; and if proper persons were nominated by him, it did not appear whether they were properly disciplined, and it might be a question, whether there was any negligence in them. There were persons with flags, but whether a proper look-out was kept might possibly be doubtful; whether means were taken for keeping a proper look-out they would have to determine under circumstances it would be for them to say whether negligence was brought home to the defendant."(13) The defendant was acquitted.

3269. In this case the defendant's negligence had not *materially* contributed to the death of the boatman. In other words, the consequence was too remote to be attributable to the negligence as its cause. The negligence was, therefore, neither "gross" nor "criminal." Other instances illustrating the same principle are furnished by the reported cases. In one, the accused, in the course of a trivial dispute gave the deceased a severe push on the back, which caused him to fall to the road below, a distance of two-and-a-half cubits. In falling, the deceased fractured his big toe, in consequence of which tetanus set in on the fifth day after the fall, from which he died. Under English Law such a case would have been manslaughter, but under the Code, it was held to be simply a case of using criminal force and not an offence under this section.(14) Of course, such a cause could not be treated as one of rash or negligent act—for, as has been already observed, there is no case of rashness or negligence, where the injury caused is wilful, and in such a case, if death ensues, it may be a case of culpable homicide or murder, but not of this offence.(15) In such cases of trivial injuries voluntarily inflicted culminating in death owing to adventitious and not natural causes, there are two reasons why the section is inapplicable: *first* because the effect produced was not the natural consequence of the injury; and *secondly*, because the using of voluntary criminal force cannot be held to be a rash or negligent act.

3270. But the rule that no negligence can be designated the cause of death, which is not the natural consequence thereof, applies equally to cases unconnected with the use of violence. Where, for instance, the accused, who was the Assistant Station Master of Gomharria, a railway station on the Bengal-Nagpur Railway Company, then working on the "line clear and caution message" system, under which trains were only allowed to leave a station on the guard

(13) *Hutchinson*, 9 Cox. 555.
(14) *Acharjys*, 1 M. 224.
(15) *Acharjys*, 1 M. 224; *William Keegan*, (1893) B. U. C. 673; *Bhikam*, (1881) A. W. N. 103.

receiving a line-clear certificate in a prescribed form, to the effect that the line is clear up to the next station, wrote out a conditional line clear message for the next station, before he had received intimation of it from that station to the following effect: "On arrival of No. 15 down passenger at Gomharria, line will be cleared for No. 80 up goods train from Gomharria to Sine," and left it on the counter in his room. The line clear so left was incomplete, for all the particulars required by the rule were not filled in, no number was entered on it, nor was the time of arrival of the train filled in. The guard of No. 80 up goods train who was waiting at Gomharria entered the stationmaster's room in his absence, took the imperfect certificate out of the book, and without reading it appended his signature, passed it on to the driver and gave the signal for the train to start,—all without the knowledge of the accused. The result was a collision between the 15 down passenger train and the 80 up goods train, causing the death of several persons.

The accused was convicted under this section, but his conviction was quashed by the High Court on the ground that the act of the accused did not in itself endanger the safety of other persons and that the effect was too remote to be attributed to such a cause.(16) The case is not unlike one in which the prisoner who was in charge of a steam engine went away, after stopping it, and during his absence a person came and set it in motion but, being unskilled, was unable to stop it, in consequence of which the deceased was killed. The prisoner was tried but Alderson, B., discharged him, holding that the death was due to the negligence of the intruder and not of the prisoner, and that, in order to constitute manslaughter, the negligent act which causes the death should be that of the party charged.(17) So in another case the accused and the deceased had a dispute about paying for liquor; when the prisoner who was in a schooner pushed the deceased's boat, then alongside his schooner, and the deceased thereupon reached out to seize a barge to prevent his being drifted away, but losing his balance he fell overboard and was drowned. It was held that this evidence was insufficient to sustain a charge of manslaughter against the prisoner.(18)

3271. The prisoner was the guard of a passenger train, and was indicted for the manslaughter of a passenger on the ground that he had directed the train to be divided on an incline, whereby a portion of the train ran backwards and collided with another train causing the death of many passengers. It was held that in order to convict the prisoner, he must be found guilty of gross negligence or recklessly negligent conduct, and that a mere intellectual defect or a mistake of judgment, without wilful disobedience of a traffic regulation was insufficient to create criminal liability.(19)

Such, however, was the case of the Assistant Stationmaster, who on his own responsibility gave the "Line-clear" to a passenger train on a foggy night, knowing that a goods train was blocking the line,

(16) *Shankar Balkishna*, 32 C. 73, following *Sant Dass*, (1891) Ind. Ry. Cas. 722.
(17) *Hilton's case*, 2 Lew. 214.
(18) *Waters*, 6 C. & P. 328.
(19) *Elliot*, 16 Cox 710.

with which it came into collision causing loss of life. The defence of the accused was that the passenger train had to run past another station before it could collide with the goods train and that the signal of that station was at danger. But the accused was nevertheless convicted under this section, the Court holding that it was no reason for taking the risk, which the accused did, in giving the line-clear contrary to rules.(20) So where the prisoner, who was an attendant in a lunatic asylum and in charge of a lunatic who was bathing, turned on hot water through mistake into the bath, but soon discovering his mistake, told the lunatic to get out, which he did not and was scalded to death, it was held that in turning on the hot water the prisoner could not be said to be guilty of gross negligence. It was merely a mistake, and the lunatic was warned of it in time, and that, though a lunatic, he could understand the warning given and could have got out if he was so minded.(21)

3272. Contributory Negligence Why Relevant.—Contributory negligence though not *per se* a defence may thus become relevant, not because it is by itself an exonerating circumstance, but as a fact showing that the consequence complained of was too remote, and not the direct consequence of negligence. The accused in another case was the porter at the Brighton station, and it was his duty to start the trains. According to the rule no train was to be started at intervals of less than five minutes from the departure of the preceding train. The charge against the accused was that he had started two trains between which the interval was only three or four minutes and which collided in a tunnel seven miles from Brighton. But the collision was not so much due to the short interval as to the wrong signalling of the porter at the other end of the tunnel, partly due to the signals being out of order and partly to his having got confused and stopped the second train in the tunnel.

On the accused being prosecuted for manslaughter, Erle, C. J., told the jury that "they must be satisfied before they found the bill that there was a *prima facie* case of such criminal negligence as had been the proximate and efficient cause of the catastrophe. The negligence imputed appeared to be the sending of one train after another in a shorter interval of time than, according to the rules, he ought to have done. A mistake, indeed, was said to have arisen from the negligence of the defendant. Still, if the particular negligence imputed to the prisoner appeared not to have been the proximate cause of the catastrophe, the bill of manslaughter ought not to be found; and if it appeared that other causes had intervened, the prisoner's negligence would not have been the proximate and efficient cause of the deaths which have occurred. That this was in entire accordance with the authorities will appear from the most recent cases. The case is to be clearly distinguished from that of joint negligence. It is, indeed, well settled that it is no defence in a case of manslaughter that the death was caused by the negligence of others as well as by that of the prisoner, for if the death of the deceased be caused partly by the negligence of others, the prisoner and all those others are guilty of manslaughter."(22)

(20) *Tapti Prasad*, 15 A. L. J. 590.
(21) *Finney*, 12 Cox. 625.
(22) *Ledger*, 2 F. & F. 857.

3273. In a similar case the driver and fireman of a train were indicted for manslaughter under the following circumstances. They, were in charge of a train run under special instructions made for the Ascot race day, which materially differed from those ordinarily in force. By them (*i*) the red signal was to mean only "danger" and not "stop" as usual; (*ii*) they prohibited the engine running with tender foremost. The object of this rule was, no doubt, to keep a look-out, but it could not be observed as there was no turn-table at Ascot. The Stationmaster started trains after the interval of five minutes each. As such he started one train, which was to stop at Egham. The other train, which was in charge of the prisoners, was started five minutes later in the same direction. The prisoners, however, did not know that the first train was to stop at Egham. The prisoners' train had not to stop there. But two stations before Egham they were shown red signal which denoted, as usual, stop, but which, in the light of their special instructions they understood to mean only "danger" and so passed through the station without stopping. On arriving at Egham they saw the previous train, upon which they unsuccessfully attempted to stop their own train, but it collided with the other train causing loss of life. They were indicted for manslaughter, but the jury, interposed and held that there was no case of culpable negligence against either of the prisoners, with which Willes, J., agreed. As to the fireman, he remarked that in a criminal prosecution an inferior officer must be held justified in obeying the directions of a superior not obviously improper or contrary to law; that is, if an inferior officer acted honestly upon what he might not unreasonably deem to be the effect of the orders of his superior, he would not be guilty of culpable negligence, if he did not know his orders to be improper or contrary to law. As to the driver, he had special instructions to read the red signal as implying only danger. No negligence could, therefore, be imputed to him.[23]

3274. Contributory Negligence How Far Irrelevant.—The accused was a sub-storekeeper, in the service of a Railway Company, and his duty was to convey six trucks across the river. On the line leading to the bridge there was a steep incline and he had explicit instructions to uncouple the trucks so as to convey them singly, but he allowed all the six trucks to be sent down the incline without uncoupling them, and that in charge of an insufficient number of men, and without ropes to hold them back from going down the incline. In consequence, they got out of control, and in their course one of the coolies, who, under the orders of the accused, was endeavouring to stop them, slipped under the wheels, and was run over and killed. He was convicted under this section, and on revision, it was contended for him that the death was due to an accident—slipping—and not the negligence of the accused. But Oldfield, J., following the English precedents held that the fact that the deceased in part contributed to his own death by his negligence, could not exonerate the petitioner from the consequences of his negligent act.[24] A railway guard failed to give to the driver a

(23) *Trainer*, 4 F. and F. 105.
(24) *Nand Kishore*, 6 A. 248; following *Longbottom*, 3 Cox 439; *Swindall*, 2 C. & C. 230; *Williamson*, 1 Cox 97;

signal to sound his whistle before starting the train, which he was bound to do under s. 244 of the Railway Rules. The driver, therefore, started the train without sounding the whistle, and a boy who was pointing a wagon on the line was in consequence run over and killed. The guard was prosecuted under this section, and it was held to be applicable to his case.(25)

3275. Any dereliction of duty and disobedience of rule may entail the penal consequence of this section. The accused sent two boxes of fireworks under the false declaration that they contained iron locks, and in loading, one of the boxes exploded, killing one coolie and injuring another, the accused was held to be liable for his death under this section. It was argued for him that the coolie had negligently droppped the box, but for which the explosion would not have occurred. But the Court had no difficulty in holding that the doctrine of contributory negligence was out of place in a criminal case (§§ 2769-2778). and held that the accused was even in that case equally liable.(1) The fact that the deceased was standing on the brink of the precipice, down which he fell by a push given by the accused, cannot exonerate the latter because of the perilous situation in which the deceased had already placed himself. The accused and the deceased were both standing on the parapet of a deep-well. They quarrelled and thereupon the accused struck the deceased a blow with a stick on his head. The deceased lost his balance, fell into the well and was drowned. The accused was convicted of culpable homicide, but the Chief Court found that the accused had no knowledge that his act was likely to cause death, but that he was guilty of a rash and negligent act, justifying his conviction under this section.(2)

3276. In such a case the accused was guilty of hurt, as well as of a rash and negligent act. So it may be that a person intending to hurt A, may, by mistake, injure B, in which case he could not be convicted of voluntarily causing hurt to B, but may be convicted under this section. Of course, where an intention or knowledge of causing death enters into the offence, the liability will be determined by s. 301; but there may be intention or knowledge, but not of likelihood of causing death, in which case there is nothing against the applicability of this section. Such a case arose in Allahabad, in which the accused, a police-officer in charge of a police station, the vicinity of which had been much haunted by thieves, had been on one occasion fired on by a thief. Subsequently, he received a report that three thieves were prowling about, upon which he with two other men went out to patrol. They saw a man crouching under a tree, and thinking he must be a thief, the accused fired at him, and killed him. The man was no thief at all. And Straight, J., convicted the accused under this section., holding that a police-officer, who had once been shot at by thieves, was

(25) *Francis R. Thompson*, (1894) B. U. K. 271.

(1) *Kamruddin*, (1905) P. R. No. 22, 2 Cr. L. J. 207; as to contributory negligence being immaterial, Chatterji, J., cited *Kew*, 12 Cox 355; *Longbottom*, 3 Cox 439; as to definition of rash and negligent act; *Naghabhushanam*, 7 M. H. C. R. 1191; *Nand Kishore*, 6 A. 248; *Bhutan*, 16 A. 472; *Crowe*, 3 C. & K. 123; *Williamson*, 1 Cox 97.

(2) *Per* Plowden, J., (1889) P. R. No. 33.

not at liberty, when alarmed upon any subsequent occasion, to discharge firearms at haphazard. To say the least, such an act was rash and negligent, and it may be even something more.(3)

Session. Cognizable. Warrant. Not comp. Not bail.

Abetment of suicide of child or insane person.

305. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide, shall be punished with death or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

[*Abets*—s. 107.]

Synopsis.

(1) *Analogous Law* (3277).
(2) *Procedure and Practice* (3278).
(3) *Proof* (3279).
(4) *Form of Charge* (3280).
(5) *Principle* (3281).
(6) *Abetment of Person under Disability* (3282-3283).

3277. Analogous Law.—With reference to this and the next section the Law Commissioners wrote: "It seems to us that the rule would be applied in these clauses chiefly in such a case as this, where a person legally bound to take care of the person of another, has by an illegal omission of his duty *intentionally* given him opportunity or permitted him to obtain the means of killing himself. It would apply also, we conceive, in the case of a person seeing another preparing to destroy himself, say by hanging, and allowing him to accomplish his purpose without any attempt to prevent him, if, as may be expected, the law of procedure makes it a common duty incumbent upon all men to assist in preventing offences about to be committed in their presence. The intention here would be inferrible from the circumstances. In the former case collateral proof of the intention would be requisite. But we apprehend that it is *active* aid which is principally intended in these clauses, and to which the higher penalties are meant to be applied."(4)

The age limit at eighteen years is fixed in accordance with the law of majority—a person under that age being incompetent to give consent.(5)

3278. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Court of Session.

3279. Proof.—The points requiring proof are:—

(1) The commission of suicide by a person who was then—

(*a*) under 18 years of age, or

(3) *Wasirulzama Khan*, (1881) A. W. N. 156.
(4) First Report, ss. 321, 322.
(5) *See* now Act IX of 1875.

(*b*) insane, or

(*c*) delirious, or

(*d*) an idiot, or

(*e*) intoxicated.

(2) That the accused abetted him.

(3) That the abetment related to the commission of such suicide.

3280. Charge.— The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you(*name of accused*) as follows:—

"That on or about the——day of——at——you——abetted one A B, a person under 18 years of age (*or* an insane person, etc.), to commit suicide, and who committed it, and you thereby committed an offence punishable under section 305 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3281. Principle.—This section relating to the abetment of suicide only applies when the suicide is in fact committed. The general law of abetment is thus wider and would be inapplicable in such a case. But the same elements which constitute abetment must also be present here (§§ 996-1028). Having regard to the incapacity of the persons described, the question of concurrence or consent is immaterial. And in such a case, except in the case of the minor, there could be no question of punishing them as principal offenders for an attempt under s. 309.

3282. Abetment of Person under Disability.—Suicide is self-murder. As such it is an offence for which the offender cannot be brought to justice. The only chance to punish him is, when it stops short of an attempt. The abettors of suicides generally are punished under the next section. This section only refers to those who abet minors and persons *non compos mentis* to self-destruction. Such persons would be as much amenable to the provisions of the next section, but this section is intended to cover cases which may not fall exactly within the terms of the next section. Such, for example, would be the case of persons who are in charge of such persons and who by illegal omission give them facilities for committing suicide. That is to say, while this section would more appropriately apply to those guilty of criminal negligence or omission, the next section applies to all abettors generally.

3283. It will be observed that this section applies only when the person abetted *commits* suicide. There must then be proof that the death of the person dead was by suicide. If it was a natural death, there could be no abetment. If it was otherwise, it may be a case of murder or homicide. It is not, however, necessary that the suicide should have killed himself *in consequence* of the abetment. It is sufficient that the accused abetted the offence.

306. If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetment of suicide.

Session. Cognizable. Warrant. Not bail. Not comp.

[*Abets*—s. 107. *Abetment of suicide*—ss. 305, 306.]

Synopsis.

(1) *Analogous Law* (3284).
(2) *Procedure and Practice* (3285).
(3) *Proof* (3286).
(4) *Form of Charge* (3287).
(5) *Principle* (3288).
(6) *Abetment of Suicide* (3289-3292).

3284. Analogous Law.—This section punishes abetment of suicide generally. In such a case, abetment must be distinguished from what may be homicide by consent. In England, an accessory before the fact to the crime of suicide was not triable at common law, because the principal could not be tried nor was he triable under the Georgian Statute[6] which did not make accessories triable except where they might have been tried before. But as was to be expected, this anomaly led to grave abuse, but it was removed only by the passing of the Statute of 1847.[7] But as it is, English Law materially differs from the law here enacted. According to English Law, if one person persuade another to kill himself, and if he persuade him to take poison, which he does in the absence of the persuader, the latter is liable as a principal in the murder.[8] But in such a case, under the Code, he will be liable only as an abettor under this section. This section creates a special offence applicable only to the abetment of suicide when the suicide is committed. It will not apply to a case of an attempted suicide merely.

3285. Procedure and Practice.—This offence is cognizable but warrant should ordinarily issue in the first instance. It is non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

3286. Proof.—The points requiring proof are :—

(1) The commission of suicide.

(2) Its abetment by the accused.

3287. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the———day of———at———one A B committed suicide, and that you——abetted its commission by——(*specify the act*),

(6) 7 Geo. IV, c. 64, s. 9.
(7) 12 Vict., c. 46, s. 1; re-enacted (1861), 24 and 25 Vict., c. 94, s. 3.
(8) 1 Hale P. C. 431; 4 Rep. 81*b*; *Dyson*, R. & R. 523; *Alison*, 8 C. & P. 418; *Jessop*, 16 Cox 204.

and thereby committed an offence punishable under section 306 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3288. Principle.—This section is enacted to remove a difficulty which may otherwise arise by following the anomaly of the English Common Law (§ 3284) of punishing a person for abetment when the principal offender had placed himself beyond the reach of law. The offence of "abetment" must naturally conform to the definition of that term as given in section 107—that is to say, there must be instigation, co-operation or intentional assistance given to the would-be suicide. It is not necessary, nor indeed is it a part of the definition, that the suicide should have been committed in consequence of the abetment. But in order to render a person liable as an abettor, it is, of course, necessary, as indeed, if it is in the case of abetment of any other offence, that the abettor should be something more than a mute spectator—*spectator haud particeps* (§ 1000-1001). It is conceivable that such presence may encourage a person to do a deed, which he might otherwise refrain from. In that case the question whether mere presence amounted to intentionally aiding another will have to be decided (§§ 1000-1007).

3289. Abetment of Suicide.—As has been remarked under the last section, suicide is self-murder. But it is only so by analogy, for an attempted suicide is not punishable under the next section, but as a distinct offence by itself. Suicide, in fact, has a distinct place in the criminology of all countries. In England suicide is presumed to be an act of insanity, and so in such cases the official verdict is couched in the formula—"committed suicide while temporarily insane." It will be presently seen how far this verdict is in accordance with the view of science.(9) For the present, the only question necessary to be considered is its abetment.

3290. The section applies only when a person has committed suicide. Now, suicide is self-destruction, and it may be accomplished in the many ways it is possible to destroy life (§§ 3005-3026) In order to be suicide the person who commits suicide must commit it by himself. If he is killed by another with his consent, the offence is homicide, and not suicide, and the person killing is so liable.(10) Between these two offences the difference may sometimes be very little; but there is a difference. Suppose A and B conspire to procure B's miscarriage, and A procures arsenic, which he gives to B, which she takes and dies. Here A could only be held liable as an abettor,(11) but if A had himself administered the poison to B and thus caused her death, he would have been guilty of culpable homicide. This case suggests a difficulty, by no means easy to overcome. If B took arsenic to procure an abortion, and not to kill herself, would her death be suicide? The question was raised but not considered by Cockburn, C. J., in a case in which the facts were somewhat similar to those in the case supposed. There B,

(9) S. 308.

(10) *Sahebloll Reetloll*, (1863) 1 R. J. P. J. 171.

(11) *Russell*, R. & M. C. C. R. 356; *Leddington*, 9 C. & P. 79.

a married woman, separated from her husband, became pregnant by A. She thereupon went to the chemists to procure corrosive sublimate to procure abortion. As the chemist refused to sell it to her, she persuaded her paramour A to procure it for the purpose she wanted it. A at first refused, but as she threatened to commit suicide, he was prevailed upon to procure her the abortive, which he did, and delivered to her. She took it and died. A was thereupon indicted for abetment, and Cockburn, C. J., directed the jury to return the verdict of guilty,(12) on the authority of the last case,(13) but on the point being raised whether B could under the circumstances be said to have committed suicide, the case was reserved, and the conviction was quashed on the ground that there was a marked difference between the two cases. In the former case A had persuaded B to take the poison; in this case B had persuaded A to bring it. The facts were quite consistent with the supposition that he hoped and expected that she would change her mind, and would not resort to it. The two cases being distinguishable the Court considered it unnecessary to decide whether the woman was *felo de se*.(14)

But what was decided is instructive. In such a case the accused could not be convicted of abetment under this section. And as regards the principal question raised, it is now settled by Statute in England that a woman taking poison to procure abortion is guilty of felony.(15) It may perhaps be added that in such a case there could be no question of suicide, for, in taking poison to procure abortion, the woman does not intend to destory herself. Her sole object is limited to the purpose for which she takes the abortive. It would then be scarcely correct to say that if in such a case death ensued, she had committed suicide, though this is the view taken in the two cases already cited.(16) Two persons may both agree to commit suicide, and if one dies, and the other survives by accident, the latter would be guilty of an abetment punishable under this section, as well as of an attempt under section 309, though in such a case he could not be sentenced to cumulative sentences.

3291. The prisoner was indicted for the murder of his sweetheart by drowning her. It appeared that the two had cohabited for several months previous to the woman's death, who was with child by the prisoner. Owing to distress and poverty they both resolved to commit suicide by drowning themselves in the Thames. For that purpose they got into a boat, but finding the water shallow, they got into another boat. They then stood up, and as they were talking, the prisoner found himself in the water. He struggled and got back into the boat again, and then found that the woman was gone. He searched for her with a view to saving her but she could not be found. He stated that

(12) *Fretwell*, 1 L. & C. 161.
(13) *Russell*, R. & M. C. C. R. 356.
(14) *Fretwell*, 1 L. & C. 161.
(15) 24 and 25 Vict., c. 100, s. 58.
(16) *Russell*, R. & M. C. C. R. 356; *Leddington*, 9 C. & P. 79. And it may be added, Blackstone is also of the same opinion; for, citing from Hawkins and Hales, he writes; "A *felo de se* is therefore he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as in attempting to kill another, he runs upon his antagonist's sword; or shooting at another, the gun bursts and kills himself."—1 Hawk. P. C. 68; 1 Hale P. C. 413; *see*, as to this view, s. 309, comm.

he intended to drown himself, but had dissuaded the woman to follow his example.

The judge told the jury that if they believed the prisoners statement, they should acquit him, but they believed that both the accused and the deceased had got into the boat with the object of drowning themselves together, each encouraged the other in the commission of a felonious act, and the survivor was guilty of murder.(17) He also told the jury, that although the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act of the throwing was to be considered to be the act of both, and so the act was reached by the indictment. The jury found that both the prisoner and the deceased went to the water to drown themselves and the prisoner was thereupon convicted. And upon a case reserved, the judges were clear that if the deceased threw herself into the water by the encouragement of prisoner, and because she thought he had set her the example in pursuance of their previous agreement, he was a principal in the second degree, and was guilty of murder; but as it was doubtful whether the deceased did not fall into the river by accident, it was not murder in either of them, and the prisoner was recommended for a pardon.(18)

3292. So in another case where the deceased and the prisoner, who had been living as husband and wife, being in very great distress, both agreed to take poison and die together, and both took a quantity of laudanum in each other's presence, after which they both lay down in the same bed, wishing to die in each other's arms, and the woman died, but the prisoner recovered; Patteson, J., told the jury that "supposing the parties in this case mutually agreed to commit suicide, and one only accomplished that object, the survivor will be guilty of murder in point of law."(19) Of course, here he would be guilty only of abetment under this section (§ 3284), as in the following case. The deceased having lost her husband, resolved to immolate herself and thus become a *Suttee*. She prepared herself for it in the presence of the accused. They followed her to the pyre and stood by her, her stepson crying "Ram, Ram !" One of the accused told her to repeat "Ram, Ram !" and she would become *Suttee*. These facts were held to prove active connivance and unequivocal countenance on their part, justifying the inference that they had engaged with her in a conspiracy for the commission of the suicide by *Suttee*. They were consequently convicted of this offence.(20)

In another case the facts constituting abetment were more conspicuous. The deceased wanted to become *Suttee*, and proceeded to the pyre. The three accused ordered a boy to light it, while another induced the deceased to return to it, after she had retired from it, and she was immolated. The three accused were convicted of abetting culpable homicide, and the boy and the other person of abetting suicide.(21) But the three accused should also have been convicted of the same offence,

(17) This, because the English rule is different; *see* §

(18) *Dyson*, R. & R. 523.

(19) *Alison*, 8 C. & P. 418.

(20) *Mohit Pandey*, 3 N. W. P. H. C. R. 316.

(21) *Saheblall Reetlall*, (1863) 1 R. J. P. J. 174.

for homicide of a person of herself is suicide, and only its abetment is punishable here. In another case the accused had reported to the Police the intention of a widow to become a *Suttee;* but before the police could arrive, the widow ordered the accused to remove her husband's body which they did. At the burning ghat she ordered them to build a funeral pyre which they did, and two of them in obedience to her request handed her a pot full of clarified butter which she poured over the pyre and her own person. The pyre was then fired but it was not proved by whom. All the five accused were held to have abetted the *Sati* and they were were all convicted under this section.[22]

Session. Cognizable Warrant. Not bail. Not comp.

307. Whoever does any act with such intention or knowledge and under such circumstances, that if he by that act caused death, would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned.

Attempt to murder.

When any person offending under this section is under sentence of transportation for life, he may, if hurt is caused, be punished with death.

Attempts by life convicts.

Illustrations.

(*a*) *A* shoots at *Z* with intention to kill him, under such circumstances that, if death ensued, *A* would be guilty of murder. *A* is liable to punishment under this section.

(*b*) *A*, with the intention of causing the death of a child of tender years, exposes it in a desert place. *A* has committed the offence defined by this section, though the death of the child does not ensue.

(*c*) *A*, intending to murder *Z*, buys a gun and loads it. *A* has not yet committed the offence. *A* fires the gun at *Z*. He has committed the offence defined in this section, and, if by such firing he wounds *Z*, he is liable to the punishment provided by the latter part of (the first paragraph of) this section.

(*d*) *A*, intending to murder *Z* by poison, purchases poison and mixes the same with food which remains in *A*'s keeping; *A* has not yet committed the offence in this section. *A* places the food on *Z*'s table or delivers it to *Z*'s servants to place it on *Z*'s table. *A* has committed the offence defined in this section.

[*Act*—ss. 32, 33. *Murder*—s. 300.]

Synopsis.

(1) *Analogous Law* (3293-3294).
(2) *Procedure and Practice* (3295).
(3) *Proof* (3296).
(4) *Form of Charge* (3297).
(5) *Principle* (3298-3299).
(6) *Meaning of Words* (3300).
(7) *Attempted Murder* (3301-3311).
(8) *English Law on Discharging Fire-arms* (3304-3306).
(9) *No Attempt where Means Inadequate* (3312-3313).
(10) *Act Without Intention* (3314).
(11) *Inchoate Acts* (3315).

(22) *Ramdial*, 36 A. 26.

3293. Analogous Law.—The clause relating to life-convicts is a subsequent addition made by the Amending Act of 1870[23] to provide for a case where the attempt was made by a person already under transportation for life; and for which the section as originally enacted had failed to prescribe a penalty. This section, and the next specially, deal with attempts to murder and culpable homicide. They are thus offences taken out of the general category of section 511. With reference to them the authors wrote: "These clauses appear to us absolutely necessary to the completeness of the Code. We have provided under the head of bodily hurt, for cases in which hurt is inflicted in an attempt to murder; under the head of assault, for assaults committed in attempting to murder; under the head of the criminal trespass, for some criminal trespass committed in order to murder. But there will still remain many atrocious and deliberate attempts to murder, which are not trespasses, which are not assaults, and which cause no hurt. A, for example, digs a pit in his garden and conceals the mouth of it, intending that Z may fall in and perish there. Here A has committed no trespass, for the ground is his own, and no assault, for he has applied no force to Z. He may not have caused bodily hurt, for Z may have received a timely caution, or may not have gone near the pit; but A's crime is evidently one which ought to be punished as severely as if he had laid hands on Z, with the intention of cutting his throat.

"Again, A sets poisoned food before Z. Here A may have committed no trespass, for the food may be his own; and if so, he violates no right of property by mixing arsenic with it. He commits no assault, for he means the taking of the food to be Z's voluntary act. If Z does not swallow enough of the poisoned food to disorder him, A causes no bodily hurt; yet it is plain that A has been guilty of a crime of a most atrocious description.

"Similar attempts may be made to commit voluntary culpable homicide in any of the three mitigated forms. A, for example, is excited to violent passion by Z, and fires a pistol to kill Z. If the shot proves fatal, A will be guilty of manslaughter; and he surely ought not to be exempted from all punishment if the ball only grazes the intended victim

"It is to meet cases of this description that these sections are enacted."[24]

3294. Of course, section 511 was no part of the Code at the time these words were written. But though that section would now obviate most of the objections set out by the authors, it does not do away with the necessity of special provisions for offences punishable with death. And moreover, the seriousness of such crime justifies their special enactment. But inasmuch as section 511 punished the doing of "any act towards the commission of the offence" its terms are obviously wider than those of this section. It may then be a question whether an act, failing to be an attempt punishable under this section may not be punishable under the more general provisions of section 511. According to the Bombay High Court it is so[25]; but that view has been controverted by Straight, J., in

(23) Indian Penal Code Amendment Act (XXVII of 1870).

(24) Note M, Reprint, pp. 150, 151.

(25) *Francis Cassidy*, 4 B. H. C. R. 17.

an Allahabad case.[1] One view presupposes this section to be inexhaustive, the other view that it is exhaustive. The question will have to be presently considered.

3295. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Court of Session.

3296. Proof.—A conviction based upon circumstantial evidence, must bear examination of every link in the chain of circumstances which, taken collectively, must be conclusive. Where, therefore, A and B were named in the first report as the assailants, but when the Police went to the spot the name of C was substituted for that of B, and the only eye-witness deposed that he had seen their backs as they ran, the Court quashed the conviction of A and C, though the clothes of A, B and C were all proved to be found stained with human blood.[2] In short, here the circumstantial evidence pointed to three assailants, whereas the eyewitness spoke of only two assailants. The circumstantial evidence must then be consistent with itself and the positive evidence adduced in the case. The points requiring proof are:—

(1) That the accused did an act.

(2) That it was done—

(*i*) *with the intention of*, or

(*ii*) *with the knowledge*—

(*a*) of causing death; or

(*b*) of causing such bodily injury as the accused knew to be likely to cause the death of the person to whom the harm was attempted to be caused; or

(*c*) causing bodily injury to a person, and the bodily injury intended to be inflicted would have been sufficient in the ordinary course of nature to cause death; or

(*d*) that the act if completed would have been so imminently dangerous that it would have in all probability caused death, or such bodily injury as is likely to cause death; and the act attempted was committed without any excuse for incurring the risk of causing death or such injury as aforesaid.

To which may be added the following aggravating circumstance:—

(3) That the accused caused hurt to the person by the act aforesaid.

And if (3) is proved, proof of the following further aggravating circumstance is admissible:—

(4) That the accused was then under sentence of transportation for life.

(1) *Niddha*, 14 A. 38.

(2) *Shera*, (1913) P. W. R. 14, 19 I. C. 196.

3297. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you——did an act, to wit——with such intention (or knowledge) and such circumstances, that if by that act you had caused the death of A B you would have been guilty of murder, [and that you thereby caused hurt to the said A B, (and you were then under sentence of transportation for life)], and thereby committed an offence punishable under section 307 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3298. Principle.—In point of gravity, this section graduates the offence of attempt to murder, (*i*) when the act stops short of causing hurt, (*ii*) when it causes hurt, and (*iii*) when hurt is caused by a life-convict. In each case, there is an "attempt," that is to say, a definite step taken towards the commission of murder. In the language of English Law, there is not merely an evil motive, but a manifest overt act. The difference between what is a mere preparation, and an attempt was intended to be distinguished by the authors who had framed for that purpose the following illustrations:—

"(*a*) *A*, intending to murder *Z* by means of a spring gun, purchases such a gun. *A* has not yet committed the offence defined in this section. *A* sets the gun loaded in *Z*'s path and leaves it there. *A* has committed the offence defined in this section.

"(*b*) *A* intending to murder *Z* by poison, purchases poison, and mixes the same with food which remains in *A*'s keeping. *A* has not yet committed the offence defined in this clause. *A* places the food on *Z*'s table, or delivers it to *Z*'s servant to place it on *Z*'s table. *A* has committed the offence defined in this clause."

3299. With reference to illustration (*a*), the Law Commissioners remarked: "If A after setting the gun, repents and removes it, we are of opinion A would not be chargeable under this section. The last act undoing the previous act, he could not, we conceive, be charged with that previous act as an offence, unless for anything he knew it might have had effect in the meantime."(3) This and the following sections seem to apply to attempts to murder and homicide, in which there has not only been a commencement of the execution of the purpose, but something little short of a complete execution, the consummation being hindered by circumstances independent of the actor's volition. The act or omission, although it does not cause death, is carried to such a length as, at the time of carrying it to that length, the offender considers it sufficient to cause death,(4) and what is more, in point of fact it was sufficient to cause death. This was, indeed, the view of the Law Commissioners who said: "By this clause, a person attempting to commit murder, though he fails in his purpose, if he shall have taken all the steps, which according to his plan, were necessary to accomplish it, will be punishable."(5)

(3) First Rep., s. 344.
(4) M. & M. 274, cited *per* Westropp, J., in *Francis Cassidy*, 4 B. H. C. R. 17 (21).
(5) First Rep., s. 339.

3300. Meaning of Words.—*"Whoever does any act"*: The word "act" would include here an illegal omission. *"With such intention or knowledge"* as is spoken of in section 300 in defining murder. *"And under such circumstances"*: These words are important, and point to the act having reached that stage of development, that there was nothing more left in the actor to complete it. It means that the circumstances present at the time of the act were such that the act would have caused death, but it did not; and if it had caused death, the offence committed would have been murder. As such the act must be capable of causing death in the nature and ordinary course of things.(6) But according to Straight, J., these words mean no more than this, that the act must be done in such a way and with such ingredients that, if it succeeded, and death was caused by it, the legal result would be murder according to sections 299 and 300.(7)

3301. Attempted Murder.—The offence here described must be an attempt of the kind here described. That is to say, it must be an attempt made under such circumstances that if the act had taken effect it would be murder. An attempt to commit a crime has been defined to be an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission, if it were not interrupted (8) It must then be an act which must be in the natural and ordinary course of things capable of causing death. Its failure to cause death must be due to an adventitious cause wholly independent of the actor's volition. Where, for example, a person discharges a loaded gun at another from a short distance he is clearly guilty of this offence, though the result of his act might be to cause only some injury,(9) or no injury at all, unless the aim is shown to have been purposely taken merely to frighten and not to hit him.(10) But if in such case the gun be unloaded, or loaded only with a blank cartridge, its firing is not an attempt to kill, because killing any one is then impossible,(11) and it has been held that the case would not be different even if the gun were loaded but somehow failed to go off.

By Discharge of Fire Arms.

Such was the case of Private Cassidy who in a state of some intoxication loaded his gun with powder and ball and pointed it at the Drum Major of his Regiment, but the gun failed to discharge as he had omitted to cap the nipple. He had been previously heard to utter threats against the Drum Major. He was tried for an attempt to murder and the jury found that the prisoner had levelled his gun at the Drum Major with intent to murder him, that the gun did not go off as it had not been capped, and that the prisoner was seized before he could pull the trigger. Upon these facts the question of law raised was; could, in view of the state of the gun, the prisoner be convicted of an attempt under this section. It was held both by Couch, C. J., and Westropp, J., that he could not be convicted, for the act, made punishable here, must be an act which was in point of fact sufficient to cause death, and that the accused must have been aware of it. As Couch, C. J., put it: The words of the

(6) *Per* Couch, C. J., in *Francis Cassidy*, 4 B. H. C. R. 17; *Martu Vithoba*, 15 Bom. L. R. 391, 21 I. C. 881.
(7) *Niddha*, 14 A. 38.
(8) Stephen's Dig. Cr. L., Art. 49, p. 29.
(9) *Kolangaret*, 29 I. C. (M.) 670.
(10) *Pir Muhammad*, 75 I. C. 1020; (1923) A. I. R. (L.) 415.
(11) *Nga Waik*, 1 R. 209.

section are 'whoever does any act with such intention or knowledge, and *under such circumstances*,[12] that if he by that act caused death would be guilty of murder.' Now, it appears to me, looking at the terms of this section, as well as at the illustrations to it, that it is necessary, in order to constitute an offence under it, that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things; and if the act complained of is not of that description, a prisoner cannot be convicted of an attempt to murder under this section."

Is S. 511 Supplementary.

3302. But if in such a case the prisoner could not be convicted under this section, is he not liable at all? In the opinion of the Bombay Court, he is,—under section 511 of the Code. The words of that section are undoubtedly more general—for they define an attempt thereunder punishable, to be any act done towards the commission of the offence, which is only another form of expression for the English phrase 'some manifest overt act.' Cassidy was accordingly convicted under section 511. But such a view is only possible, if it is held that this section is inexhaustive and does not cover all cases of punishable attempts. This was indeed the view of the Court in Bombay. But it has been combated by Straight, J., in an Allahabad case, in which two dacoits had fired at a chowkidar who had attempted to arrest them. One of them Niddha had pulled the trigger, the cap exploded, but the charge did not go off. He was thereupon convicted under section 300 of the Code. On appeal it was contended for him that the offence of the accused must either fall under this section or not at all. And it was so held by Straight, J., who held this section to be exhaustive, and section 511 inapplicable for the following reasons: (*i*) because section 511 applies only to offences punishable with[13] "transportation or imprisonment," whereas section 302 is punishable with death; (*ii*) the section applies only where no express provision is made for the punishment of such an attempt, but this section is an express provision, specially and deliberately providing for the offence of attempt to murder, and this section must be held to be exhaustive; (*iii*) the maxim *expressio unius est exclusio alterius*[14] should be applied in construing a penal Statute of this kind; (*iv*) any other view would create uncertainty and conflict of opinion as to what constitutes an attempt to commit murder.

When this section was under discussion, the words required that the accused should carry "that act or omission to such a length as at the time of carrying it to that length he contemplates as sufficient to cause death." The word "contemplates" was objected to as too wide. The Law Commissioners defended its retention,[15] but the whole clause was afterwards deleted from the section, it being recognized that the door of repentance should be kept open as long as possible in law, as well as in religion. There is nothing to shew that this section was to be inexhaustive, and supplemented by the more comprehensive provisions of section 511. At the same time a good deal might be said in answer to the view taken by Straight, J. As against his first ground, it may be urged that section 302 is punishable both with death as well as transportation. His second objection is no

(12) *See*, as to the meaning of these words, *per* Straight, J., in *Niddha*, 14 A. 38, quoted under § 3146.

(13) *Cassidy*, 4 B. H. C. R. 17.

(14) "The specific mention of one is the exclusion of another."

(15) First Rep., s. 338.

more insuperable, for section 511 speaks of "*such* attempt" as is therein described, and which is *ex hypothesi* not provided for by this section, and therefore elsewhere in the Code. The third and fourth are no objections at all, but pious precepts are by no means universal. At any rate, they could not by themselves refuse any other construction if it was reasonably plain.

Conflict between Bombay and Allahabad.

3303. Adverting now to the merits of the case before the Allahabad Court, it was conceded that the facts before it were different to those upon which the Bombay Court had to decide. In the latter case Cassidy's gun was uncapped and he was seized before he could pull the trigger. In the Allahabad case Niddha pulled the trigger and the cap detonated, but the charge failed to take fire. In the one case the contingency of the Drum-Major's death was too remote for the prisoner to be charged under this section: in the Allahabad case the accused had left nothing undone to kill the chowkidar, and his escape was due to a mere accident. Therefore, if the Bombay Court had to decide the Allahabad case, they would have felt no difficulty in upholding the prisoner's conviction under this section. But if the Allahabad Court had to decide the Bombay case, Cassidy would have been convicted, but of this offence and not under section 511. If the Bombay Judges had taken Straight, J.'s view of this section, they should have acquitted Cassidy. A similar point recently arose but was not taken in the case of a student who had attempted to assassinate Sir Andrew Fraser, then Lieutenant-Governor of Bengal. It appears that the accused had possessed himself of a five-chambered revolver, of which he pulled the trigger twice at the Governor, but each time he missed to fire. The weapon was examined and it appeared that the percussion caps were damaged. He was prosecuted under this section, but his counsel did not raise the point as to the accused's liability under this section, and he was accordingly convicted by Stephen, J., at the criminal session of 1908. The case is not reported.

The Punjab Court had to deal with a similar case in which the accused, a police sowar pulled the trigger of a loaded rifle three times to stop a prisoner escaping from.

3304. English Law on Discharging Fire-arms.—In England the mere drawing of the trigger, independently of its effect is declared to be a felony under the following provision of the Statute[16]:—

"S. 18-A. Whosoever shall unlawfully and maliciously by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person with intent to maim, disfigure, or disable any person or to do some other grievous bodily harm to any person, shall be guilty of felony, and being convicted shall be liable, etc."

3305. On this provision of law the following cases are instructive. The prisoner went to the house of his mother, but she refused to admit him. He threatened to shoot her, and then left. Twelve days later he called again, but being refused admission, returned. He returned later the same evening and opened the door which was unlocked, and entered the room where his mother was sitting. He immediately took out a revolver

(16) 24 & 25 Vict., c. 100, s. 18.

loaded in two-chambers, and aiming it at her said, "I will give you this." At this juncture he was seized by a man then present. But though he was overpowered, his finger and thumb were seen fumbling in the revolver, which cocked automatically on pulling the trigger. The jury found that the prisoner had attempted to discharge the revolver, and on the case being reserved, Lord Coleridge, C. J., (with whom the other Judge concurred), held that the prisoner had been rightly convicted of an attempt.[17] But though this case was decided under the Statute, it elicited a general discussion as to the meaning of an attempt.

Referring to the case of *Reg* v. *Lewis*[18] in which a similar question had been decided differently, Coleridge, C. J., distinguished it, adding that the facts there were that the prisoner did not raise the blunderbuss to his shoulder, and, it being a fire-arm discharged by means of a flint, there was no flint in it. There was therefore a serious question whether a man could attempt to discharge a fire-arm, which, in fact, could not possibly be discharged. I do not say how that question would be decided at the present day; but at all events there is something to be said upon the point."[19] He wholly dissented from the other case,[20] in which the prisoner had raised his arm and had pointed a pistol at another person, and he had his hand upon the trigger. So far as raising his arm and pointing the pistol were concerned, he did all that he could do to discharge it, and then other persons interfered, and took the pistol from him, and the attempt ended there. "I should think it reasonably clear to most ordinary minds that there had been an attempt to do what was prevented from being done by the interference of a third person."[21]

3306. This was the view taken in another case in which during the interview between the prisoner and the prosecutor, the former drew a loaded revolver from his coat pocket, whereupon the prosecutor immediately seized the prisoner and prevented him from raising his arm, a struggle ensued, in the course of which the prisoner nearly succeeded in getting his arm free, but after a few minutes the prosecutor wrested the revolver from him, and he was taken into custody. The prisoner was convicted of an attempt to discharge the revolver.[22] These cases are sufficient to settle this, that if the fire-arm attempted to be discharged was loaded and capped, an attempt to discharge it would be sufficient to constitute an attempt to murder, though the charge may not go off, because there is an accidental miss-fire or because the accused was seized before he could discharge it. But the same rule could not obviously be extended to an uncapped gun, and as Lord Coleridge pointed out, such a case presents materially distinguishing features. It would, therefore, seem that if Cassidy could not be convicted under section 511, he could not have been convicted at all, for his act was too remote to constitute an attempt under this section. And as regards the applicability of section 511, the question is not free from difficulty, but it would seem that that section was not intended to supplement other sections relating to attempts, which

(17) *Duckworth*, (1892) 2 Q. B. 83 (86, 87), overruling *St. George*, 9 C. & P. 483.
(18) 9 C. & P. 523.
(19) *Duckworth*, (1892) 2 Q. B. 83 (86).
(20) *St. George*, 9 C. & P. 483.
(21) *Duckworth*, (1892) 2 Q. B. 83 (87).
(22) *Linneker*, (1906) 2 K. B. 99.

being specifically enacted to deal with those offences must be deemed to be exhaustive. This was at any rate the implied view of the Law Commissioners.[23]

3307. The question whether an act has reached the degree of development that it may constitute an attempt under this section depends upon what was done, and how much was left undone. According to the Bombay Court the words "and under such circumstances" point to that stage in the act that death might be caused, if the act took effect.[24] In the view of Straight, J., too much importance should not be attached to them which mean no more than this—that the act must be done in such a way and with such ingredients that, if it succeeded, and death was caused by it, the legal result would be murder under sections 299 and 300.[25] But there is no difference between the two views. The words no doubt, refer to the circumstances which convert a mere killing into a murder, such as premeditation, the use of lethal weapons, the selection of vital parts for the inflictions of the injury, and the like. Such a circumstance would arise where the accused immediately after the birth of a child took it away and abandoned it in a place where it was likely to be picked up and was in fact picked up soon afterwards. The child died from want of sustenance, and the question was what offence the accused had committed. Here if the child had died in consequence of the exposure, the accused might have been tried for murder or homicide.[1] If he had abandoned it in an unfrequented place, it would have been a circumstance in proof of that crime. But as he had left it in a frequented place, it rebutted that inference, and reduced the offence to one under section 317.[2]

3308. In order that the completed act should be murder, it is also a circumstance that the act must be such as would in the ordinary course of nature have caused death. The question then resolves itself into this: (*i*) what was the act? (*ii*) what would have been its effect in the ordinary course? (*iii*) with what intention or knowledge was it done? (*iv*) and what prevented it from producing the effect contemplated? Intention or knowledge followed up by an act done are then the two cardinal essentials of an offence under this section. The degree of completion attained by the act is a question of fact, upon which depends the criminality of the act. At the same time if a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid, an obstacle intervening not known to himself. If he did all that he could do, and completed the only proximate act in his power, he cannot escape criminal responsibility because his own set volition and purpose having been given effect to their full extent, a fact unknown to him, and at variance with his own belief, intervened to prevent the consequences of that act ensuing, which he expected to ensue.[3] Any other view would

(23) First Rep., ss. 335-339.
(24) *Cassidy*, 4 B. H. C. R. 17; *Martu Vithoba*, 15 Bom. L. R. 291, 21 I. C. 881. *See* also *Noa Theik*, 2 R. 558.
(25) *Niddha*, 14 A. 38.
(1) S. 317, Expl.
(2) *Khodabux Fakeer*, 10 W. R. 52.
(3) *Per* Straight, J., in *Niddha*, 14 A. 38, following *Brown*, 24 Q. B. D. 357; to the same effect, *Mangavalli*, (1889) 1 Weir 328 (329); *Abdul Rahaman*, 9 C. L. J. 432, 2 I. C. 593; *Kolangaret*, 29 I. C. (M.) 670.

lead to awkward results. For suppose a pick-pocket put his hand into another's pocket, in which there was nothing that he could steal, is he to escape punishment for an attempt, because he found nothing worth stealing? This was undoubtedly the view once taken,[4] but it has since been overruled.[5]

Emp. v. Khandu, 15 Bom. 194, Examined.

3309. A somewhat curious question arose in Bombay, and it shows the danger to which technicality might at times lead one up to. In that case the accused struck the deceased three blows on the head with a stick, with the intention of killing him. The deceased fell down senseless on the ground. The accused, believing that he was dead, set fire to the hut in which he was lying, with a view to removing all evidence of the crime. The medical evidence showed that the blows struck by the accused were not likely to cause death, and did not cause death, and that death was really caused by injuries from burning when the accused set fire to the hut. The accused was convicted of murder and sentenced to death. On the sentence coming up to the High Court for confirmation, the question arose whether, in the circumstances, the accused could be convicted of murder: Parsons, J., was of opinion that he could be, but Birdwood, J., differed from him, holding that, the circumstances, he could not be convicted of anything more than an attempt. The question was, therefore, referred to Sargent, C. J., who agreed with the latter, though he held that the deceased died of the blows inflicted by the accused, but assuming that the deceased would not have died from the effect of the blows, "though the accused undoubtedly believed he had killed his victim, there would be a difficulty in regarding what occurred from first to last, as one continuous act done with the intention of killing the deceased. Under these circumstances, the offence should be held to have been only the attempt to murder, and that the sentence should be transportation for life, under section 307."[6]

3310. Here then there was an act intended and even caused in fact, though not in law, since criminal causation implies a conscious effort which ceased after the accused's mistaken belief that the man was dead. If death was intended but was not so caused, the accused could no more be convicted of murder than if the death were caused by circumstances unconnected with the intention. In such a case there may be death, and yet the accused might not be guilty of anything more than a mere attempt. If there was neither intention nor knowledge, the accused may not be guilty of even that offence. The prisoner took the child away shortly after its birth, and abandoned it in a thicket not far from a house and the footpath, and in a place where the villagers were in the habit of herding cattle. The child was picked up almost immediately after its exposure, but it died presumably from want of sustenance some six hours after. It was found that the child did not die in consequence of the exposure. The accused could not therefore be convicted of murder or homicide, nor could he be convicted of an attempt to murder or commit homicide. His offence fell under section 317, and he was convicted of it.[7]

3311. Where the act done is consistent only with one intention, that intention may justifiably be presumed. For instance, a person who fires

(4) *Collins*, 33 L. J. M. C. 177.
(5) *Per* Lord Coleridge, C. J., in *Brown*, 24 Q. B. D. 357 (359).
(6) *Khandu*, 15 B. 194 followed in.
(7) *Khodabux Fakeer*, 10 W. R. 52.

two shots in succession at another person cannot be acquitted of murderous intention.(8) So where a widow of twenty years of age, being anxious to join her paramour, and being resisted by her parents and brother, administered them *dhatura* in their food which she cooked. She confessed to having drugged them to secure a chance for elopement. She did not know that *dhatura* would kill them, and she had no intention of killing them. But the Court held that she must be presumed to have foreseen the natural consequences of her act, and she was convicted under this section, as the persons drugged escaped, as they were speedily removed to the dispensary.(9) The *rationale* of this case is wholly opposed to Khandu's case decided in Bombay.(10)

3312. No Attempt where Means Inadequate.—Again, there may be intention to cause death, and yet the means adopted be wholly inadequate to cause death. In such a case there could be no conviction for even an attempt. Such was the case of the wife, who intending to poison her husband, mixed some arsenic with his food, but it was insufficient to kill him. He died sometime afterwards from inflammation of the brain. but there was no evidence that the poison was even the secondary cause of the death.(11) In another similar case the food was found to contain poison, but there was no evidence of its quantity and of its probable effect on any one who might have eaten it; which was held to justify no conviction for anything more than an attempted hurt punishable under section 328.(12)

In another case the accused struck his wife on her neck with an axe causing an incised wound, and the question that exercised the Court was whether his conviction under this section was justifiable. "That section," it observed, "provides in terms for the punishment of a person who does any act with such intention or knowledge and under such circumstances that if he by that act caused death, he would be guilty of murder. It seems clear on these words, and still clearer from the illustrations appended to the section, that the only act which could fall within the purview of the section is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events.....Now although a hatchet is a dangerous weapon, a blow with it is not, in our opinion, an act ordinarily capable of causing death in the natural and ordinary course of events. On the contrary, we should say that whether a blow with a hatchet is or is not capable of causing such a result must depend upon the particular nature of the blow inflicted. It seems to us, therefore, that this is a case where the accused's criminal liability must be limited to the act which he in fact did, and cannot be extended so as to embrace the consequences of another act which he might have done but did not do." The conviction of the accused was, consequently, altered to one under s. 324 and the imprisonment for seven years reduced to that for one year.(13)

3313. A case on the other side of the line was that of a Brahmin widow who enticed into her house a boy aged nine years, used violence

(8) *Ahmad Yar Khan*, (1909) P. W. R. 1, 5 I. C. 602.
(9) *Tulsha*, 20 A. 143.
(10) 15 B. 194.
(11) *Venkatasami*, (1882) 1 Weir (3rd Ed.) 187.
(12) *Mi Pu*, 5 L. B. R. 79, 3 I. C. 721.
(13) *Martu Vithoba*, 15 Bom. L. R. 291, 21 I. C. 881.

to him, and removed several jewels from his person, and being unable to remove his anklets and earrings, tied his wrists and neck with a rope, put a cloth in his mouth, took him into a room and placed him sitting in a jar which was only twenty-two inches deep, all night, and put a millstone on the mouth of it, through three holes of which the boy received a stinted supply of air. She did not give him food at night and before dawn lifted the millstone once and looked at the boy, but replaced the millstone. The boy untied the rope, and owing to the omission of the accused to watch the jar and the room, got out in the morning and ran home. The accused was convicted under this section, and the High Court affirmed the conviction, holding that in cases arising under this section, two questions were material: (*i*) intention; and (*ii*) nature of the act done. As to intention the Court accepted the verdict of the lower Court that the accused intended to cause death, such intention being presumed from the nature of the act done. As regards the act done, the Court held with the Bombay High Court,[14] that the evidence must be of the act which should be physically capable of causing death, and such evidence was held to be supplied by the boy's confinement in the jar without food, which was physically capable of causing death. His escape was due to his adventurous escape due to lack of sufficient vigilance and the conviction of the accused under this section was, consequently, held to be both appropriate and justifiable.[15]

But the following case is by no means so easy of solution. The accused in the course of a quarrel with her sister-in-law and in a fit of anger flung her child, aged 3 years, into a pond on the edge of which her house was situate, exclaiming that the death of the child should rest as a curse on the head of the woman with whom she was quarrelling. The child was picked up by the by-standers. The pond was found to contain about four feet of water. The Sessions Judge had convicted the accused under section 323, but the High Court altered it to one under this section, holding that her ejaculation showed her intention[16]; but what about the by standers?

Act Without Intention.

3314. Of course, as already remarked, an act, though in the ordinary course of nature sufficient to cause death, would not constitute this offence if the intention to kill is lacking. Such was the case of the wife who administered to her husband a potion to improve the quarrelsome nature of her husband. The potion was supplied to her by her lover, who and another knew it was *dhatura*. Thereupon the Court convicted the wife under s. 337, her lover under this section read with s. 107 and the third person under this section read with s. 109.[17]

3315. Inchoate Acts.—It is perhaps unnecesary to add after what has been made sufficiently manifest, that a mere preparation falling short of a definite act, is not punishable as an attempt under section 511. much less under this section. Such was the case of the accused who went to purchase poison with the object of poisoning her son-in-law.[18] And so a person purchasing a pistol with the intention of committing a murder

(14) *Cassidy*, 4 B. H. C. R. 17.
(15) *Mangavalli*, (1889) 1 Weir 328.
(16) *Nanubi Babu*, 5 I. C. (A.) 138.
(17) *Bhagava*, 19 Bom. L. R. 54, 38 I. C. 1003.
(18) *Bukhtavar (Mt.)*, (1882) P. R. No. 24.

could not be punished for an attempt. Such acts are in fact regarded as too indefinite to be visited with the vengeance of law.(19)

Attempt to commit culpable homicide.

308. Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Session. Cognizable Warrant. Bailable. Not comp.

Illustration.

A, on grave and sudden provocation, fires a pistol at *Z*, under such circumstances, that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. *A* has committed the offence defined in this section.

[*Act*—ss. 33, 34. *Cause death*—s. 299. *Culpable homicide*—s. 299.]

Synopsis.

(1) *Analogous Law* (3316).
(2) *Procedure and Practice* (3317).
(3) *Proof* (3318).
(4) *Form of Charge* (3319).
(5) *Attempt to Commit Culpable Homicide* (3320-3321).

3316. Analogous Law.—This section is *per verba et literis*, the same as the last section, with the only difference that it relates to an attempt to commit culpable homicide, whereas the last section relates to an attempt to commit murder. The punishment here provided is consequently also less. In other respects the constituting elements of the two sections are the same.

3317. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session.

3318. Proof.—The points requiring proof are:—

(1) That the accused did an act.

(2) That he did it with—

(*A*) *the intention of*—

(*a*) causing such bodily injury as is likely to cause death, or

(*b*) causing death on—

(i) grave and sudden provocation not courted, or

(ii) in the exercise of the right of private defence which was, however, exceeded, or

(iii) believing in the lawful discharge of his public duty, or

(19) S. 511, Comm.

(*iv*) by consent of the deceased; or

(*B*) *the knowledge*—

(*c*) that the act was likely to cause death.

To which may be added the following aggravating circumstance:—

(3) That the act caused hurt to the person upon whom the attempt was made.

3319. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) *as follows*:—

"That you, on or about the—day of—at—did an act, to wit—, with such intention (or knowledge), and under such circumstances that, if by that act you had caused the death of *A B*, you would have been guilty of culpable homicide not amounting to murder (and that you caused hurt to said *A B* by the said act), and thereby committed an offence punishable under section 308 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3320. Attempt to Commit Culpable Homicide.—To quote again the language of Sir James Stephen, an attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.[20] It has been shown under the last section, how far and in what respects an attempt differs from a mere preparation or a preparatory act. The act must be an attempt in the legal sense of that term. It must then be an attempt to commit culpable homicide not amounting to murder. This can only be proved by proving facts and circumstances from which it would be justifiable to hold that if the act had been completed, it would have been only culpable homicide, and not murder. This is not difficult to ascertain—for a person may attempt to shoot unnecessarily a burglar, or an intruder who had come to have an intrigue with his wife, or one who resists a public servant in the discharge of his duties, and whom it was possible to overcome otherwise, or indeed, in any of the cases discussed under sections 299 and 300, in which the completed act would have been culpable homicide and not murder.

3321. So there may be cases in which the probability of a certain result may be gauged by the nature of the weapon used, or the amount of injury inflicted. In all such cases the attempt will be the attempt to commit culpable homicide, and not murder.

Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp.

309. Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

s Attempt to commit uicide.

(20) Stephen Dig. Cr. L., Art. 49, p. 29.

Synopsis.

(1) *Analogous Law* (3322-3325).
(2) *Procedure and Practice* (3326).
(3) *Proof* (3327).
(4) *Form of Charge* (3328).
(5) *Principle* (3329).
(6) *Meaning of Words* (3330).
(7) *Attempted Suicide* (3331).
(8) *What is an Attempt to Commit Suicide?* (3332).
(9) *Attempt must be Intentional* (3333-3335).
(10) *Measure of Punishment* (3336-3338).

3322. Analogous Law.—The word "or with fine" or "with both," were substituted for the word "and shall also be liable to fine" by the Amending Act of 1882.[21] This amendment has had the effect of overruling the Bombay case in which the sentence of imprisonment was held to be compulsory.[22] This section punishes an attempt to commit suicide. The definition of an attempt, as here given, is the same as forms part of section 511, and is a paraphrase of the English phrase "manifest overt act." Sir James Stephen defined an attempt to commit a crime as an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission, if it were not interrupted.[23]

3323. The stoic philosophers of old and the Hindus of the present day regard life as an evil, and its destruction was, therefore, in a manner encouraged as tending to the emancipation of that ethereal spirit, which, when imprisoned within its earthly encasement, could not ascend to that empyrean, which is its natural destiny and abode. The ancient stoic philosopher destroyed himself to escape the ills of life. The modern Hindu torments life to escape from its imprisonment. The civil law tolerated an attempt to commit suicide, but the laws of Athens punished the would-be suicide by cutting off the hand which attempted to commit the desperate deed.[24] The advent of Christianity created a new ideal of life and it became soon recognized that no one had a power to destroy it, except by commission from the Almighty Author of it. And so the suicide began soon to be recognized as guilty of a double offence; one, spiritual, in invading the prerogative of the Almighty, and rushing into His immediate presence uncalled for; the other, temporal, against the king, who has an interest in the preservation of all his subjects.[25]

The law has, therefore, ranked this amongst the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact as well as other felonies; for, if one persuades another to kill himself, and he does so, the adviser would be held guilty of murder.[1] And as for the suicide himself, law could not touch his soul, so it used to punish him so far as it could, by denying him the right of a Christian burial and by forfeiting all his property, thereby depriving his family of all means of sustenance. This punishment was a sort of vicarious punishment resembling the posthumous dishonour which made the living reflect before launching themselves into eter-

(21) Indian Penal Code Amendment Act I, (VIII of 1882), s. 7.
(22) *Chanivora*, 1 B. H. C. R. 4.
(23) Steph. Dig. Cr. L., Art. 49, p. 29.
(24) *Pott Antty.*, B. I. C. 26; 4 Black, 189.
(25) 4 Black, 189.
(1) *Ib.*

nity. So the Athenian Magistrates, alarmed at the frequency of suicide amongst the Athenian maidens, ordained the dragging of their nude bodies through the public places, which at once led to the stoppage of suicide.

3324. The posthumous punishment of a suicide in England continued for many years. But as the punishment of forfeiture cruelly visited the innocent, the juries adopted the practice of pronouncing the suicide as committed in a state of temporary insanity, which enabled the Court to circumvent the harsh law laid; and the penalty of forfeiture, which was at no time popular, became in course of time so unpopular that it had to be abolished in 1870,[2] and eleven years later (in 1882) the right of burial in church was also restored.

3325. There is thus now no temporal or ecclesiastical penalty attached to a suicide though the juries still couple insanity as the cause of all suicides. The suicide was at no time subject to any civil penalties in this country. The only penalty that a suicide has now to suffer is that prescribed under this section. In short, it is the only offence in which while an attempt is punishable, a completed crime is not.

3326. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Presidency Magistrate, or a Magistrate of the first or second class.

3327. Proof.—The points requiring proof are:—

(1) That the act in question was an attempt.

(2) That the attempt was by doing an act towards the commission of suicide.

3328. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you attempted to commit suicide, and did an act, to wit——towards the commission of it, and you thereby committed an offence under s. 309 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* High Court.)

"And I hereby direct that you be tried (by the said Court) on the said charge."

3329. Principle.—Law esteems the lives of men as not only valuable to their own possessors, but as also valuable to the State which protects them and for the protection and amelioration of which the State exists. It, therefore, rightly claims to prevent persons from taking their own lives, as much as it prevents them from taking the lives of others. This right has been claimed by the State at all times (§ 3325), though the nature of its interference has, from time to time, varied. At the present time, it is the recognized doctrine of criminal jurisprudence that though the State

(2) (1870), 33 & 34 Vict., c. 23, s. 1.

should not impose posthumous disabilities in case of suicide, it should certainly punish those who attempt to commit it. It may be said, that the policy of punishing an attempt, where the completed act goes unpunished, might encourage those who made the attempt to make it successful. But this has not been the experience of jurists who have found the provisions as existing both salutary and deterrent.

3330. Meaning of Words.—"*Does any act towards the commission of such offence*": "Such offence" refers to suicide, but suicide is not an offence under the Code or under any special or local law. The language of the section is inapt. To be more correct, it should run thus. "Whoever attempts to commit, and does any act towards the commission of suicide. etc." For the meaning of "*attempt*," *see* § 3332.

3331. Attempted Suicide.—Suicide, as such, is no crime under the Code. Its attempt alone is punishable under this section. The fact that an attempt to commit suicide is made criminal shows that in the eye of the law suicide is not necessarily the outcome of deranged intellect. But that it may be a crime committed by a person in his sober senses. And this is the view of medical men and of many psychologists.(3) There can be no doubt but that persons are often driven to commit suicide owing to poverty or distress, loss of honour and fortune; while others are driven to self-effacement under the impulse of religion, as witness the case of *suttee* and of those who starve or torture themselves to death to attain *Nirvan* or a supreme beatitude by absorption in the Divine essence.

3332. What is an Attempt to Commit Suicide?—So far then the question presents no difficulty. But when the question of attempt is considered, two questions naturally arise: what is an attempt, and when does the preparation end and an attempt begin. A person who feels moody and melancholy and threatens to commit suicide may have that intention, but he cannot be convicted of an attempt. An attempt implies at least an act toward the commission of suicide; such as drowning or poisoning or shooting oneself. If a person throws himself into a well with a view to drowning himself, and is rescued, he is guilty of such an attempt as is punishable under this section.(4) But if he runs to a well with a view to drown himself, but is rescued before he throws himself into it, he could not be convicted of an attempt; for his act was a mere preparation to commit an act, and before committing which he might have changed his mind.(5) So the pounding of oleander roots with an intention to poison oneself with the same, does not constitute an attempt to commit suicide.(6) It is a mere preparatory stage, and the door of repentance is still open to him. A woman, who was in an advanced stage of pregnancy being unable to endure the pains of the prolonged labour threw herself into a well. She was rescued but the child was born dead. It was held that the offence she had committed was one under this section, and that she could not be convicted of attempting to cause miscarriage.(7)

(3) 2 Taylor's Med. Juris., p. 495, (1850) Jour. Psych. Med., p. 19.
(4) *Mulia*, 17 A. L. J. 478, 50 I. C. 1003.
(5) *Ramakka*, 8 M. 5.
(6) *Tayee*, (1883) B. U. C. 188.
(7) *Mulia*, 17 A. L. J. 478, 50 I. C. 1003.

3333. Attempt must be Intentional.—The essence of suicide is an intentional self-destruction of life. If, therefore, a person take an overdose of poison by mistake, or in a state of intoxication, or in order to evade his arrest by his pursuers,[8] he could not be held accountable for his action. But if there was an *intention* to commit suicide, and an attempt for that purpose was made, the accused could not escape responsibility for his action, except on the ground of insanity. This was settled in England in a case, the decision of which does not appear to be in every respect satisfactory. The case arose out of a policy of life-insurance, which, by its terms, became void on the insured committing suicide. The deceased was proved to have been killed by taking sulphuric acid in a state of insanity. And the question was whether such death amounted to suicide. Cressel, J., held that suicide meant "a felonious killing," and that it did not extend to such a case as that of the accused.[9] But unfortunately this decision was reversed on appeal by the Judges who held that if a person killed himself *intentionally*, no matter whether he was at that time sane or insane, he had committed suicide. This may be true, but how, it may be asked, can a person have *intention*, when he is bereft of reason, by reason of his insanity? There can be scarcely any doubt that if such a question arose again, the judgment of the Court would be very different. But whatever may be the view of English Law, it is abundantly clear that such a case could not be similarly decided in this country (§§ 773-775).

English Law Distinguished.

3334. The accused jumped into a well to avoid and escape from the Police. He came out of the well of his own accord. He was convicted of this offence, but his conviction was quashed by the High Court on the ground that he had no intention to commit suicide.[10]

3335. Suicide, of course, implies total deprivation of life. Mutilation of one's person is not suicide. So a person could not be convicted of this offence for emasculating himself.[11]

3336. Measure of Punishment.—Compared to the gravity of the crime, the punishment here provided is comparatively light. This is because, law regards would-be suicides as fitter objects of commiseration than of punishment. Indeed, this is as may well be expected. For men are by instinct endowed with the desire of self-preservation. And self-preservation is the mainspring of human existence and human enterprise. A person who casts to the winds this great impulse must either be insane or moved by deep feeling. In either case he is a fit object of human sympathy.

If he is shown to be insane so as to be bereft of the power of cognition, he is wholly exempt from punishment. If he is not so exempt, it will then be a question as to what should be the proper measure of punishment.

3337. In the case of sane persons, suicide is invariably due to some motive, perceptible or imperceptible, but there is always a motive for the crime. Such motives differ in different countries with the different environments. As a rule, similarity of environments and purpose and view

(8) *Dwarka Poonja*, 14 Bom. L. R. 149. 14 I. C. 598.
(9) *Schwabe* v. *Clift*, (1846) L. T. 342.
(10) *Dwarka Poonja*, 14 Bom. L. R. 146, 14 I. C. 598.
(11) *Madho Singh*, (1878) P. R. No. 22.

of life lead to the same motive. Thus the annual records of suicides committed in a notorious gambling city show the same motive—financial ruin and disappointment. Love, again, accounts for a good percentage of such cases. In India, jealousy, family discord, destitution and physical suffering are potent factors in causing suicide. In European countries, the means adopted for self-destruction are shooting, hanging, poisoning, drowning, and lastly cut-throat. In India drowning is preferred to hanging, but they are both equally responsible for such deaths.

3338. The points which should weigh with the Court in awarding punishment are:—

(1) Age and mental state of the accused.

(2) His motive for the attempt. Was it poverty and distress, loss of a dear relation, mental suffering brought on by disease and pain, or was it attempted in a fit of angry passion, or out of jealousy and family discord? In the former case, there is reason for indulgence, in the latter case there is comparatively no such reason.

(3) The committing of suicide by *Dharna* was at one time much in vogue. The creditor hired a man, perferably a Brahmin, to go to the debtor, and sit at his door fasting till he was repaid the loan. In many cases, the creditors themselves used to resort to their debtors and offered up their ghosts in attempting to realize their dues. This practice was much improved upon by harpies and extortioners of all kinds, who insisted upon the satisfaction of their demands, failing which they attempted to cut their throats in the presence of their victim. Needless to say, such exactions could only be tolerated by men who dread to take upon themselves the sin of having a man dying at their door. Such cases, if they ever arise, should be met with a firm hand.

310. Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.

Thug.

[*Murder*—s. 300. *Child stealing*—ss. 359, 360 *Robbery*—s. 390.]

Synopsis.

(1) *Analogous Law* (3339-3341). (2) *What is a Thug?* (3342-3343).

3339. Analogous Law.—This section provides for a species of crime, which is happily soon passing away. Thugee was once rampant in the country, and the Thug regarded himself as a special object of protection by the goddess Kali or Devi, whose protege he claimed to be, and to whom he offered up the blood of his victims. The first British Statute dealing with this class of professional criminals was the Act of 1836[12] which enacted as follows:—

(12) Act XXX of 1836.

"Whoever belongs or has at any time belonged to any gang of persons associated for the purpose of gaining a livelihood by inveigling and murdering travellers in order to take the property of such travellers is designated a thug."

The punishment provided for belonging to a gang of thugs was imprisonment for life with hard labour. This section and the next incorporate these provisions of the Thugee Act, omitting therefrom "for the purpose of gaining a livelihood" which were both unnecessary and objectionable.(13) The sentence of transportation was, again, substituted for the life imprisonment provided by the Act of 1836, as being more appropriate.

3340. As the term is now defined, a thug must be distinguished from a robber on the one hand, and a dacoit, on the other. Thugs are as a rule robbers and dacoits, but not *vice versa*. Persons who "habitually associate" with thugs are members of their gang. The object of thugs is described to be robbery or kidnapping accompanied with murder. This means that the commission of murder as of set purpose is an ordinary incident in the life of a thug. Thugs are, in short, organized bands of roving marauders of the type of Robin Hood and his crew, who work in gangs, and have no half measure with their victims. They kill them first and rob them afterwards. They used to frequent bazars, serais, fairs and public ways, where people used to throng or pass by. They used to appear in various disguises, and often worked as domestic servants, cartmen, syces or merchants—but in each case their object was to reconnoitre their surroundings or inveigle travellers to rob and murder them.

Thugs as such, have now passed away into the history of the past; but the Code naturally contains provisions, but for which the crime could not be adequately punished.

3341. It will be observed that in order to constitute a thug, it is not necessary that the accused should have in fact committed murder or robbery. All that is necessary is that he must have been the habitual associate of such a person—that is to say, a member of his gang, or in short, his confederate. The actual commission of an offence by him is not then necessary.

3342. What is a Thug?—The general view of a thug has been already presented. It is here intended to analyse the definition of the term as enacted in the section. To begin with, the section has no retrospective application. It applies only to persons whose case falls within its purview since the passing of the Code, namely, 6th October, 1860. In order to be a thug a person must (*i*) habitually (*ii*) associate with (*iii*) other or others (*iv*) for the purpose of committing robbery or child stealing *by means of or accompanied with* murder.

The first three requirements of the offence are that the person must be the habitual associate of another. There must then be at least two persons in the crime. A single individual planning robbery by means of murder, cannot be proceeded against as a thug. The fact that the thug must have associated with another, habitually and for a common purpose, points to such association for a definite time or during some definite period. A person casually associating with another may or may not be his confederate. He is not a thug.(14) Again, in order to be a habitual associate of

(13) First Rep., s. 346. (14) *Pira*, (1881) P. R. No. 28.

another, there must be evidence of their companionship. The fact that A was at times with B who was the associate of C, who was a thug, would not make A C's habitual associate, nor render him guilty through B.

So where the accused Sharf-Din was charged for being a thug, and it was proved that he had been habitually associated during various periods with various persons for the purpose of committing robbery by means of the administration of *dhatura*, it was held by the Chief Court of the Punjab that the proof that Sharf-Din had associated himself on different occasions with different persons for a particular purpose was proof that Sharf-Din was habitually associated with other persons for that purpose within the meaning of this section. But this fell short of proof that each person with whom Sharf-Din was associated was habitually associated with Sharf-Din, or was habitually associated with any other person with whom Sharf-Din was associated. In order to convict a person for being a thug, two things were essential: (*a*) that during some definite period of the accused's career, he was habitually associated with Sharf-Din for the purpose specified in the definition, or (*b*) that at some definite point of time Sharf-Din and one or more other person or persons were associated for that purpose, and the accused was during some definite period of time habitually associated with Sharf-Din and such other person or persons for that purpose.(15)

Again, the object of associates must be to commit the definite offences of robbery or child-stealing. A gang of men organized to commit any other crime by means of murder would not be thugs.

3343. Lastly, the commission of murder must be the necessary accompaniment or means of committing those crimes. Hence it follows, that persons who administer stupefying drugs to facilitate their crimes are outside its category. As was observed by the Punjab Chief Court in the case last cited: "Whether the purpose involves the commission of murder must depend principally upon the *modus operandi* intended to be employed, the purpose may in truth only be robbery by means of hurt or grievous hurt, or of culpable homicide. Even when death has occurred, it might be established that the act of causing death was only culpable homicide not amounting to murder, although the drug was intentionally administered to facilitate robbery, the fact being that *dhatura* both can be, and in practice frequently is, used by robbers without a fatal result. It is necessary, therefore, to show against a person accused of a purpose to commit robbery with murder, something more than that he proposed to administer, or did on a particular occasion administer *dhatura* in order to effect his purpose of robbery: though it may not be absolutely necessary to show that on any occasion culpable homicide amounting to murder was in fact committed."(16)

311. Whoever is a thug, shall be punished with transportation for life, and shall also be liable to fine.

Session. Cognizable. Warrant. Not bail. Not comp.

Punishment

[*Thug*—s. 310.]

Synopsis.

(1) *Analogous Law* (3344).
(2) *Procedure and Practice* (3345).
(3) *Proof* (3346).
(4) *Form of Charge* (3347).

(15) *Pira*, (1881) P. R. No. 28.

(16) *Pira*, (1881), P. R. No. 28.

3344. Analogous Law.—The last section defined a thug. This section punishes him. As already remarked (§ 448), a thug is a person who habitually associates with another for murder and robbery or child-stealing. The gist of the crime lies in being a member of such an organisation,—the actual commission of the offence is not necessary. But there must be evidence that the gang was formed for that purpose, though the purpose may not have been yet achieved.

3345. Procedure and Practice.—This offence is cognizable, but warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Court of Session.

3346. Proof.—The points requiring proof are:—

(1) That the accused associated with any person or persons.

(2) That he did so since 6th October 1860 (the date of the passing of the Code).

(3) That he did so habitually.

(4) That the purpose of such association was to commit robbery, or child-stealing, by means of or accompanied with murder.

3347. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you——were a thug, and that you thereby committed an offence punishable under section 311 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

"And I hereby direct that you be tried by the said Court on the said charge.

Of the Causing of Miscarriage: Of Injuries to Unborn Children: Of the Exposure of Infants: Of the Concealment of Births.

ion. -cog. rant. able. comp.

Causing miscarriage.

312. Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.

[*Voluntarily*—s. 39. *Good Faith*—s. 52.]

Synopsis.

(1) *Analogous Law* (3348-3350).
(2) *Procedure and Practice* (3351).
(3) *Proof* (3352).
(4) *Form of Charge* (3353).
(5) *Principle* (3354-3355).
(6) *Meaning of Words* (3356).
(7) *Criminal Abortion* (3357-3361).
(8) *Abortion by Mechanical Means* (3358).
(9) *Its Detection* (3359).
(10) *Abortion by Medicine* (3360-3361).
(11) *Causing Miscarriage and Attempting it* (3362-3363).
(12) *What is Causing Miscarriage* (3364).
(13) *Pregnancy Indispensable* (3365).
(14) *Miscarriage after being "quick with child"* (3366).
(15) *Measure of Punishment* (3367).

3348. Analogous Law.—As to this group of sections the authors of the Code wrote: "With respect to the law on the subject of abortion we think it necessary to say only that we entertain strong apprehensions that this or any other law on that subject may, in this country, be abused to the vilest purpose. The charge of abortion is one which, even where it is not substantiated, often leaves a stain on the honour of families. The power of bringing a false accusation of this description is, therefore, a formidable engine in the hands of unprincipled men. This part of the law will, unless great care be taken, produce few convictions, but much misery and terror to respectable families, and a large harvest of profit to the vilest pest of society. We trust that it may be in our power in the Code of Procedure to lay down rules which may prevent such an abuse. Should we not be able to do so, we are inclined to think that it would be our duty to advise his Lordship in Council rather to suffer abortion, when a mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions which would occasion more suffering to the innocent than to the guilty."[17]

3349. These views of the authors have been given effect to by the Procedure Code, which takes the offence out of the cognizance of the Police.

The offence, as here constituted, punishes both the mother as well as her accomplice. But only the accomplice, and not the mother was at one time punishable under English Law,[18] but the law as since enacted makes them both equally liable[19]:—

"58. Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour and with or without solitary confinement."

(17) Note M, Reprint. p. 151.
(18) 43 Geo. III, c. 58; 9 Geo. IV, c. 31; 7 Will IV & 1 Vict., c. 85.
(19) 24 & 25 Vict., c. 100, s. 58.

3350. As to this section, it may be observed, that in its verbiage, it differs materially from this section, for it speaks of "administering or causing to be taken any *poison* or other *noxious* thing," which restricts the operation of the rule, far more than the offence here enacted. In short, in England the abortion must be either poisonous or noxious, and it must be moreover administered or caused to be taken, but it need not be either under this section.

3351. Procedure and Practice.—This offence is non-cognizable but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is exclusively triable by the Court of Session.

3352. Proof.—The points requiring proof are:—

(1) That the woman was with child.

(2) That the accused did some act to cause her to miscarry.

(3) That he did so voluntarily.

(4) That that act caused her to miscarry.

(5) That he did not cause the miscarriage in good faith, in order to save the mother's life.

To which may be added the following aggravating circumstance:-

(6) That the woman was then quick with child.

3353. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you voluntarily caused one A B (name of the woman miscarrying), then (quick) with child to miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said A B, and thereby committed an offence punishable under section 312 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3354. Principle.—The offence of fœticide—or aborticide—may be committed with or without the consent of the woman. This section relates to the causing of miscarriage with her consent, while the next section deals with the same operation performed without her consent. The saving grace of the offence in each case is good faith and life-saving necessity.

3355. Miscarriage is punished in law, both because it involves the performance of an operation dangerous to the life of the mother, as because it arrests the growth of population which is necessary for the existence and welfare of society. At the same time, circumstances arise when the performance of the operation alone can save the life of the mother. In that case its performance becomes justifiable, and law then allows the sacrifice of one rudimentary life to save another comparatively more valuable.

3356. Meaning of Words.—"*A woman with child*" simply means pregnant, as opposed to being "*quick with child,*" which refers to that advanced stage of pregnancy when the "quickening" takes place. "Quickening" is the perception by the mother of the movements of the fœtus, when the embryo assumes a fœtal form.[20] It is derived from Lat. *vivus*, Skr. *jiv*, to live, and "quick" thus means "living." The old notion was that the fœtus became first endowed with life when that sensation was felt.

3357. Criminal Abortion.—Fœticide or aborticide or causing miscarriage consists of causing the expulsion of the contents of the uterus after conception and before the term of gestation is completed. "Causing miscarriage" is a popular expression for this operation. Now, miscarriage may be natural or violent. Neither this section nor the next deals with natural abortion. It only penalizes violent or forced abortion. The question whether a miscarriage caused is natural or violent, depends upon the evidence of abortives used or given. Abortion may be induced as much by the administration of irritant medicines, as by the use of mechanical means. A pregnant woman who threw herself into a well because she could not endure the travails of labour could not be convicted of this offence, because what she did was intended to put an end to her own life and not to cause the miscarriage, which resulted from her act, voluntarily within the meaning of the section.[21]

(1) Abortion by Mechanical Means.

3358. Abortion by use of mechanical means may be induced in a variety of ways. It may be produced as much by violent exercise, as by riding or driving, as by use of pressure on the abdomen, or the passing of a sound into the uterus the object of which is to force the membranes destroying the fœtus, and thereby leading to its expulsion. Abortion is often induced in this country by the insertion into the uterus of a stick or probe smeared with assafœtida, which ruptures the membranes and causes abortion. Another method adopted is the ulceration of the womb by the insertion of a piece of wire or whale-bone into the mouth of the womb till blood appears. The mere insertion of a male catheter, or bougie between the membranes and the walls of the womb may induce abortion. To further aid the mechanical means employed, the operator may give pills of oil of savin, sulphate of iron and aloes to aid in the expulsion of the ovum.

Abortion may be induced by producing anæmia caused by profuse bleeding from the arm. The object in each case is the destruction of the *ovum* or embryo by destroying or puncturing the enveloping membranes. But the successful performance of this operation demands care and a most accurate knowledge of anatomy. In the hands of an unskilled operator it is as dangerous to the mother as it is unsuccessful in its results. The skilled surgeon first dilates the mouth of the womb and the membranes are ruptured by the use of a female catheter, or by an instrument of similar type but including a blade like a tonsil-lancet. Abortion can only be insured by opening the inner membrane or amnion. If the membranes are completely penetrated, they discharge a watery fluid, and the commencement of premature labour may then take place at any time up to two or three days.

(20) *Ademma*, 9 M. 369.

(21) *Mulia*, 17 A. L. J. 478; 50 I. C. 1003.

Its Detection.

3359. The detection of miscarriage caused by mechanical force, depends upon the degree of skill exercised by the abortionist. In ordinary cases such operation can seldom fail to leave behind marks of violence on the womb, as well as on the fœtus. But this can only be ascertained by a medical examination either *ante-mortem* or *post mortem*. The artificial dilation of the womb by sponge tents or Brane's bag may suggest the hand of a more skilled operator. And it may not be possible to trace the true cause, if the abortion was caused by a trained surgeon well versed in human anatomy of the ovum and the maternal structures, as well as of the state of development which the neck of the uterus assumes at different periods of pregnancy

(2) Abortion by Medicine.

3360. Another mode of procuring abortion is by the administration or application of medicines. But though more frequently resorted to, it is neither so safe nor so certain in its results. Indeed, the only drugs known to act directly on the womb are *ergot* and to a smaller extent borax, aloes, ferric chloride (when given in large doses) and *actea racemosa*, but their action is uncertain, and ordinarily they cost the life of the woman. Besides those already enumerated, mineral poisons, such as arsenic, sulphate of copper, copperas or ferrous sulphate, corrosive sublimate, bichromate of potassium, preparations of ferric chloride are amongst the chief employed for this purpose in Europe. But these are not all. Drugs, such as croton oil, elaterium, gamboge colocynth, pillcochia (a mixture of aloes and colocynth) and other drastic purgatives have been used with criminal intent for the same purpose. Some herbs, such as pennyroyal, broom and fern are said to possess a certain virtue as abortives. They are, at any rate, harmless as compared to white and black hellebore, yew and laburnum which are often administered for the same purpose. Of these kinds savin, black hellebore, aloes, gamboge, rue, madder, stinking goose foot gin, borax, have been proved to possess the property of promoting menses. They, however, all act indirectly on the womb by producing a shock to the general system. Consequently, medical men classify medical abortives as (*i*) *Ecbolics*[22] and (*ii*) *Emmenagogues*.[23]

3361. In India the substances commonly employed are camphor, saffron, copper, seeds of papaya, carrots, aloes, mercury, croton oil, quicklime, copper, the juice of the jeata, bamboo leaves and the mulberry, the roots of *pan* and seajeena. They are supposed to have a direct effect on the uterus, but in reality they only act as irritants on the system.

The action of these drugs upon human system is not the same, and their detection in the case of the living can, of course, be only made by ascertaining their effect upon the system and the symptoms produced. Where autopsy is made, their effect may be ascertained by examination of the parts affected, the coating of the stomach and other traces which irritant poisons leave behind them. In certain cases medical examination would have to be supplemented by the chemical examination of the contents of the stomach. Stains on clothes are sometimes subjected to chemical analysis, but this test is fallacious, as there is no difference between natural and violent abortion, or between menstrual discharge and abortion.

(22) From a Greek name of a medicine which causes abortion.

(23) From Gr. *emmena* the menses—*em* in, *men* or *menos*, a month, and *ago* to lead. Lit., a medicine taken to promote menstrual discharge.

3362. Causing Miscarriage and Attempting it.—But in each case the questions that arise under this section are: (*i*) was there the causing of an abortion; (*ii*) was there an attempt to cause it; (*iii*) and was the abortion caused or attempted to be caused criminal?

Where the abortion has been actually caused, the only question that then remains is, whether it was natural or induced. In the former case there is, of course, no occasion to bring the section into requisition. Its applicability only arises in the latter case. And the questions that have been very briefly touched upon in the foregoing discussion would only then arise. In a case of attempt[24] it may also be sometimes possible to trace the crime to its true origin. But in such cases, if the woman was a consenting party, it is not always possible to connect the various links in the chain of evidence.

3363. Assuming, however, that these stages are circumvented, the next question that stamps the deed with illegality and criminality is, that the abortion should not have been caused in good faith for the purpose of saving the life of the woman. This must be proved by the prosecution, for it is a part of the definition of the crime. It may, however, be as much proved by direct evidence, as it would be presumed from circumstances. Such presumption would arise if the woman was a widow, or unmarried, or if she belonged to the "fashionable" set who dread the responsibilities of matrimony. In the latter case, if the woman was married the *res questae* may not be so obviously traceable, though this only affects the proof and not the crime which is the same in each case.

3364. What is Causing Miscarriage?—The term "causing miscarriage" has not been defined, and requires a word of explanation. It would include anything done or given to the woman to procure abortion, and which has that result. A mere verbal advice as to the potency of certain drugs to procure abortion is not sufficient. Such a person may be guilty of abetment, but he cannot be convicted of an attempt to commit this offence, or of its commission under this section. But in England, where the offence consists of "administering or causing it to be taken" (§ 3350), it has been held that a mere delivery to the woman is not sufficient unless she swallows a part of it, in which case the administering is complete.[25] But this section does not follow the verbiage of the English Statute. And it is apprehended that a person who supplies to a woman an abortifacient drug which she takes, would be as much guilty as if he had himself put it down her throat, provided, of course, that the other elements of the crime are present and proved. Indeed, this was the view taken on a case reserved, where the prisoner having been asked by one Emma Cheney to give her something to cause her miscarriage delivered her some preparation of mercury which she took in his absence. It was held that the prisoner was properly convicted of "causing to be taken" within the Statute.[1]

3365. Pregnancy Indispensable.—The section divides the crime into grades: (*i*) when a woman is with child, and (*ii*) when she is *quick* with child. Now a woman is said to be with child, when there is a child in the

(24) S. 511; *Arjuna Bewa*, 19 W. R. 32. In England an attempt is also punishable; 14 & 15 Vict., c. 100, s. 9; *Wyatt*, 39 L. J. M. C. 83.

(25) *Cadman*, R. & M. C. C. R. 114.

(1) *Wilson*, D. & B. C. C. C. 127, *Fretwell*, 31 L. J. M. C. 145.

uterus. It may be in a most rudimentary state; in fact, it may be a mere fœtus or an embryo, but then it must exist. Consequently the woman must be pregnant. And the prosecution must prove it. If, therefore, a widow, carrying on an intrigue with another, and believing herself to have conceived, took an abortive, she could not be convicted—nor the another for abetting her, if in fact it appeared that the woman was never pregnant,(2) or the prosecution fail to establish it. Again, it is only criminal to cause miscarriage, but not to *prevent* conception. Of course, from the stand-point of public morality the one act may be as immoral as the other, but law cannot compel one to prevent conception any more than it can compel all bachelors to get married. The application of preventive drugs, plugs and pessaries is not, therefore, criminal. Nor is their sale prohibited. The possibility of the offence only commences with conception or pregnancy.(3)

But though this is theoretically correct, it is not possible to prove pregnancy immediately after conception. And though the woman may suspect it, her suspicion is not proof of her pregnancy. As a matter of fact criminal abortion is rarely attempted before the third month; it is more common in the fourth and fifth month when the woman begins to feel certain about her pregnancy.(4) But it is not necessary for the crime that there should be the perception by the mother of the movements of the fœtus, or that the embryo should have assumed a fœtal form. Pregnancy takes place, if at all, with connection. She is thenceforward liable for causing miscarriage, though at that early stage her pregnancy may be difficult of proof. However it may be, law makes no such assumption, and the Madras High Court rightly quashed the acquittal of a woman who had been discharged on the sole ground that having been pregnant only for a month, she could not be said to be "with child" within the meaning of this section.(5)

3366. Miscarriage after being "quick with child."—A woman who miscarries only when she is "with child" is not liable to the same degree of punishment as one who causes miscarriage after she is "quick with child." The term "quickening" implies perception by the mother of the movements of the fœtus, after the embryo has assumed a fœtal form,(6) which ordinarily takes place between the fourth and the fifth month of conception.(7) The term is probably used here in a more popular sense as denoting an advanced stage of pregnancy.

This state lasts till the child is full grown, that is up to the sixth month, after which there can be no miscarriage, which presupposes an expulsion of the child before the period of gestation is completed. The expulsion brought about by artificial means would in such a case be premature labour, though a person employing criminal means may be convicted of an *attempt* under this section read with section 511.(8) But in such a case, would not a conviction under section 315 be more appropriate?

(2) *Kabul Pattur*, 15 W. R. 4; *James Scudder*, 3 C. & P. 605.
(3) *Ademma*, 9 M. 369.
(4) 2 Taylor, 186; according to Lyon, the sensation called quickening may be felt by the mother as early as the twelfth week—ordinarily it is felt between the fourteenth and twenty fourth week, but in some cases it is not felt at all; Med. Jur. (2nd Ed.) 336.
(5) *Ademma*, 9 M. 369.
(6) *Ademma*, 9 M. 369.
(7) 2, Taylor 186.
(8) *Arjuna Bewa*, 19 W. R. 32.

3367. Measure of Punishment.—The section provides the same punishment whether the person causing abortion be the woman herself or another person. In the case of the woman accused, to whom the exposure and indignity of a criminal prosecution is a sufficient punishment, law would probably be vindicated by awarding a nominal sentence.(9) But the same leniency cannot be extended to a person to whom is due the necessity, and who causes the miscarriage. Then again his case is not so bad as that of a professional abortionist who prostitutes his knowledge for mercenary gain. He is a real danger to the State, for the mischief he is likely to create is widespread and far-reaching. His case calls for the very reverse of judicial indulgence.

313. Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Session. Non-cog. Warrant. Not bail. Not comp.

Causing miscarriage without woman's consent.

[*Consent*—s. 90. *Quick with child*—s. 312, § 3366.]

Synopsis.

(1) *Analogous Law* (3368).
(2) *Procedure and Practice* (3369).
(3) *Proof* (3370).
(4) *Form of Charge* (3371).
(5) *Criminal Abortion Without Consent* (3372).

3368. Analogous Law.—This section presents an aggravated form of the last section—the circumstance constituting the aggravation being, the absence of the woman's consent to the causing of the miscarriage. In such a case the degree of criminality does not vary with the stage of her pregnancy.

3369. Procedure and Practice.—This section like the last is non-cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Court of Session.

3370. Proof.—The points requiring proof are:—

(1) That the woman was with child.

(2) That the accused did some act to her.

(3) That he did it voluntarily.

(4) And without her consent.

(5) That she miscarried in consequence of it.

(6) That such miscarriage was not caused in good faith in order to save the woman's life.

(9) *Cf.* First Report, s. 349.

3371. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you voluntarily caused A B (*the woman who miscarried*) then being with child to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said A B, and thereby committed an offence punishable under section 313 of the Indian Penal Code, and within the cognizance of the Court of Sessions (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3372. Criminal Abortion Without Consent.—The last section applies equally both to the woman miscarrying as well as to the abortionist who causes her miscarriage. The offence is committed by the latter with the consent of the former. They are, therefore, both *particeps criminis.* This section deals with the same case presented under different circumstances. It relates to the commission of the same offence when the woman, who is primarily interested in the result, is not a consenting party to the act. This naturally aggravates the crime, and justifies the heavier sentence here provided.

It is, indeed, lighter than under English Law, where the offence in a similar case would be murder.

Session. Non-cog. Warrant. Bailable. Not comp.

Death caused by act done with intent to cause miscarriage.

314. Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

If act done without woman's consent.

and if the act is done without the consent of the woman, shall be punished either with transportation for life, or with the punishment above mentioned.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

[*Act*—ss. 32, 33. *Consent*—s. 90. *Miscarriage*—s. 312, § 3364.]

Synopsis.

(1) *Analogous Law* (3373).
(2) *Procedure and Practice* (3374).
(3) *Proof* (3375).
(4) *Form of Charge* (3376).
(5) *Principle* (3377).
(6) *Meaning of Words* (3378)
(7) *Intending Abortion Causing Death* (3379-3380).
(8) *Consent Mitigates the Offence* (3380).
(9) *Case Excepted* (3381).

3373. Analogous Law.—This section deals with the offences last described, when the act done with intent to cause miscarriage, causes death. In this respect, again, the section discriminates between acts consentient and non-consentient, the one being visited with less punishment than the latter (§ 3377).

3374. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session.

3375. Proof.—The points requiring proof are:—

(1) That the woman was with child.

(2) That the accused did an act to her.

(3) That he did so with intent to cause her miscarriage.

(4) That the act caused her death.

To which may be added the following aggravating circumstance:—

(5) That the act was done without the woman's consent.

3376. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you did an act, to wit—— with intent to cause the miscarriage of A B (*name of the woman*), which caused her death, and thereby committed an offence punishable under section 314 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3377. Principle.—This section punishes for causing the death of a woman, by doing an illegal act, which is known to be dangerous to the life of the woman. In order to render the accused liable, all that is necessary is that the act should be done with intent to cause her miscarriage. It is then wholly immaterial, whether she was or was not pregnant, and whether the act done was or was not intended or known to cause her death. Law here holds the accused responsible for the natural consequence of his illegal act. It is immaterial that he had taken due care and that the result was wholly unexpected and due to causes which no human sagacity could foresee. He knew that he was performing an act flagrantly illegal and he must abide by the consequence.[10]

3378. Meaning of Words.—"*With intent to cause miscarriage*": These words are wider than those used in the two preceding sections in which the only offence punishable is the "causing miscarriage." Under this section, the mere *doing an act with intent* to cause miscarriage becomes

(10) § 581.

punishable it being immaterial whether miscarriage was or was not in fact caused. *"Does any act which causes the death"*: The act must be the proximate cause of the death. The phrase here bears the same meaning as in section 299 (§§ 3007-3008). *"The offender should know, etc."*: If he does, he is clearly guilty of culpable homicide. In fact, this section only applies, when the offence is not punishable as murder or culpable homicide.(11)

3379. Intending Abortion Causing Death.—The general policy of the rule here enacted has been already discussed. The section holds the accused responsible for the natural consequence of his illegal act. In so enacting, law makes no departure from the general law (§§ 3027-3042). A person cannot violate the law, and then seek its protection against its natural consequences. The offence consists in doing an act with intent to cause miscarriage. That act may be done by either administering some abortive, or performing an operation (§§ 3357-3361). In either case he is equally responsible if the woman dies in consequence of his act. The intention to cause miscarriage would have to be gathered from the surrounding circumstances, such as undue intimacy with the deceased, the procuring of abortives, consulting persons on the subject, and the like. The fact that the woman was not pregnant is, of course, immaterial, for it is not a mistake of fact which justifies his killing her(12) (§ 581). Nor does law feel any compunction in punishing a man who did the deed to save the family from disgrace. It may be a ground for the alleviation of sentence but it is not a ground for exoneration. Nor is it necessary that the drug administered or the operation performed should be in itself poisonous or dangerous.

So in an English case where the prisoner was indicted for administering saffron to a female with intent to cause abortion, and the prisoner's counsel was interrogating the witness as to the innocuous nature of the article, Vaughan, B., interrupting him said: "What does that signify? It is with the intention that the jury have to do, and if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient."(13) But it is submitted, it is not, for though there may then be the intention there must be also evidence of the act having *caused* the death, and the noxiousness of the drug would be relevant for that purpose.

Consent Mitigates the Offence.

3380. The only mitigating circumstance recognized in the section is the consent of the woman; such consent may be express or implied. It is not necessary that it should be worded with the accuracy of a plea. If an abortive is given to her, and she knowingly takes it, she consents to its taking and thereby consents to its being given to her.(14) Indeed, in the vast majority of cases, the only evidence available on this point would be the statement of the accused, which may be more or less corroborated by circumstances. Direct evidence on such a point is not to be expected, and if it is forthcoming it should be received with caution.

(11) *Kalachand Gope*, 19 W. R. 59.
(12) *Gaylor*, (1857) D. & B. 288; *Whitchurch*, 24 Q. B. D. 420.
(13) *Coe*, 6 C. & P. 403.
(14) *Kalachand Gope*, 10 W. R. 59.

3381. Case Excepted.—This section has of course no application to an act of miscarriage done under the exceptional circumstances elsewhere provided.(15)

Act done with intent to prevent child being born alive or to cause it to die after birth.

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Session. Non-cog. Warrant. Not bail. Not comp.

[*Good faith*—s. 52.]

Synopsis.

(1) *Analogous Law* (3382).
(2) *Procedure and Practice* (3383).
(3) *Proof* (3384).
(4) *Form of Charge* (3385).
(5) *Principle* (3386).

3382. Analogous Law.—This section is intended to be a variation of the same crime, and it has the same object in view (§§ 3354-3355). The comparatively lighter punishment here provided, is due to the act being directed against the destruction of life which may or may not be fully developed. The exception here made, is not covered by any of the sections under the general exceptions. The long range of sentence varying from a mere fine to imprisonment extending up to ten years is dictated by the varying criminality of the act. In some cases, it may be only a technical offence verging upon the case excepted. In the other case it may be a case of deliberate infanticide done, say, to prevent an inheritance taking effect.

3383. Procedure and Practice.—This offence is non-cognizable but warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Court of Session.

3384. Proof.—The points requiring proof are:—

(1) That the woman was with child.
(2) That the accused did an act before the child was born.
(3) That he did it with the intention of preventing the child from being born alive, or causing it to die after its birth.
(4) That in consequence of the act the child was born dead or died after its birth.

(15) Ss. 87-90, Comm.

(5) That the act was not done in good faith to save the life of the mother.

3385. Charge.—The charge should specify the act by which the accused intended to prevent the child being born alive, and should also state that the act was not caused in good faith for the purpose of saving the mother.[16] It should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you did an act, to wit——to A B before the birth of her child, with the intention of thereby preventing that child from being born alive (*or* causing it to die after its birth), and by that act did prevent that child from being born alive (*or* caused it to die after its birth) and the said act was not done in good faith for the purpose of saving the life of the mother, and thereby committed an offence punishable under section 315 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge.

3386. Principle.—This offence is separated by a narrow margin from infanticide, which would in the same circumstances be murder, pure and simple. The only difference between such fœticide and infanticide which is murder is, that the former offence is committed before its delivery, while the latter can only be committed after its delivery.

The section is aimed at fœticide while in the womb, after the fœtus develops sufficiently to assume the human form, which it does in normal cases in the sixth month. When it attains that degree of development the act, which would, if done earlier, be abortion, ceases to be so, as the delivery of an undeveloped child would be premature labour, for which the accused is held more responsible owing to the more advanced stage of fœtal life.

Session. Non-cog. Warrant Not bail. Not com

Causing death of quick unborn child by act amounting to culpable homicide.

316. Whoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

[*Culpable homicide*—s. 299. *Quick*—s. 312, § 3200.].

(16) 3 W. R. Cr. L. 5.

Synopsis.

(1) *Analogous Law* (3387).
(2) *Procedure and Practice* (3388).
(3) *Proof* (3389).
(4) *Form of Charge* (3390).
(5) *Culpable Foeticide* (3391).

3387. Analogous Law.—This section differs from the last in the intention and act of the offender. Under the last section his primary intention was to cause abortion, failing which to prevent the birth of a living child or to insure its death after birth. The offender under this section need not necessarily cause abortion, or intend to kill the inner life. But if he does an act likely to cause its death, though neither intended nor desired, he would be guilty of this offence. Such would be the case where a blow struck to a pregnant woman destroys the child, or causes premature labour ending in its destruction. This offence can only be committed after the woman became "quick" with child, a term which has been already explained under section 312 (§ 3356), and before its birth. During the period any act or omission of such a nature and done under such circumstances as would amount to the offence of culpable homicide, if sufferer were a living person will, if done to a quick unborn child, thereby causing its death, amount to the offence here described.

3388. Procedure and Practice.—This offence is non-cognizable but warrant should issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Court of Session.

3389. Proof.—The points requiring proof are:—

(1) That the woman was quick with child.

(2) That the accused did an act to cause the death of the child.

(3) That the circumstances under which the act was done was such as would have amounted to culpable homicide, if the child were born.

(4) That the act caused the death of the unborn child.

3390. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you did an act, to wit ——under circumstances, to wit——that if you thereby caused death, you would be guilty of culpable homicide, and did by such act cause the death of a quick unborn child of A B, and you thereby committed an offence punishable under section 316 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3391. Culpable Foeticide.—This offence is in reality a modified form of homicide as applied to an unborn child. All it says is that an act which would be culpable homicide of a person born, would be an

offence here described if the person thereby killed was still unborn. In other respects the act must possess all the elements necessary to constitute culpable homicide.

Session. Cognizable. Warrant. Bailable. Not comp.

317. Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Exposure and abandonment of child under twelve years by parent or person having care of it.

Explanation.—This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.

Synopsis.

(1) *Analogous Law* (3392-3395).
(2) *Procedure and Practice* (3396).
(3) *Proof* (3397).
(4) *Form of Charge* (3398).
(5) *Principle* (3399).
(6) *Meaning of Words* (3400).
(7) *Abandonment of Infants* (3401).
(8) *Persons Liable* (3402-3409)
(9) *Intention must be to Abandon it* (3404-3405).
(10) *Exposure and Leaving in a Place* (3407).
(11) *Actual Harm Immaterial* (3409).
(12) *Death in Consequence* (3410-3411).

3392. Analogous Law.—An offence under this section would ordinarily be committed by the parents of bastard children, anxious to screen the visible evidence of their crime from public gaze. Parents in distress may also be tempted to abandon their offspring. The section applies, however, only to abandonment when it is not followed by the death of the child. If it dies, there is nothing to prevent the offender from being tried for culpable homicide or murder.[17]

3393. The English Statutes provide both against the abandonment as well as the ill-treatment of children.

The provision against abandonment[18] runs as follows:—

"S. 27. Whosoever shall unlawfully abandon or expose any child being under the age of two years whereby the life of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour and being convicted thereof shall be liable to be kept in penal servitude."

3394. And the following provision of the Cruelty to Children Act, 1894,[19] also deals with the same subject:—

(17) *Banni*, 2 A. 349.
(18) 24 & 25 Vict., c. 100, s. 27.
(19) 57 & 58 Vict., c. 41.

"(1) If any person over the age of sixteen years, who has the custody, charge or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, adandons, or exposes such child or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health including injury to or loss of sight, hearing, or limb, or organ, of the body, and any mental derangement, that person shall be guilty of a misdemeanour; and on conviction on indictment, shall be liable at the discretion of the Court, to a fine not exceeding £100, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years."

This Statute defines a person in custody to include a parent, or other person to whose charge a child is committed by its parent, or who has actual possession or control of it.[20]

3395. Between these Statutes and this section there is not much in common[21] except the central thought which is in each case the same. The English Statute is confined to the protection of children below 2 years of age, whereas this section extends to children below 12 years of age. This section is on one point apparently more restricted than the English Statute inasmuch as it extends only to parents and persons in charge of the children, but as the English Statute only punishes one who *unlawfully* abandons a child, the result is in each case the same. But there is this most material difference between the two acts, namely, that while the English Statute only punishes an abandonment "*whereby the life of such child shall have been, or be likely to be, permanently injured,*" the same limitation does not apply to this offence, the gist of which is exposure with intent to abandon it.[22] Here, as in many other places in the Code, the legislature looks mainly to the intention of the accused rather than to the consequences of the act done, which is an essential standpoint under the English Law. English authorities are, therefore, of not much help in the interpretation of this section.

3396. Procedure and Practice.—This offence is cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session.

3397. Proof.—The points requiring proof are:—

(1) That the accused was a parent or caretaker of the child in question.

(2) That the child was then under 12 years of age.

(3) That such person exposed or left such child in a place.

(4) That his intention in exposing or leaving was wholly to abandon it.

3398. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you, being the father (*or* mother, *or* having the care) of your (*or* a) child named,——which was then aged about——exposed (*or* left) it, in a certain place, to wit

(20) 57 & 58 Vict., C. 41, s. 23 (3). 24 M. 662.
(21) *Mirchia*, 18 A. 364; *Antakke*, 24 (22) *Antakke*, 24 M. 662.

——, with the intention of wholly abandoning it, and thereby committed an offence punishable under section 317 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3399. Principle.—This section is intended to protect infants of tender years, who are unable to take care of themselves. The primary responsibility of bringing them up rests on their parents, who have brought them into existence. But a duty is likewise cast on those who undertake to bring them up, and who cannot thereafter shirk their self-imposed responsibility by abandoning their charge, without committing it to anybody's care.

They are *prima facie* aware of the risk they run in thus abandoning young infants, and they may be presumed to know that if abandoned in a given circumstance, they may die in consequence. In such a case their offence is naturally one punishable under the general law as murder or culpable homicide, as the case may be. But in that case he could not be also punished under this section as well.[23]

3400. Meaning of Words.—"*Or having the care of such child*": This does not apply to a menial servant such as a nurse or an Ayah. It means a person who has undertaken the support and maintenance of the child, whether by adopting it or by way of contract with the parent, or otherwise. "*Expose or leave such child*": The word "leave" must be understood *ejusdem generis* with "expose." It does not mean merely relinquishment, but desertion in a place, with the intention of leaving it to its fate. "*This section is not intended to prevent,*" *i.e.*, it does not bar the trial of the accused for a higher offence, if his act warrants it. "*If the child die in consequence of the exposure,*" that is, if it dies on account of exposure, as by contracting cold or for want of nourishment, or if it is killed by a wild beast.

3401. Abandonment of Infants.—The obligation to support and maintain children is primarily cast on their parents.[24] It is the natural duty which the parents owe to their offspring, whether legitimate or illegitimate. For legitimacy is but a social convention. The duty to maintain one's offspring appeals to a principle which is common to all sentient beings. This duty is, as it were, reflected in those who are *in loco parentis*, and who thereby become responsible for the discharge of the same social duty. Once undertaken, no matter how, it cannot be cast aside by abandonment of the charge. Under the English Statute before cited (§§ 3392-3395) this liability is not confined only to parents and guardians but extends to all like.[25] English Law, moreover, provides against cruelty to children.[1] The combined effect of these two Statutes is much wider than is contemplated by this section. But though the responsibilities differ, the act penalized in both the countries is the same (§§ 3392-3395).

(23) *Banni*, 2 A. 349.
(24) S. 488, Cr. P. C.
(25) 24 & 25 Vict., c. 100, s. 27.

(1) Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict., C. 41, ss. 1-24), abstracted under Analogous Law (§§ 3392-3395).

3402. Persons liable.—But under this section the liability rests only with the father or mother or one "having the care of such child." Of father and mother, the primary duty of maintenance rests with the father, who is then responsible for the maintenance of both the child and its mother. The latter would then be responsible for its maintenance and liable for its neglect. In the absence of the mother, the father is so responsible. But the section holds both equally responsible for abandonment in the manner contemplated by the section. And in this respect the English Law makes no distinction, but holds both the parents equally liable. The prisoner was the father of a bastard child under two years of age. The child was in the custody of the mother, who lived apart. One evening at 7 P.M., she brought the child up to the door of his house and leaving it there called out, "Bill, here's your child, I can't keep it; I am gone." She left, and the prisoner afterwards came out of the house, stepped over the child, and went away. An hour and-a-half afterwards the child was still lying on the road outside the wicket of the garden; it was dressed in short clothes, and had nothing on its head. On the prisoner's return, his attention was called to the child, but he said that he should not touch it, and that those who brought it there must come and take it. The child was found at 1 A.M., cold and stiff. The prisoner was convicted of having abandoned and exposed the child within the meaning of 24 and 25 Vict., c. 100, s. 27.(2)

3403. In another case, decided under the same Statute, the two prisoners, one of whom was the mother of an illegitimate child under the age of two years, put it in a hamper wrapped up in a shawl and packed with shavings and cottonwool; the mother then booked it for carriage by train to its father's address, a distance of 10 minutes by the train. She told the booking clerk to be very careful of it, and she marked the hamper: "With care; to be delivered immediately." It was delivered in a little less than an hour. It was taken by the relieving officer the same evening to the workhouse, where it died in three weeks from causes not attributable to the conduct of the prisoners. They were convicted of abandonment and exposure, and on a case reserved, the conviction was upheld by the majority of the Judges.(3) The two accused were sisters. One of them, the mother of a newly born child, made it over secretly to the other accused, her elder sister, for disposal. She carefully wrapped it up and left it in a second class compartment of a railway train with a bottle of milk by its side. On an appeal by Government against their acquittal it was held that both the accused were guilty of this offence, the mother because she had abandoned it, and her sister, because she had the care of the child and as such she had abandoned it.(4)

Such a person would include a schoolmaster who has the care of infants placed under him for education, the proprietor or manager of a baby farm to whom young children are made over for upbringing, and indeed, all those

(2) *White*, L. R. 1 C. C. R. 311, 40 L. J. M. C. 135. To the same effect *Khairo*, (1872) P. R. No. 33; *Bhuran*, (1878) P. R. No. 5; *Bhagan*, (1879) P. R. No. 4—all of which have been discussed *post*.

(3) *Falkingham*, L. R. 1 C. C. R. 122, 39 L. J. M. C. 47.

(4) *Cripps*, 41 B. 152.

who, whether for love or money, placed themselves in the position of guardians, temporary or permanent, of infants of tender years.(5) Persons who take children in adoption, or who are in charge of orphanages, or who in any capacity become charged with the care of such children, place themselves in a position of social duty to them, which they cannot shirk by leaving their charges to their fate. It follows that where the parent who is primarily responsible for the care of his child, places it with another, the latter undertaking to maintain it, he is relieved from that obligation, and cannot then be, during that period, prosecuted under this section, for abandonment of it by the caretaker.

Intention must be to Abandon it.

3404. The liability of persons for the neglect and abandonment of infants is, in this country, qualified by their duty. It is further subject to the words "expose or leave such child" *in any place*, with the intention of wholly abandoning it.(6) As it was observed in a case, the real object of this section is the prevention of abandonment or desertion by a parent of his or her children of tender years in such a manner that children, not being able to take care of themselves, may run the risk of dying or being injured. The section implies that children left without any protection are the objects of its provision. So where the mother of two children left her husband's house in consequence of her husband's ill-treatment, her conviction under this section was quashed on the ground that the children were left in the house where her husband and mother were to take care of them.(7)

If children are left in charge of somebody, however incompetent to take care of them, they could not be said to have been *wholly* abandoned. The accused, a beggar woman, was the illegitimate mother of a child six months old. She induced a blind woman to accompany her to a fair. On the road she made over the child to the blind woman, promising to return with food which she said she was going to beg. She never returned. The blind woman made over the child to the police, and the mother was prosecuted under this section, but it was held that the fact that she had left the child with the old woman, could not be said to constitute its exposure or "leaving in any place" with intent to wholly abandon it. In the view of the Court the abandonment made punishable here, is not a mere desertion or neglect, but an abandonment effected by exposure or leaving "in any place," which is distinct from leaving with any *person*. The fact that the woman with whom the child was left, was herself blind and poor would not constitute an act criminal, when it was not otherwise criminal: In short, the section must be construed strictly, and its operation must be confined only to an abandonment effected by exposure or leaving in any *place*. But this does not mean that the terms of the section will be sufficiently complied with if the child is left with another wholly unable to take care of it.(8)

3405. Such was the case of the mother of an illegitimate child who made over her new-born child to her sister who left it carefuly

(5) Cripps, 41 B. 152.
(6) *Gita Bai*, 55 I. C. (N.) 205.
(7) *Felani Hariani*, 16 W. R. 12; *Bhuran (Mt.)*, (1878) P. R. No. 5; *Bhagan (Mt.)*, (1879) P. R. No. 4.
(8) *Mirchia*, 18 A. 364.

wrapped up in the compartment of a train, whereupon both were convicted under this section, though the child was rescued by the Police.[9] The fact that the child was a month old and was being nourished by the mother's milk, is immaterial if it is left with the husband, the wife eloping with her paramour, for in that case there is neglect but not exposure or leaving as required in the section.[10] The accused Khairo was delivered of a child at the house of S, who was under no obligation to support it. Her husband was then absent in Kashmir. Khairo's mother took the child to its father's sister and placed it naked at her feet, saying, "This is you brother's child," and left. The child died some hours afterwards: whereupon S was prosecuted under this section, and Khairo for abetment, but they were both acquitted, the Court holding that neither had exposed or left the child in any *place*, so as to make either amenable to the penalties of this section.[11]

3406. Even the fact that the wife leaves the child in her husband's vacant house during his temporary absence from home would not amount to its exposure or leaving in a place, if the husband was to, and did in fact, soon return.[12] In all such cases there may have been an intention to wholly abandon the child, but it was not abandoned in the manner made penal. Such, however, was the case, where a child was left by its mother on the roadside within a thorn enclosure within 200 yards of a village, where it was picked up by a traveller, but which died within thirty hours after its discovery.[13] In this case the mother was convicted of murder, but the Chief Court held that a conviction for murder could not be supported as it might have been, had the child been left on a barren heath, or in an unfrequented place, though the mother was guilty of abandonment under this section.[14] But if in such a case the mother had, instead of leaving the child on the roadside, starved it to death in her own house, she could not be convicted under this section, though she might have been then convicted of culpable homicide.[15] The object of this section is merely to punish an abandonment by exposure or desertion in a place. It is not necessary that there should be an intention to abandon the child so as to endanger its life.[16] If the abandonment is proved to have been made with that intention, the offence would then be culpable homicide or murder, and not only one punishable under this section.

Exposure and Leaving in a Place.

3407. It is clear from the foregoing discussion (§ 3406) that the gist of the crime is as much an intention of abandonment, as its abandonment by exposure and leaving in a place. The word "exposure" is sufficiently intelligible. It means setting out or leaving in a place unprotected and uncared for.[17] The leaving of a child naked or but

(9) *Cripps*, 41 B 152.
(10) *Bhagan*, (Mt.), (1879) P. R. No. 4.
(11) *Khairo*, (1872) P. R. No. 33.
(12) *Bhagan*, (Mt.), (1879) P. R. No. 4.
(13) *Nankee* (Mt.) (1866) P. R. No. 23. To the same effect, *Khoda Bux Fakeer*, 10 W. R. 52: *Kundan*, (1903) A. W. N. 43; *Antakke*, 24 M. 662.
(14) *Ib.*
(15) *Ram Dai*, (1870) P. R. No. 18.
(16) *Boya Sunkulamma*, (1890) 1 Weir 331 (332).
(17) Fr. *Ex*,—out, and *poser*, to set or place.

slightly covered to a cold atmosphere would amount to its exposure. So merely leaving it in the hot sun would be exposing it. The question whether the leaving of a child in a given circumstance amounted to its exposure, is a question of fact upon which the jury would have to form their own opinion. The question of exposure would have to be considered in connection with the danger to which the child is thereby exposed. In case of death, it would be a question upon which the medical witness would have to be examined as to how far its death was due to exposure.[18]

3408. The question of exposure does not perhaps present the same difficulty as the other phrase used in describing the offence. It is, however, clear that it has been used *ejusdem generis* with exposure, to which it is in its sense closely allied. For the phrase does not merely mean the physical act of leaving a child in a place unconnected with the risks to which it is thereby exposed. As was remarked in a Punjab case: "In order to make the 'leaving' of a child an offence under section 317, the child must be left *without protection*. I think it is clear in the first place because the word 'leave' being coupled in that section with the word 'expose,' it must on the principle *noscitur a sociis*[19] be considered to some extent taking its colour from the word 'expose,' and must be construed as meaning leave under circumstances more or less resembling those of an exposure. I think this is clear further from the intention which is expressly required by the section to constitute the offence. There must be an intention wholly to abandon the child. Now I think an intention wholly to abandon the child means something more than an intention to go away from it and never to return to it. The phrase to abandon the child, in its ordinary acceptance, means something more than merely to go away from it. In fact, it seems to me that, here again, the idea of leaving without protection comes in."[20]

Actual Harm Immaterial.

3409. But though the section is designed to prevent harm to children, its actual presence is not a part of the definition of the offence, as it is under the English Statute (§§ 3392-3395). It is, therefore, immaterial, except as a matter which the Court may properly take into consideration in estimating the gravity of the offence, and in apportioning the sentence.[21] The accused, who was a beggar woman and a widow, deposited her illegitimate child about three months old close by a channel some 200 yards from the house of one Kartha, and left the place for good. Kartha found the child and took care of it, but being sickly it died in a few days. The accused was prosecuted under this section, but the Sessions Judge acquitted her, holding on the strength of the English Statute that the abandonment should have been under circumstances so as to endanger the safety of the child. But on appeal

(18) 2 Taylor (5th Ed.), 294.

(19) "Know by its association." The meaning of a doubtful word should be interpreted by reference to the meaning of other words associated with it. So Lord Bacon said: *Copulatio verborum indirat acceptionem in eodem sensu* (The coupling of words show that they are to be understood in the same sense).

(20) *Bhuran*, (1877) P. R. No. 5. To the same effect, *Mirchia*, 18 A. 364; *Mi Mein Gale*, (1914) U. B. R. 5, 24 I. C. 837; *Mi Ma*, *ib.*

(21) *Antakke*, 24 M. 662.

by Government, the High Court set aside the acquittal, holding that the English Statute was materially different from this section and approached the question from an altogether different stand-point, that the only thing material under this section was the intention of abandonment and exposure, which were both present, the nature of abandonment being only relevant to mitigate the crime, and in this view, it sentenced the accused to rigorous imprisonment for six months.[22]

Explanation.

3410. Death in Consequence.—But though the absence of harm or injury to the child is not material for the purpose of the crime, its *presence* would be material, if death was caused in consequence of it. For as the explanation points out, it may then turn into a case of culpable homicide or murder. But to do this there must be evidence that the child died *in consequence of the exposure*; that is to say, the exposure was the proximate cause of its death. Such would be the case where a child is left, naked or slightly covered in a cold atmosphere, and it dies from cold or some other result from exposure. The explanation does not apply to a case where it dies on account of malnutrition due to the ignorance of people who picked it up for maintenance. The accused left a child, a few hours old, carefully wrapped in a thicket not far from a house and a footpath, and in a place where the villagers were in the habit of herding cattle. It was found almost immediately by some people who tried to feed it with cow's milk from a shell—a mode of nourishment wholly ill adapted to the case of a newly born child. It died for want of sustenance. There was no evidence that its exposure had contributed to its death. It was held that it was not a case of a higher offence than that here provided, but having regard to the nature of the abandonment the prisoner was sentenced to seven years' rigorous imprisonment.[23] The mere abandonment of the child by its mother in the house, cannot expose her to the penalty of the section, if it dies of weakness, which its mother's presence might conceivably have averted. The accused, a young married woman, bore an illegitimate child in her husband's house; ten days after the birth, she left her home, leaving the child in the house. It was fed for four days partly with cow's milk, and partly from the breast of its mother's sister, but eventually it died of weakness, probably resulting from infantile diarrhœa. The accused was thereupon convicted of culpable homicide, but Tyrrell, J., quashed the conviction, holding that the death of the child was due to natural causes.[24]

3411. Of course, in such cases the only question is whether the exposure was the cause of the death. The fact that it may have in some remote way contributed to its death cannot be held to enlarge the criminal responsibility of the parents or guardians of infants. They are not the insurers of their infants' lives. Nor can law visit them for a consequence unconnected with their illegal act. Even if the death was in consequence of the exposure, this section is no authority for holding the accused liable for culpable homicide, or murder as the case may be. For in order to make him so liable, his case must fall within

(22) *Antakke*, 24 M. 662.
(23) *Khodabux Fakeer*, 10 W. R. 52.
(24) *Jeoni (Mt.)*, (1803) A. W. N. 100; *Justan*, 17 I. J. (N.S.) 183.

the definition of those offences as given in sections 299 and 300, as the explanation is intended only to save the operation of those sections, but does not create a new crime.

Session, Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Bailable. Not comp.

318. Whoever, by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Concealment of birth by secret disposal of dead body.

Synopsis.

(1) *Analogous Law* (3412).
(2) *Procedure and Practice* (3413-3414).
(3) *Proof* (3415).
(4) *Form of Charge* (3416).
(5) *Principle* (3417).
(6) *Meaning of Words* (3418).
(7) *Secret Disposal of Children* (3419-3427).
(8) *What is a Child* (3421).
(9) *Child must be Dead* (3422).
(10) *Secret Burial or Disposal* (3423-3424).
(11) *Evidence of Secrecy* (3425-3426).
(12) *These must be Intentional Concealment of or Endeavour to Conceal the Birth* (3427).

3412. Analogous Law.—This section is again intended to prevent infanticide, by penalizing the disposal of the corpus delicti, and thereby prevent its detection (§ 3417).

It is taken from 9 Geo. IV, c. 31, s. 14, which provided a penalty for children secretly "buried or otherwise disposed of." The Statute has since been repealed by 24 and 25 Vict., c. 100, the provisions of which relating to this offence run thus:—

"S. 60. If any woman shall be delivered of a child, every person who shall by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of misdemeanour, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour."

The rest of the section legalizes a conviction under this section, on a charge for murder if it fails. The language used in this section is the same as was used in the earlier Statute. The words of the present Statute "by any secret disposition of the dead body" vary. A good deal turns upon this charge of verbiage, so much so that the cases decided under the earlier Statute are regarded as no authorities for the interpretation of the later.

3413. Procedure and Practice.—This offence is cognizable, but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class.

3414. This section only applies to the secret burial of a child, and not of a mere *foetus*. The secret disposal of the latter may, however, be punishable under section 312|511 of the Code.[25] In the case of premature labour, it may be a question whether what was buried was a child, or a mere *foetus*. The evidence of a medical witness may then be important. If the mother was seven months advanced in pregnancy it would undoubtedly be a case under this section, though there are cases on record where a fœtus of 5 or 6 months only, lived for some time after birth.[1] And relying on this, the Madras High Court refused to disturb the sentence of one month passed on a person under this section.[2] A case arising under this section may develop into one of murder, but unless there is clear evidence of murder against a person secretly disposing of the dead body of a child, which is found to have been killed after its birth, such person should not be charged and tried for murder, but should be convicted only under this section.[3]

3415. Proof.—The points requiring proof are:—

(1) The birth of a child.

(2) That what was born was a *child* and not the *foetus* of a child.

(3) Its death before, during or after its birth.

(4) That the accused buried, or otherwise disposed of the dead body.

(5) That such burial or disposal was done secretly.

(6) That in so doing his intention was to conceal its birth.

3416. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you intentionally concealed (*or* endeavoured to conceal) the birth of a certain child, to wit——(*the child of A B*) by secretly burying it (*or* disposing of its dead body), and thereby committed an offence punishable under section 318 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3417. Principle.—One way of preventing the detection of the crime of infanticide, and probably the most effective, is the concealment of the *corpus delicti*, which this section is enacted to punish. Being directed against the concealment of the births of children, it does not hold one criminally accountable for their death or disposal in secret, but only such secret disposals as are made with the intention of concealing their births. The offence would, as a rule, be applicable to the parents and relations of bastard children. But it is no part of the section which is general in its applicability.

(25) (1866) M. H. C. P. 1 Weir 333.
(1) (1869) M. H. C. (App.) 63.
(2) *Sunna*, (1884) 1 Weir
(3) *Subbalakshmi*, (1900) 1 Weir 334.

3418. Meaning of Words.—"*Or otherwise disposing of,*" as by cremation, or throwing it into tank, well or river, or leaving it in the jungle to be devoured by the wild beasts. "*Intentionally conceals its birth*": If the birth was only reported, the intention to conceal it would then cease to exist. Such intention, when present, must be gathered from the surrounding circumstances. "*Or endeavoured to conceal*": This would be the case where the attempt to conceal the birth is unsuccessful.

3419. Secret Disposal of Children.—This section follows the general policy adopted in all countries of insuring full publicity to births and deaths. It is, moreover, directed against the secret disposal of the offsprings of illegitimacy. Various modes are adopted for their disposal. The Code only reprobates those which threaten danger to their existence. Such children may be given into adoption, or made over to a foundling institution, as they are in London and other Western countries. But they must not be killed or abandoned in the manner already set out under the last section. If they are killed, it is murder. If they are abandoned, it may be an offence under the last section. If their dead bodies are disposed of so as to destroy the very evidence of their birth, it would be an offence under the last section. By its terms, it only applies to the secret disposal of a *dead* body of a child, with the intention of concealing its birth. The section has no application to a case, where the child was left to die in a place where it was hidden soon after its birth. Such a case would be probably visited with the higher penalties provided under the last section, or sections 302 and 304, but this section is then inapplicable. It was so held in the case of a woman, delivered of a child born alive, who endeavoured to conceal the birth thereof by depositing the child, while alive, in the corner of a field, leaving it to die from exposure, which it did, whereupon she was indicted for secretly disposing of the dead body of a child, but it was held that she could not be so convicted.(4)

3420. In order to constitute an offence under this section, there must then be (*i*) a *dead* child, (*ii*) its *secret* disposal, (*iii*) such disposal being with the intention *to conceal its birth.*

3421. Firstly then, there must be a child, and it must be dead.

(1) What is a Child.

Now the Code does not define a "child." It must therefore bear its plain popular meaning. Ordinarily, this term is only applied to an infant which has attained a certain degree of maturity and development, so that it ceases to be a foetus and acquires an independent existence. As Erle, J., told the jury in a case based on the similar wording of an English Statute: "This offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. It is not necessary that it should have been alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself, or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity, and if she had miscarried at a time when the fœtus was but a few months old, and therefore could

(4) *Jane May,* 10 Cox 448.

have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins; but it may, perhaps, be safely assumed that under seven months, the great probability is that the child would not be born alive."(5)

There can be, of course, no rigid rule laid down as to at what exact period a thing ceases to be a *foetus* and becomes a child. The question is one of fact, and would be left to the jury in each case.(6) But within certain limits, the question seems to admit of no doubt. For instance, a fœtus four(7) or even five months old cannot be well described as a child, though there are recorded cases of a fœtus between five and six months old having lived for some time after birth.(8) In such a case, it will be a question for the jury to decide whether what was delivered was a fœtus or a child. But a fœtus seven months old would be ordinarily designated a child, for cases of mature labour in seven months are well authenticated.

(2) Child must be Dead.

3422. The second requirement of the section has been already considered,—what has been disposed of must be a *dead* child. If the child was abandoned when it was living, the offence may be murder or culpable homicide, but it is not an offence under this section. The fact that the child died before, during or after its birth, is immaterial. But it necessarily presupposes that it was at some time alive, but not that it should have been *born* alive.(9) But how and when and from what causes it died are then immaterial. What the section is intended to punish for is not the death but its disposal.

(3) Secret Burial or Disposal.

3423. Such disposal must be in a secret place(10) and with the intention to conceal its birth. The words "disposing of the dead body" are evidently taken from the English Statue (§ 3412), but their meaning has given rise to some controversy, which has been set at rest by the amendment of the Statute.(11) Under the old Statute,(12) the words used were "buried or otherwise disposed of" and they were held to contemplate the final disposal of the body. It was accordingly held that where the accused secreted that body in the drawer in the house,(13)

(5) *Berriman*, 6 Cox 388; followed in 4 M. H. C. (App.) 63. But Martin, B., said in *Colmer*, 9 Cox 506, that a fœtus not bigger than a man's finger, but having the shape of a child, is a child within the Statute. But, with due deference, it is submitted that this is neither the legal nor the popular meaning of the term, and is wholly at variance with the medical view. In any other view, if fœtus is a child, then fœticide would be murder.

(6) So it was left by Smith, J., in *Hewitt*, 4 F. & F. 110.

(7) 4 M. H. C. (App.) 63.

(8) *Sunna*, (1884) 1 Weir 334. In *Kasai*, (1894) B. U. C. 727, Jardine and Ranade, JJ., had to deal with a fœtus six months old; they, however, refrained from deciding whether it was a fœtus or a child, but upheld the conviction under this section, as there were no aggravating circumstances, and even reduced the sentence from three months to six weeks' imprisonment.

(9) *Lalbu*, (1898) B. U. C. 961.

(10) *Abbas Bi*, (1911) 2 M. W. N. 379; *Bakhtawari*, (1913) P. L. R. 328, 20 I. C. 1005 (Leaving a child on a dungheap is not its secret disposal).

(11) 9 Geo. IV, c. 31, s. 14, repealed and amended by 24 & 25 Vict., C. 100, s. 60, set out *ante* (§ 3256).

(12) 9 Geo. IV, c. 31, s. 14.

(13) *Ash*, 2 Moo. & R 294; *Bell*, 2 Moo. & R. 294; *Opie*, 8 Cox 332 (*per* Martin, B.).

it was not a final disposal to be punishable as a misdemeanour under the Statute. But these cases were afterwards overruled, it being held that the disposal whether temporary or permanent, was equally punishable. So the accused, who had secreted the body of her illegitimate dead child between the bed and the mattress, was held to have brought herself within the mischief of the rule.(14)

But in one case where the mother had secreted the dead body of her illegitimate child in a box in her bed-room, and it was found there with the lid open, Byles, J., left it to the jury to say whether it amounted to a secret disposal of the body, adding, there must be a secret disposition for the purpose of concealing the birth. "The concealment must be by a secret disposition of the body, and a disposition could not be secret by placing it where it was likely to be found. Secrecy was the essence of the offence. Could they say that an open box in the prisoner's bed-room was a secret disposition? It was for them to say, but in his opinion it was not."(15)

3424. In such case the question may be, whether what was done was sufficient to amount to a *secret* disposal. In another case, the prisoner was detected while carrying a bundle containing the body of her dead child across a yard in the direction of the privy. But Gurney, B., directed an acquittal, holding that the act was *in fieri* and not completed.(16) Again, in order to amount to a disposal, the prisoner must do some act towards concealing the body of the child *after* it is dead. So where the prisoner had gone to the privy and where she was delivered of a child and which fell and got suffocated in the soil, it was held that there had been no disposal; Patteson, J., holding it to be essential to the commision of the offence, that the prisoner should have done some act of the disposal of the body after the child was dead; therefore, if she had gone to privy for another purpose, and the child came from her unawares and fell into the soil and was suffocated, she must be acquitted of the charge, notwithstanding her denial of the birth of the child.(17) Where, however, the prisoner put the dead body of her child over a wall into a field where there was no path, it was held to be a secret disposition.(18)

Evidence of Secrecy.

3425. The evidence of secret disposition consists in the situation in which the body is found.(19) It does not necessarily depend upon the secrecy of the place but upon the secrecy of the act. So Bovill, C. J., said: "The first point, is, whether there was any evidence of a secret disposition within the Statute. That is a question which depends upon the circumstances of each particular case. The most public exposure may be a secret disposition, as, for instance, in the middle of Dartmoor, or on the top of a mountain in Scotland in winter."(20) There may be

(14) *Goldthorpe*, 2 Moo. C. C. 244; *Farnham*, 1 Cox 349; *Gogarthy*, 7 Cox. 107; *Perry*, Dears C. C. 471 (Pollock, C. B., *dissentiente*).

(15) *Sleep*, 9 Cox. 559; *Clarke*, 4 F. & F. 1040; *Coxhead*, 1 C. & K. 623.

(16) *Snell*, 2 Moo. & R. 44.

(17) *Turner*, 8 C. & P. 755; *Coxhead*, 1 C. & K. 623.

(18) *Brown*, L. R. 1 C. C. R. 244, 39 L. J. M. C. 94.

(19) *Brown*, L. R. 1 C. C. R. 244.

(20) *Ib.*

secrecy and no disposal; or a disposal but no secrecy. In order to constitute an offence under this section, there must be both disposal and secrecy. The accused was delivered of a dead child in the compound of her house. She left it there, and told no one about its birth. The Court held that the accused could not be convicted merely for holding her tongue. She had neither secretly buried nor disposed of the dead body of the child, and she could not, therefore, be convicted under this section.(21) It would have been, however, different, if the accused had thrown the body down a privy.(22) But leaving it in two boxes, one inside the other in a bed-room, which were neither locked nor fastened and were in such a position as to attract the attention of those who daily resorted to the room, is not a secret disposition of the body.(23)

3426. But where the prisoner being delivered of a child in an out-house, left it there, concealed from view, and it afterwards died, whereupon she re-visited the place and recovered it, it was held to amount to a secret disposition of the dead body. And so Lord Campbell, C. J., said: "I have carefully examined the Statute, and the facts with reference to the point suggested by the counsel for the prosecution. Any objection that might have arisen, that there was no attempt to conceal the dead body of the child, is, I think, removed in the manner suggested; for there cannot be any reasonable doubt that the prisoner visited the out-house after the child was dead, and although she did not remove it, any replacing of the clothes or other things by which the body was concealed from view would, I think, be an endeavour to conceal by a secret disposal of the dead body within the Statute."(24) But it is submitted, that though it may amount to secrecy, it could hardly be called a disposal of the dead body. Where the dead body was found on the floor of an attic wrapped in bed sheets which had been removed from the room below; the head decapitated and a knife lying near it, and the body was in the middle of the room, it was held that there was no evidence of an endeavour to conceal.(25) There could be no secret disposal where the only evidence available was, that the woman who was delivered of a child, had allowed two others to take away its body.(1)

There must be Intentional Concealment of or Endeavour to Conceal the Birth.

3427. Lastly the secret disposal of the body must be with the sole intention of concealing or attempting to conceal its birth. The mother of a bastard child drowned it by throwing it into a lake. She said that she had done so to conceal the fact from her father, whereupon Coltman J., told the jury that the offence contemplated by the Act,(2) was the endeavour to conceal the birth from the world at large, and not from any individual. The Statute did not apply to individuals, but to society in general. If, therefore, the secret disposal of the said body arose from an endeavour to conceal the birth from

(21) *Amina*, (1892) B. U C. 607 (608).
(22) *Elizabeth Cornwall*, R. & R. 336; *Ann Coxhead*, 1 C. & K. 623.
(23) *George*, 11 Cox 41.
(24) *Hughes*, 4 Cox. 477.
(25) *Goode*, 6 Cox 318.
(1) *Emma Bati*, 11 Cox 686.
(2) 9 Geo. IX., c 31, s. 14.

some private individual, and not from the world at large, then the offence contemplated by the Statute had not been committed; and if the jury believed that the prisoner, was really actuated by the dread of provoking her father's displeasure, she was not guilty of this offence.(3) But it is submitted that the only persons from whom the mother would in such a case conceal the birth of her child are persons before whom she is ashamed to proclaim her unchastity. Fear of excommunication, or other social ostracism, leads people to commit infanticide and the secret disposal of the bodies of their illgitimate offspring. If the section is intended to strike at that mischief, it is difficult to see why the prisoner in the case last cited was not guilty of secret disposal.

OF HURT.

319. Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

Hurt.

Synopsis.

(1) *Analogous Law* (3428).
(2) *Meaning of Words* (3430).
(3) *Composition of Hurt* (3431-3435).
(4) *Causing Bodily Pain* (3432).
(5) *Disease* (3433-3434).
(6) *Infirmity* (3435).

3428. Analogous Law.—The smallest offence connected with the infliction of bodily pain is assault, which has been defined in section 351. This section defines the bodily pain which is caused by actual contact with the body, and which is caused by a somewhat aggravated assault. But between assault and hurt there is no radical difference. So the framers said : "Many of the offences which fall under the head of hurt will also fall under the head of assault. A stab, a blow which fractures a limb, the flinging of boiling water over a person, are assault, and are also acts which cause bodily hurt. But bodily hurt may be caused by many acts which are not assaults. A person, for example, who mixes a deleterious potion, and places it on the table of another; a person who conceals a scythe in the grass on which another is in the habit of walking; a person who digs a pit in a public path, intending that another may fall into it, may cause serious hurt, and may be justly punished for causing such hurt, but they cannot, without extreme violence to language, be said to have committed assaults..

"We propose to designate all pain, disease and infirmity by the name of hurt."

"We have found it very difficult to draw a line between those bodily hurts which are serious and those which are slight. To draw such a line with perfect accuracy is, indeed, absolutely impossible; but it is far better that such a line should be drawn, though rudely, than that offences some of which approach in enormity to murder, while others are little more than frolics which a good-natured man would hardly resent, should be classed together.

(3) *Morris*, 2 Cox 489.

"We have, therefore, designated certain kinds of hurt as grievous."(4)

3429. The difference between assault and hurt is even invisible in English Law, where such offences are designated "assault and battery." An assault being an attempt to offer, with force and violence, a corporal hurt to another; as by striking at another with a stick or other weapon, or without a weapon, though the party striking misses his aim.(5) A *battery* is more than an attempt to do a corporal hurt to another. It is an actual injury, be it ever so small, but actually done to the person of a man.(6) Every battery thus includes an assault.(7) The distinction between an assault and battery in English Law is as fine as the distinction between an assault and hurt in the Code. The only distinction possible between them is one of degree.

3430. Meaning of Words.—"*Whoever causes bodily pain*": The pain must be bodily, not mental. The breaking of alarming news to one may cause pain, but it is not *bodily* pain. It is not, therefore, hurt. "*Disease*": A person communicating a specific disease to another would be guilty of hurt. It must, however, be done by contact. "*Or infirmity to any person*": An infirmity is a disease, or it may be weakness,(8) brought on by the administration of a deleterious or poisonous substance. Such infirmity may be brought on by the taking of alcohol, in which case the person administering it would be guilty of causing hurt (§ 3435). "Infirmity" denotes an unsound or unhealthy state of the body. "*To any person*," who must be other than the sufferer himself; for hurt self-inflicted is not within the definition.

3431. Composition of Hurt.—This section does not define the offence of causing hurt. It defines only the term "hurt." As such, it does not describe the circumstances under which it may be caused, or those which aggravate or extenuate the liability for causing it. The definition is confessedly unsatisfactory, but it must be understood as implying the causing of bodily injury resulting either in bodily pain, disease or infirmity. The causing of bodily pain, disease or infirmity may, however, vary both in the manner and the extent. It may be insignificant enough to be unnoticed(9) or it may lead to the dismemberment of the human body and even death. In all such cases the bodily pain caused is, broadly speaking, hurt, but it is then hurt, which has received distinct appellations in the Code, and by which it is then distinguishable from it. Then, again, the manner of causing hurt may vary. It may be caused in committing a crime, or in self-defence, or it may take the middle course of being caused on grave and sudden provocation, in all of which cases, the act becomes distinguished, and is separately punishable. The term, as here defined, refers to the underlying elements which are common to all such crimes. In that sense, and that sense alone, they may be all designated hurt, but from which they are otherwise distinguishable.

(4) Note *M.*, Reprint, p. 151.
(5) 1 Hawk. P. C. C. 62, s. 1; Bac. Abr., tit. "Assault and Battery" (A); 3 Black. 120; 1 East P. C. 406.
(6) 1 Hawk. P. C. C. 62, s. 2.
(7) 1 Hawk P. C. C. 62, s. 1.
(8) Lat, *in*, not, and *firmus*, strong.
(9) S. 95.

3432. The causing of bodily pain necessary to constitute hurt must, it is apprehended, be caused by the direct application of force to the body. Bodily pain caused by the reflex action of the mind, as by the breaking of sad tidings or the like, is too remote to constitute criminal causation, for between the act and the effect there is the intervening mind, the action of which is neither invariable nor automatic in each case. But where the direct result of an act is the causing of bodily pain it is hurt, whatever the means employed to cause it. Where, for instance, a boy of 16 gave a girl of 12 with whom he had fallen in love some sweets, mixed with *Dhatura* to eat, which he wrongly believed would act as a love philtre, he was held to have caused hurt as he could not be acquitted of the knowledge that it would cause her physical pain.[10]

(1) Causing Bodily Pain.

3433. But the communication of disease or infirmity to another stands on a different footing. But in this respect the English rule is now settled to be different,[11] though there are earlier cases in which the Court had laid down the contrary[12]; but all these cases were passed in review in the case referred to the Judges in 1888, in which the husband had communicated gonorrhœa to his wife who had consented to the sexual intercourse without knowing of his condition, and the question referred to the Judges was whether it amounted to the infliction of any grievous bodily hurt unlawfully and maliciously within the meaning of s. 20 of 24 & 25 Vict., c. 100. The case was argued before thirteen Judges, nine of whom[13] were of opinion that the injury so caused could not be said to have been "inflicted unlawfully and maliciously," and on the broad question they held that the communication of disease by means of sexual intercourse could scarcely be designated an assault.

(2) Disease.

"The one act differs from the other in the immediate and necesary connexion between a cut or a blow and the wound or harm inflicted, and uncertain or delayed operation of the act by which infection is communicated. If a man by a grasp of the hand infects another with small-pox, it is impossible to trace out in detail the communication between the act and the disease, and it would, I think, be unnatural use of language to say that a man by such an act 'inflicted' small-pox on another. There is authority for the proposition that poisoning is not an assault.[14]....Infection is a kind of poisoning. It is the application of animal poison, and poisoning, as already shown, is not an assault.[15]" The view of Hawkins J., was that the act amounted to an assault, and that it had been inflicted unlawfully or maliciously. For, a person presumably knows of his condition and that by sexual intercourse he is likely to communicate what he has got. His act is

(10) *Anis Beg*, 21 A. L. J. 844.

(11) *Clarence*, 22 Q. B. D. 23 (42, 43).

(12) *Per* Willes, J. in *Bennett*, 4 F & F. 1105; followed in *per* Shee, J., in *Sinclair*, 13 Cox 28; disapproved in *Hegarty* v. *Shive*, 2 L. R. Ir. 273; o. p. 4 L. R. Ir. 288.

(13) Lord Coleridge, C. J., Pollock and Huddleston, B. B., Stephen, Manisty Nathew, A. L. Smith, Wilis, and Grantham, JJ.; *contra* Field, Hawkins, Day and Charles, JJ.

(14) *Dilworth*, 2 Mo. & Ro. 53, dissenting from *contra* in *Button*, 8 C. & P. 660, to the same effect *Hanson*, 2 C. & K. 912; *Walkden*, L. R. 1 C. C. R. 282.

(15) *Per* Stephen, J., in *Clarence*, 22 Q. B. D. 23 (42).

therefore unlawful because it affords a good ground for a judicial separation.[16] And it is malicious to do unlawful act wilfully. But this was not the view of the majority of the Judges who were of opinion that the act could neither be said to amount to the infliction of injury, nor could it be said to have been done unlawfully or maliciously.

3434. A similar question went up for decision before West and Nanabhai Haridas, JJ., but in that case the learned Judges did not refer to this section. There, a prostitute had connexion with a prosecutor to whom she communicated syphilis, whereupon she was convicted under s. 269; but West, J., rightly held her act not to amount to the spreading of infection, because she could not spread it without the complicity of the prosecutor who was a willing party. Her offence was held to fall under the provisions of either section 417 or 420, if there were evidence to show that the intercourse with her was induced by misrepresentation on the part of the diseased person.[17] But the Court did not advert to this clause in connexion with the case, for as the clause stands, it is difficult to see when the causing of disease is hurt if it is not hurt in the cases last considered. It may be that the interval between the act and the disease is too remote; but it is a question of fact whether what was done was sufficiently proximate to constitute the cause of the disease communicated.

So where the prisoner, who had venereal disease, induced a girl of thirteen years of age, who was ignorant of his condition, to have connexion with him, and he infected her, he was held to be guilty of indecent assault.[18] This case was followed by Shee, J.,[19] who held it to be a case in which the prisoner might have been charged for an assault occasioning actual bodily hurt. As remarked before, these cases were referred to by the Judges in *R.* v. *Clarence*,[20] but not overruled, and Pollock, B., who was of the majority, expressly intimated as his opinion, that though he was not prepared to adopt them in their entirety, still without further argument and consideration he was not prepared to say that they should be overruled, especially as in cases of a similar kind, which might well arise, they were undoubtedly important and useful in the administration of the criminal law.[21] It is also to be noted that the decision of the majority was more confined to the construction of the words of the statute, such as "*inflicted*," "unlawfully" and "maliciously," rather than the broad question whether such an act could amount to an assault. But as the section is worded, there can be no doubt that such cases were clearly intended to be within its comprehension.

(3) Infirmity.

3435. The same remark applies to the causing of infirmity which is something akin to, but not identical with, disease. The term "'infirmity" is used to denote the inability of an organ to perform its normal function. It may be temporary or permanent, as where it is caused by the administration

(16) *Brown* v. *Brown*, L. R. 1 P. & D. 46; cited *per* Hawkins, J., in *Clarence*, 22 Q. B. D. 23 (47).
(17) *Rakma*, 11 B. 59.
(18) *Per* Willes, J in *Bennett*, 4 F. & F. 405.
(19) *Sinclair*, 13 Cox 28; followed in *Hegarty*, 4 L. R. Ir. 288.
(20) 22 Q. B. D. 23.
(21) *Ib.*, p. 63.

of a stupefying drug such as opium, *dhatura*, alcohol or chloroform. It is not necessary that the infirmity caused should necessarily produce any bodily pain, or that it should produce any sensibility at all. All that is necessary is that some organ of a person should have suspended its normal function.

320. The following kinds of hurt only are designated as "grievous":—

Grievous hurt.

First.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration of the head or face.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life or which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits.

Synopsis.

(1) *Analogous Law* (3436).
(2) *What is Grievous Hurt* (3437).
(3) *Emasculation* (3438-3439).
(4) *Injuring Eyesight* (3440).
(5) *Causing Deafness* (3441).
(6) *Loss of Limb* (3442).
(7) *Impairing of Limb* (3443).
(8) *Permanent Disfiguration of the Head or Face* (3444).
(9) *Fracture or Dislocation of a Bone or Tooth* (3445-3446).
(10) *Dangerous Hurt* (3447-3450).

3436. Analogous Law.—This is hurt of a more serious kind but the distinction between it and the other kind of hurt, called simple, is purely arbitrary. This was conceded by the draftsman who wrote: "We have found it very difficult to draw a line between those bodily hurts which are serious, and those which are slight. To draw such a line with perfect accuracy is, indeed, absolutely impossible; but it is far better that such a line should be drawn, though rudely, than that offences some of which approach in enormity to murder, while others are little more than frolics which a good natured man would hardly resent, should be classed together.

"We have therefore designated certain kinds of hurt as *grievous*.

"We have given this name to emasculation, to the loss of the sight of either eye, to the loss of the hearing of either ear, to the loss of

any member or joint to the permanent loss or the imperfect use of any member or joint, to the permanent disfiguration of the head or face, to the fracture and to the dislocation of bones. Thus far we proceed on sure ground. But a more difficult task remains. Some hurts which are not, like those kinds of hurts which we have just mentioned, distinguished by a broad and obvious line from slight hurts, may nevertheless be most serious. A wound, for example, which neither emasculates the sufferer, nor blinds him, nor destroys his hearing, nor deprives him of a member or a joint, nor permanently deprives him of the use of a member or a joint, nor disfigures his countenance, nor breaks his bones, nor dislocates them, may yet cause intense pain, prolonged disease, lasting injury to the constitution. It is evidently desirable that the law should make a distinction between such a wound, and a scratch which is healed with a little sticking-plaster. A beating, again, which does not maim the sufferer or break his bones, may be so cruel as to bring him to the point of death. Such a beating, it is clear, ought not to be confounded with a bruise which requires only to be bathed with vinegar, and of which the traces disappear in a day.

"After long consideration, we have determined to give the name of grievous bodily hurt to all hurt which causes the sufferer to be in pain, disease or unable to pursue his ordinary avocations, during the space of twenty days."(22)

This provision, they went on to remark, was suggested to them by Article 309 of the French Penal Code.

There is nothing like grievous hurt, as a distinct offence in English Law. The offence of aggravated assault owes its character not from the nature or manner of the assault, but from the character of the place, and position of the persons assaulted, such as an assault in a church or churchyard, striking in the king's palaces, assault with intent to commit robbery, assaulting peace officers in the execution of their duties, or the like. The distinction between hurt and grievous hurt is thus a distinction, which follows no precedent of English Law. All the same it is a distinction based upon sound discrimination.

3437. What is Grievous Hurt.—This section like the last, merely defines the term "grievous hurt" in the abstract. It then defines, what is voluntarily causing hurt or grievous hurt, and then follow the sections prescribing punishments for the two offences. The variations caused in the criminality due to the nature of the weapon used, or the provocation received, form then the subjects of other distinct sections.

For the present, it is necessary to appreciate clearly the distinction which this section makes between hurts, pure and simple, and those designated grievous. Of these latter this section enumerates eight kinds, all of which it designates "grievous," calling for the enhanced punishment prescribed for them. These clauses are by no means mutually exclusive and exhaustive, for there may be injuries which may fall under two or more clauses. An injury may, for instance, deprive a person of his eye. In all such cases the injury inflicted is only grievous; but then even grievous hurt may be of a varying degree of

(22) Note M, Reprint, pp. 151, 152.

atrocity. But this is to be taken into consideration in meeting out the sentence, and not in describing the crime. Of the eight kinds of grievous hurt here described, the hurt mentioned in clauses 1, 2, 4, 5 and 7 would be called "maiming" in English Law.[23]

"First."

3438. Emasculation.—Of these the foremost is emasculation,[24] which is depriving a man of his virility. It is unsexing the man. Emasculation naturally applies only to man, and the clause was inserted to counteract the practice common in this country for women to squeeze men's testicles on the slightest provocation. It was suggested that other injuries to the *membera private* falling short of emasculation should also be treated as grievous[25] as the act should be repressed by severe penalties, as peculiarly offensive to the feelings of the party injured, as well as most dangerous—the slightest excess causing the severest suffering. But the Law Commissioners considered the proposed change unnecessary, adding that when this barbarous kind of hurt is caused for the purpose of extortion, it is punishable severely, under section 330, "and there being no ground," as far as we know, "to believe that it is an offence of which there has been such experience under other circumstances as to call for its being distinguished specially."[1]

3439. Emasculation may be caused in a variety of ways. It may be caused by inflicting such injury to the scrotum of a person as has the effect of rendering him impotent. The impotency caused must be permanent, and not merely temporary and curable, caused by an injury, the effect of which will disappear as soon as it is cured. The injury to scrotum often leads not only to emasculation but death. Indeed, as remarked by Dr. Chevers, it is a form of assault which is extremely liable to prove fatal.[2] In that case, the accused would be guilty of not only grievous hurt, but of culpable homicide.[3]

But, of course, since a person cannot inflict grievous hurt upon himself within the meaning of this section it follows that one who emasculates himself cannot be convicted of causing himself grievous hurt under section 325, or indeed of any other offence under the Code.[4]

"Secondly."

3440. Injuring Eyesight.—Another injury of almost equal gravity is the "permanent privation of the sight of either eye." Such injury must have the effect of permanently depriving the injured of the use of one or both of his eyes. The test of the gravity is the permanency of the injury, which may be caused by hand, as by gouging out one's eye with the thumb nail, or by poking it with a stick, or the like. The injury is grievous, both because it deprives a man of an organ of sight, as also because it disfigures him for life.

"Thirdly."

3441. Causing Deafness.—In this respect, this injury is more serious than the "permanent privation of the hearing of either ear" which deprives a man of the use of his auricular organ, but does not disfigure him. At the same time, it is a

(23) First Rep., § 385.
(24) Lat. *e*, privative, and *masculus*, male—the act of depriving of virility, castration.
(25) First Rep., § 367.

(1) First Rep., § 369.
(2) (1870) Med. Juris. 478; cited in *Kaliyani*, 19 M. 356.
(3) *Kaliyani*, 19 M. 356.
(4) *Madho Singh*, (1878) P. R. No.

serious injury to deprive a man of his sense of hearing, and its loss law well esteems as grievous. Such injury may be caused by a stunning blow, given on the head or the ear, or those parts of the head which communicate with and injure the tympanum or other auditory nerves, thrusting a stick into the ear, or pouring into it some substance which leads to deafness.

3442. Loss of Limb.—The permanent "privation of any member or joint" is another instance of grievous hurt. This clause and the next refer to the old offence of *mayhem* which Hawkins defined to be violently depriving another of the use of such of his members, as may render him the less able in fighting, either to defend himself, or to annoy his adversary. And, therefore, the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be *mayhems*.(5) This offence was in England, at one time, visited with the penalty of death(6); and by the ancient law the penalty sanctioned for the same crime was *membrum pro membro*—an eye for an eye, and a tooth for a tooth. The punishment provided by the Code depends upon the nature of the member or joint lost. For, of course, the same penalty cannot attach to the mutilation of an arm as to the loss of one's little finger. The term "member," as used here, means nothing more than an organ or a limb, being a part of man capable of performing a distinct office. As such, it includes both the eyes, the ears, the nose, mouth, hands, feet and, in fact, all distinct parts of the human body designed to perform a distinct office. A "joint" is a place where two or more bones or muscles join. So there are well-known joints in human anatomy at lower jaw, shoulder, elbow, wrist, thumb, hip, knee, and great toe. All these joints are in the nature of hinges and which perform a similar function.(7) Their permanent privation must involve such injury to them as makes them permanently stiff, so that they are unable to perform the normal function assigned to them in human economy.

"Fourthly."

3443. Impairing of Limb.—The use of limb and joints is essential to the proper discharge of the normal functions incident to ordinary life. Their deprivation involves lifelong crippling with its attendant defencelessness and misery. They are consequently so highly prized that the law has at all times permitted even homicide if committed *se defendendo*, or in order to preserve them.(8) And this clause sanctions the same policy of law in making it a grievous hurt to destroy, or permanently impair the use of any limb or joint without causing its total deprivation or destruction. Indeed, the mere retention of a limb, when it cannot be put to the use for which it was created, is as great a hardship as if it had been wholly lost by amputation or otherwise. The clause speaks of "destruction or permanent impairing" of their powers, and which would include not only the total but also a particular use of the limb or joint. Any *permanent* decrease in their utility would then constitute grievous hurt. But if their destruction or deprivation was not perma-

"Fifthly."

(5) 1 Hawk. P. C. 111; 4 Black, 205.
(6) 9 Geo. I, c. 22 (called the Black Act); 26 Geo. II, c. 19, s. 1; 7 & 8 Geo. IV, c. 27; 5 Hen. IV, c. 5; 22 & 23 Car. II, c. 1 (Coventry Act); 9 Anne, c. 16—all since repealed.
(7) Ellis's Anatomy (10th Ed.), pp. 85, 314, 317, 320, 324, 653, 692 701, 709.
(8) S. 100, "*Secondly*"; 1 Black, 130.

nent, but only temporary, the injury may nevertheless be grievous if it falls under the terms of clause 8.

3444. Permanent Disfiguration of the Head or Face.—The sixth species of grievous hurt consists in the permanent disfiguration of the head or face. The word "disfigure" must be distinguished from the word "disable." For to disfigure is to do a man some external injury which detracts from his personal appearance, but does not weaken him, but to "disable" is to do something creating a permanent disability, and not a mere temporary injury. Such disfigurement may be caused by lopping off a man's ear or nose, in which case there would be sufficient disfigurement without consequential disability, so as to constitute grievous hurt under this clause.(9) A nasty gash on the face leaving a permanent scar would be another instance of this species of injury. So branding may leave a permanent scar causing disfigurement,(10) but whether they will or will not do so is a question of fact depending upon the seriousness of branding and the injury inflicted, upon which the testimony of a medical witness should be material. An injury may both disfigure as well as disable a person, *e.g.*, gouging out an eye. In that case the offence will be the same, namely, grievous hurt, though the injury would then fall both under this clause as well as clause 2.

"Sixthly."

3445. Fracture or Dislocation of a Bone or Tooth.—The fracture or dislocation of a bone or tooth is another species of grievous hurt, which may or may not be attended with permanent disability. For a bone, though fractured or dislocated, may rejoin or be set and leave no trace behind of its fracture or dislocation. But the injury is esteemed grievous on account of the intense suffering to which it gives rise, and the serious disability which it causes in the sufferer. The same disability may attach to the dislocation of a tooth.

"Seventhly."

3446. The term "fracture"(11) simply means breaking. The term "dislocation"(12) literally means displacement, being applied to a bone removed from its normal connexions with a neighbouring bone. A bone moved out of its socket, or put out of its joint is a dislocated bone, and anything causing it to be so dislocated is said to dislocate it. It is a question for the medical witness to determine whether what has been done amounts to a fracture or dislocation. The fracture or dislocation of any bone is, however, sufficient to constitute grievous hurt.

3447. Dangerous Hurt.—Lastly, injuries which are dangerous to life, or those which cause the sufferer to be in severe bodily pain for the space of twenty days, or unable to follow his ordinary pursuits for the same period are grievous. There is nothing corresponding to this clause in the English Law, which the framers had confessed to having borrowed from the French Penal Code.(13) The period of twenty days fixed by them for making the injury grievous was, of course, necessarily arbitrary, but any period fixed would have been the same. So the authors wrote: "It appears to us that the length of time

"Eighthly."

(9) First Rep., § 373.
(10) *Anta*, 1 B. H. C. R. 101.
(11) Lat. *frango*, *frangere*, to break
(12) Lat. *dis*, apart, and *locare*, to place; lit. displacing.
(13) Art 309; Note M, Reprint, pp 152, 153, First. Rep, §§ 371, 374.

during which a sufferer is in pain, diseased or incapacitated from pursuing his ordinary avocations, though a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised. It is a criterion which may, we think, with propriety be employed not merely in cases where violence has been used, but in cases where hurt has been caused without any assault, as by the administration of drugs, the setting of traps, the digging of pitfalls, the placing of ropes across a road. But though we have borrowed from the French Code this test of the severity of bodily injuries, we have framed our penal provisions on a principle quite different from that by which the authors of the French Code appear to have been guided. In apportioning the punishment, we take into consideration both the extent of the hurt and the intention of the offender."(14)

But all the same the test adopted was an arbitrary one, and it did not pass unchallenged. And the Law Commissioners had to admit the force of the criticism, for, they wrote: "We cannot but think that there is a reason in the exceptions taken to estimating the severity of a hurt by the time during which the sufferer is unable to follow his ordinary pursuits, as a rule, which will operate unequally. The man who lives by daily labour suffers far more by being kept from his work for twenty days, than he who has independent means, and whose ordinary pursuits may be intermitted for that time without causing him any material privation. Again, an injury to the right hand, may, in the case of a clerk, keep him from his work for twenty days, which, if it happened to the left hand, would be of no consequence. An injury to the foot may prevent one man from following his business, in which walking is necessary, which if it happened to another man in a sedentary employment, would not interrupt him at all. The proposed criterion is, therefore, unsatisfactory, but some criterion is necessary and it will be difficult to devise a better."(15)

3448. The clause refers to three classes of injuries which it designates grievous, namely:—

(*a*) Those which *endanger* life;

(*b*) Those which cause *severe* bodily pain for 20 days;

(*c*) Those which disable the sufferer to follow his ordinary pursuits for 20 days.

Now the inequality of the definition would only fall on cases comprised in clause (*c*). From that stand-point clauses (*a*) and (*b*) appear to be unexceptionable. Clause (*a*) refers to dangerous injuries, that is to say, injuries which are apt to be dangerous to life. Such are injuries inflicted on some vital part, such as the head, the chest and the abdomen. Of these severe injuries those inflicted on the head are always regarded as dangerous to life. They may not cause fracture of the skull-bone, and yet may prove fatal by reason of the injury they impart to the brain. Injuries of the chest and abdomen often prove fatal on account of the rupture of the liver and spleen, and on account of the injury to the other members vital to life. The question whether a given injury was dangerous to life is one upon which the testimony of the medical witness is material.

(14) Note M, Reprint, pp. 152, 153. (15) First Rep., § 374.

3449. An injury which is dangerous to life would necessarily cause severe bodily pain, unless death supervenes instantaneously. But an injury may cause such pain, and yet be not dangerous to life. It is even then grievous. But it must be shown that it was sufficient to cause severe bodily pain for that period. For, otherwise, it may be true enough that such pain was caused though there may be nothing to show that it was caused in consequence of the injury. And in such cases to infer *post hoc ergo propter hoc* would be as fallacious as it may at times prove mischievous. For cases of malingering and self-inflicted injuries are by no means uncommon in this country, added to which there are quacks with their nostrums which are calculated to aggravate rather than alleviate their patient's suffering.

3450. Lastly, the test of grievousness is the sufferer's inability to attend to his ordinary duties for a period of twenty days. This clause necessarily involves many elements of uncertainty, but, as has been already explained, it was inevitable (§§ 3447-3448). But here again to prevent its misapplication in cases of feigned inability, regard must be had to the nature and severity of the injury, as well as to the probability of the disability it was thereby likely to occasion. The mere fact that the sufferer did not attend to his duty for the statutory period, or that he remained in the hospital for that period[16] is no indication of his inability to do so. As was observed in a Bombay case: "An injured man be quite capable of following his ordinary pursuits long before twenty days are over and yet for the sake of permanent recovery or greater ease or comfort be willing to remain as a convalescent in a hospital especially if he is fed at the public expense."[17] Where the sufferer is treated in a hospital, the opinion of the medical officer attending on him is on the point of his disability relevant, but by no means conclusive. But in judging of the probability it must be remembered that the medical witness is no more qualified than any other person of ordinary experience and knowledge of human nature. It is in fact not a scientific question but one upon which the medical witness is permitted to depose, because he is presumed to know about the functions of the human organs and the general condition of the sufferer more than a non-scientific witness.

321. Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt."

Voluntarily causing hurt.

[*Act*—ss. 32, 33. *Voluntarily*—s. 39. *Hurt*—s. 319.]

Synopsis.

(1) *Analogous Law* (3451). (2) *Any Person* (3452).

3451. Analogous Law.—This definition of the offence of "voluntary hurt" is but an echo of the definition of culpable homicide as given in section 229. The words used in both the sections are similar, but the effect intended or known in each case, of course, necessarily differs. As in the

(16) *Vasta Chela*, 19 B. 247. (17) *Ib.*

case of culpable homicide, so in the case of hurt, this section requires proof of (*i*) the doing of any act, (*ii*) that act being done (*a*) with the intention of causing hurt to a specified person or (*b*) with the knowledge that he is thereby likely to cause such hurt, and lastly (*iii*) the act so done and intended does cause hurt.

3452. "Any person."—The section speaks of "any person" in three connections; that is, in connection with the intention, act and effect. But should he be the *same* person at each stage of the crime? Evidently not. For, a person intending to assault one person may by mistake assault another, and yet his offence is the same. He cannot be heard to say that he had aimed his blow at one whom it did not hit. In aiming his blow he was guilty of doing an illegal act, and he cannot plead mistake if another innocent person fell a victim to his illegality. So where the accused intending to assault a woman who had then a child in her arms, struck her a number of blows, one of which fell on the child's head causing its death, it was held that the accused had been guilty of voluntary grievous hurt Referring to this section Markby, J., said: "The very general language of this section was, I think, used expressly for the purpose of covering a case of this kind."[18] The learned Judge did not refer to the English Law, but it is on this point identical. In this case the degree of violence used was such as led the Court to hold that the accused must have known from the proximity of the child to the mother and the severity of his blows that his act was likely to cause grievous hurt. The question whether in such a case the hurt, intended or known to be likely was simple or grievous must in a measure depend upon the effect produced, the degree of violence used, and the natural consequence of the use of that violence which the accused might reasonably be presumed to know.

Voluntarily causing grievous hurt.

322. Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt, and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration.

A, intending or knowing himself to be likely permanently to disfigure *Z*'s face, gives *Z* a blow which does not permanently disfigure *Z*'s face, but which causes *Z* to suffer severe bodily pain for the space of twenty days. *A* has voluntarily caused grievous hurt.

[*Voluntarily*—s. 39. *Hurt*—s. 319. *Grievous hurt*—s. 320.]

Synopsis.

Analogous Law (3453-3455).

(18) *Saha Rae*, 3 C. 623.

3453. Analogous Law.—This section differs from the last in so far as the intention or knowledge of effect of the act in this case is grievous hurt instead of only simple hurt: otherwise the two sections are the same.

The explanation is self-evident. For, having intended an unlawful act the accused could not be heard to discriminate between the illegal act of one kind and another.

3454. But there must be evidence that what the accused had intended or known to be likely was not only hurt, but *grievous* hurt. But how is such intention or knowledge to be proved? This difficulty was suggested to the Law Commissioners who said: "The Judge is not to trouble himself with seeking for direct proof of what the offender thought was likely to happen, but is to infer it from the nature of his act, taking him to have intended grievous hurt, or at least to have contemplated grievous hurt as likely to occur, when he did what everybody knows is likely to cause grievous hurt, and the more certainly drawing this conclusion where there is evidence of previous enmity against the party who has suffered. If the act was such that nothing more than simple hurt could reasonably be thought likely to ensue from it, then although grievous hurt may unexpectedly have ensued, it would be his duty to convict the offender of simple hurt, judging that grievous hurt was not in his contemplation; for, according to this section a person can be convicted of grievous hurt only, when the result and intention correspond, or when grievous hurt has been suffered from an act which was intended to cause grievous hurt, though it may be of a different kind."(19)

3455. This is, of course the only way in which intention and knowledge can be proved. Overt act and declarations, the amount of violence used, the nature of the weapon selected for that purpose, the part of the body, vital or otherwise, where the wound was inflicted, the effect produced are, indeed, some of the most essential facts from which the Judge or the jury may infer an intention. It cannot be judged from any isolated fact, but must be judged from all together. For, suppose a person strikes a blow with moderate violence, which would not cause death of an ordinary subject, but which owing to the latent disease in him caused his death, the criminality of the act could not obviously be judged by the fatal result, but only by the nature of the act, namely, the severity of the blow.(20) Again, a person cannot be convicted of murder merely on account of his murderous intention. There must be the act done in pursuance of his intention, and which alone converts it into an offence of that description.

Any Mag. Non-cog. Summons. Bail. Comp.

Punishment for voluntarily causing hurt.

323. Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

[*Voluntarily*—s. 39. *Hurt*—s. 319. *Voluntarily causing hurt*—s 321.]

(19) First Rep., § 377.

(20) *O'Brien*, 2 A. 766; *Idu Beg*, 3 A. 776.

Synopsis.

(1) *Analogous Law* (3456).
(2) *Procedure* (3457-3459).
(3) *Proof* (3460).
(4) *Charge* (3461).
(5) *Principle* (3462).
(6) *What is Voluntary Hurt* (3463-3467).
(7) *Intention or Knowledge Material* (3468-3471).
(8) *Rioting and Hurt* (3472).
(9) *Measure of Punishment* (3473).

3456. Analogous Law.—After defining "hurt" in s. 319 and "voluntarily causing hurt" in s. 321, this section merely declares the latter act to be an offence and prescribes for it a penalty. This is, however, a section providing for a normal case, that is to say, a case in which there are no circumstances of aggravation or mitigation where such circumstances are present, the Court varies the penalty accordingly. So where the hurt is caused by means dangerous to life, the penalty to which the accused is liable is trebled, as provided in the next section and where the means employed is poison or other unwholesome drug, the punishment may extend even to ten years. So where it is caused for the purpose of extortion or coercion, the penalty prescribed is the same. If the same offence is committed to extort a confession, or to coerce the restoration of property, the maximum sentence prescribed in s. 330 is seven years.

Another species of aggravation furnishing a ground for enhanced sentence is that presented in s. 332, that is, where hurt is caused to deter a public servant from his duty. Lastly, where hurt is caused in an attempt to commit murder or culpable homicide the offence is punishable under the provisions of s. 307 or s. 308. Then there are cases in which the causing of hurt *aggravates* the crime, often converting it from the offence of one kind into another more heinous. Such is house-trespass under s. 452, lurking house-trespass under s. 455 or 458, robbery under s. 390 and dacoity under s. 391. In all such cases the causing of hurt is a circumstance of aggravation, changing the complexion and enhancing the atrocity of the crime. These exhaust all the cases of aggravation. Section 334 deals with hurt caused on grave and sudden provocation, and in which the penalty prescribed is imprisonment which may extend up to one month, or a fine, the maximum of which is Rs. 500. Hurt caused by doing a rash or negligent act is punishable under ss. 336 and 337, the one with a fine, and the other with imprisonment which may extend to six months.

There are thus eight sections providing for deviation from the normal case here presented; of these the first five (ss. 324, 327, 328, 329, 330) are instances of aggravation entailing enhanced penalties; the remaining three (ss. 334, 336, 337) afford instances of mitigation in which the penalties provided are below the normal.

This section will then apply only if none of the attendant circumstances of aggravation or alleviation are present.

3457. Procedure and Practice.—This offence is non-cognizable and summons should ordinarily issue in the first instance. It is both bailable as well as compoundable, and is triable by any Magistrate, and may be tried

summarily.[21] A prosecution for this offence is essentially a personal action which on the death of the complainant, his legal representatives have no right to continue.[22] Nor have they the right to compound the offence.[23] It, however, does not abate on the death of the complainant.[24]

A conviction under s. 147 and this section cannot be altered to one under s. 160.[25] But a conviction had under s. 149 and this and its cognate sections, *e.g.*, ss. 325 and 326 may on appeal be altered to one under this section or s. 325 or s. 326, the main question being whether the accused would be prejudiced by the alteration.[1]

3458. A bailiff went to deliver possession, when he was alleged to have been drunken and disorderly and to have pushed the complainant's wife, so that she fell down and sustained bruises. It appeared that the bailiff had pushed her, and that the rest of her complaint was supported by false evidence, whereupon the High Court altogether acquitted the accused, holding that the evidence found to be exaggerated on the major points, could not support a conviction on the minor point.[2] The High Court is competent to alter a conviction from s. 147 to s. 323 though the accused charged under ss. 147 and 325 had been acquitted of s. 325,[3] provided, the charge under s. 147 stated the causing of hurt or grievous hurt as its object.[4] Contrariwise a conviction under s. 326 on a charge under s. 326 read with s. 149 was held to be not necessarily bad, the question depending upon whether the accused was prejudiced.[5] The fact that hurt or grievous hurt is caused is not of itself sufficient to convict a person under s. 323 or s. 325; for there must be proof that it was caused voluntarily. Where, therefore, the only evidence adduced was that A struck B fracturing his skull it would not justify A's conviction under s. 325 without proof that he intended to cause grievous hurt, though the fact that A struck would support his conviction under this section.[6] A prosecution under this section, being a personal action, abates on the death of the complainant, whose legal representatives have no right to continue it.[7]

3459. The term "hurt" is a generic offence, and as pointed out under the last article (§ 3456), it may be caused under many circumstances of aggravation or palliation, apart from which, it may on account of the degree of force used, or the effect caused, be something more than a mere hurt here punishable. In such cases it is the duty of the Magistrates to weigh the facts carefully before taking upon themselves to try the accused. This should be especially the case if death is caused,

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(21) S. 260 (c) Cr. P. C.

(22) *Rama Nand*, (1917) P. R. No. 26, 40 I. C. 1008.

(23) *Rahmat*, 37 A. 419.

(24) *Mhd. Ibrahim* v. *Dawood*, 44 M. 417; *Musa*, 22 A. L. J. 520; *contra* in *Labhu*, (1919) P. R. No. 25, 52 I. C. 797.

(25) *Sreeramulu*, 47 M. 61; *contra* in *Sabir Hussain*, 19 A. L. J. 487 dissented from as prejudice to the accused by the alteration not considered

(1) *Theethumalai*, 47 M 746, F. B., dissenting from *Reazuddi*, 16 C. W. N. 1077.

(2) *Meredith* v. *Sanjibani*, 42 C 313, *Sarju* v. *Mallar*, 2 Pat. L. W. 78.

(3) *Kunja Bhuniya*, 39 C. 896; *Rittal, Singh*, 74 I. C. 717.

(4) *Lal Mohan* v. *Kali Kishore*, 38 C. 293.

(5) *Theetumalai*, 47 M. L. J. 221, F. B.

(6) *Nga Tune*, (1914) U. B. R. 35, 28 I. C. 1007.

(7) *Rama Nand*, (1917) P. R. No. 26, applying the principle of cases of defamation in *Ishar Das*, (1908) P. R. No. 10; *Krishna* v. *Corporation*, 31 C. 993.

in which case the Magistrate should ponder whether it is not a case fit for commitment, and he should only commit the accused under this section if the facts clearly warrant adoption of such a course.[8] Again, there is a noticeable distinction between this section and the common assault punishable under s. 352. The former is a warrant-case; the latter a summons-case. Consequently, Magistrates often find it more convenient to treat a case of hurt as one of assault and dispose of it accordingly. This promotes despatch, but it is a misapplication of the different procedures prescribed for the trial of the two cases designated " warrant and summons " cases.

The Punjab Chief Court, in their circular to Magistrates,[9] observe that the Magistrates have been known to resort to this device to shorten the procedure applicable to summons cases in which the Magistrate need not frame a charge, take down the defence of the accused, tender witnesses for further cross-examination and adjourn it to enable the accused to summon his witnesses. All this is dispensed with in the abridged procedure provided for the speedy trial of summons cases in which the accused is primarily responsible for the production of his evidence on the day fixed for hearing. There is a discernible difference between the offences comprised in this section and section 352, and where the use of criminal force causes "hurt" within the sense ascribed to that term in section 319, the accused has the right to be tried under that section, and to insist upon the observance of the procedure applicable to the trial of warrant-cases.

3460. Proof.—The points requiring proof are:—

(1) That the accused caused bodily pain, disease or infirmity to the complainant.

(2) That the accused caused it with—

(*a*) the intention of thereby causing hurt to the complainant; or

(*b*) with the knowledge that he is likely thereby to cause hurt to any person.

(3) That the hurt was not caused on grave and sudden provocation as provided in s. 334.

3461. Charge.—A charge under this section, as read with s. 149 should be so worded, since no person charged under these sections can be legally convicted under this and the following cognate sections.[10] Nor can one charged under s. 147 be convicted under this.[11] Where the offence made out is clearly one under this section, the charge should run thus:—

" I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

(8) 12 W. R. Cr. L. 7.
(9) 2 Cr. P. C. 52.
(10) *Madan Mondal*, 41 C. 662, following *Ressuddi*, 16 C. W. N. 1077, 15 I. C. 646; distinguishing *Panch*, 34 C. 698; *contra* in *Theethumalai*, 47 M. L. J. 221, F. B. (1925) M. 1.
(11) *Rakhal Chandra*, 87 I. C. (C.) 842.

"That on or about the——day of——at——you voluntarily caused hurt to A B, and thereby committed an offence punishable under s. 323 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3462. Principle.—The question whether the causing of any particular injury amounts to hurt, or is more or less, depends as much upon the sole question of the injury caused as upon the intention, with which it was caused, and the means that were adopted to cause it. They vary the offence from that punishable under s. 334 which is an offence, which, having regard to human infirmity and passions, law almost condones, to one punishable under s. 307 which illustrates the measure of retribution varied by intention. In this respect the classification of the Code is much more scientific than the division which has become recognized in English Law, and in which the only circumstances of aggravation recognized are those presented by the use of deadly weapons or means, and the fact of the person assailed being entitled to some special protection, as where he is a public servant in the execution of his duty, or the like (§ 3456). But in fact, there is no logical division of the subject at all, and no division has ever been attempted upon the principles here presented. The substantial result in each case is, however, the same—for whether division or no division, justice is justice—but cases do sometimes arise under English Law, the solution of which is confronted with difficulties which the subjective treatment of the law adopted throughout in the Code greatly eliminates.[12] Take, for example, the case of a person (A) attacking another (B) in which the latter in defending himself receives a wound, not from any direct stroke of A, but by striking himself against A's weapon, or by being thrown against some sharp object.

3463. What is Voluntary Hurt?—The general outline of the offence here made punishable, has already been given under the sections defining "hurt" (§§ 3431-3435) and "voluntarily causing hurt" (§§ 3451-3452). Its practical outcome will be presented here. As is pointed out in s. 319, "hurt" is the causing of bodily pain, disease or infirmity. The phrase "causing bodily pain" must be understood to mean the imparting of pain directed to the body, by the sense of touch, as by the use of force. There are other means of causing bodily pain, equally great, and often greater. As for instance, the breaking of an alarming tidings to one which is sufficient to cause mental anguish and nervous prostration. But here though the pain is caused to the body, it is caused by the reflex action of the mind, and not by the direct application of force. Now, as the operation of the human mind varies with each person, its reaction on the body is not uniform in all cases. Besides, there is no means available to judge of its effect. Such circuitous causation is, therefore, excluded from the category of penalties. The same observation applies to the causing of disease or infirmity. A person may put another up amidst insanitary surroundings. He may contract a disease and die. The accused may have adopted this means intending thereby to cause the effect produced.

(12) Introduction, §§ 65-67.

But his act is too remotely connected with the effect to be criminal. The cause here spoken of is then the direct proximate cause of the disease or infirmity (§§ 3007-3014).

3464. As regards the effect produced the same section speaks of pain, disease or infirmity. Pain is, of course, a sensation of which there may or may not be any external visible evidence. And so in the case of disease, there may or may not be any external visible symptom —for it all depends upon its nature and character. In the case of infirmity, however, there must be some external sign of weakness or of the cessation of the discharge of some normal function of the body or of any of its organs. But this too is not invariably necessary. For the requirements of the definition are satisfied as soon as there is the pain, disease or infirmity. If it cannot be seen, it may be difficult of proof. In that case the accused may be discharged, not because he has not committed the act, but because the evidence necessary to bring the offence home to him is lacking.

3465. The terms bodily pain, disease and infirmity have been already explained (§§ 3431-3435). These are the effects of an act, the causing of which in a certain manner constitutes the offence described in s. 321. That section describes the circumstances that clothe the act with the element of criminality, making it an offence, for which this section prescribes a penalty. Those circumstances are: (*i*) the doing of an act,(*ii*) coupled with the intention or knowledge of causing hurt, (*iii*) to any person.

3466. The act done must then cause bodily pain disease or infirmity, for otherwise it cannot cause hurt. It is not necessary that it should be an act of a specified kind or done in a specified manner. The term is unlimited and unqualified, except by the effect specified. If there is an act and it produces the requisite effect, law is satisfied to call it the causing of hurt, which may or may not be by means of human agency. Such an act may consist of the direct application of force, however inconsiderable, to the body causing it pain, as in the case of beating with a stick. So where one struck another with an umbrella across the chest, it was held that the hitting may have caused ever so little pain, but still the offence committed would be hurt unless the case is one covered by the provision of s. 95.[13] Hurt may be caused by any means as by the pelting of stones at the house of another knowing that his missiles might injure some one of its inmates.[14] So the communication of disease to another may be by any of the means known to man. It may be communicated by holding a voluntary sexual intercourse when one is suffering from a specific desease, which is communicated to another by means of the intercourse; or disease may be directly inoculated into another, or it may be otherwise disseminated by an act of some malignity, implied by the presence of the intention or knowledge that it is likely to affect another. In this respect such act differs from a mere negligent act endangering the public health or safety which law classes and punishes as a public nuisance[15] (§§ 2640-2645).

(13) *Sheo Gholam Lalla*, 24 W. R. 67 (68).

(14) *Maung Po Nyan*, 36 I. C. (Bur.) 145.

(15) S. 269, *et seq.*

3467. So again the causing of an infirmity must be subject to the same rule. So if a person administers chloroform or any other stupefying drug causing the suspension or cessation of the normal function of his body or of any of its organs, it will be an act voluntarily causing infirmity to another, and, therefore, the act would be punishable under this section, provided that it is not elsewhere excepted, extenuated or aggravated by the presence or absence of other circumstances. But as a matter of fact in the last two cases, the offence is more likely to fall under the more drastic provisions of the next section where the question will be found to be more exhaustively set out (§§ 3481-3489).

3468. Intention or Knowledge Material.—The act causing hurt must be done with "the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person." These words are intended to define and at the same time qualify the rule. If the act done was with the intention of causing anything more than hurt, say culpable homicide, or murder, dacoity or robbery or any of the other offences, the heinousness of which is enhanced by the causing of hurt (§ 3456), then this section is inapplicable to punish the crime, because the act was not with the mere intention of causing hurt, but with the intention of committing something else. Again, if there was neither intention nor knowledge to cause hurt, the act causing hurt may be due to an accident or misfortune. It is not then criminal. In order then to constitute hurt, it must be the be-all and end-all of the criminal's intention. But how is this intention to be judged? As pointed out under the last section (§§ 3453-3455), it can only be proved by the overt acts and declarations of the accused, the nature and ferocity of his act, and the effect thereby produced.

There can be no single criterion for judging of the complex and varied activity of the human mind. Law therefore attempts to judge of it by such of its external manifestations as are the indelible signs of its operation and unerringly connected with the execution of its commands. Adopting the subjective conception of crime, law punishes the act according to the *quantum* of criminality disclosed in the criminal's mind judged by its operation on the external world. In other words, law primarily looks to the intention, and not to the act, and when it looks to the act, it does so for the purpose of inquiring into the intention. If the intention did not go beyond the causing of hurt, this section applies, no matter what was the effect of the act. So if a person beat another intending to do no more than cause him hurt, and death ensues owing to an undisclosed disease, the accused would be liable only for the hurt caused, and not the death which was thereby occasioned. The several cases of deaths caused by the rupture of enlarged spleen or liver illustrate this rule[16] (§§ 3046-3047)

3469. Privileged and Negligible Assaults.—In all such cases the deceased was struck by the accused, under circumstances of such slight

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(16) *Nidarmarti* 7 M. H. C. R. I. 19; *Pemkoer*, 5 N. W. P. H. C. R. 38; *Mant, ib.*, p. 235; *Bysagoo Noshyo*, 8 W. R. 29; *Ketabdi Mundul*, 4 C. 764; *Fox*, 2 A. 522; *O'Brien*, 2 A. 766; *Idu Beg*, 3 A. 776.

provocation and by the use of such moderate force that the result that happened could not be said to have been intended by or known to the accused. The parents possess the authority to chastise their children, an authority which is impliedly delegated to the schoolmaster who is entitled to inflict reasonable corporal punishment as may be necessary for the purpose of school discipline.[17] Such cases may arise where the husband chastises his wife in the course of a verbal wrangle,[18] or a swineherd is hit with a brickbat for not minding his flock,[19] or the master kicks or beats his *punkah* cooly for going to sleep on duty,[20] or a soldier strikes a man for not letting him have his tonga on hire.[21] In such cases the motive for the crime was trivial, and it was consequently rightly presumed that the intention to commit the crime was no more than may be judged by the degree of the violence used, and not by the effect it produced. This is always a material element in estimating the crime.

A person may have no motive or intention to kill another—that other may be his own mother, but if he commits a brutal assault upon her causing her death, his intention would then be judged by his act.[22] It may be that he is a choleric man of great strength and that these circumstances have materially contributed to the result produced. But if he was a man of an irascible temperament, he has no right to assault others without just cause. And if he was a man of immense strength and the deceased a comparatively weak man and he was aware of it, he should have accordingly measured his blows. Law does not, therefore, take note of such circumstances. But it does of those which ordinarily regulate the course of human action. It is then a concession made to a human infirmity, but for which law will cease to be a correcting agency. In such cases it provides a specially mitigated sentence. But they must for the present be left alone.[23] Apart from one factor in measuring the degree in criminality is the degree of violence used.

3470. There may be right in a man to chastise another, but if the right is exceeded, the resultant hurt may be punishable according to the degree of the violence, aggravated by the brutality of the attack. The accused struck one Dil Mahomed a blow or slap which knocked him down. He then without inquiry as to whether he was dead or not, hung him up in haste to a tree, so as to make it appear that he had committed suicide, in consequence of which he died. The question was whether the offence of the accused fell under this section or was of a more serious kind as amounting to culpable homicide or murder. It was conceded that the accused had erroneously *believed* the deceased dead when he hung him up. He could not have, therefore, *intended* to kill him by *that* act. The only criminal act of which he was guilty was a slap which at the most would amount only to hurt. But it was held that the jury might fairly presume against the accused that he must have known that he was *likely by that act to cause death.* The accused did not know—he could not know—and thus took no pains to

(17) S. 89; *Mg. Ba Thaung*, 3 R. 661.
(18) *Idu Beg*, 3 A. 776.
(19) *Randhir Singh*, 3 A. 597.
(20) *Fox*, 2 A. 522.
(21) *O'Brien*, 2 A. 766.
(22) *Nidamarti*, 7 M. H. C. R. 110.
(23) S. 334.

ascertain whether Dil Mahomed was dead, and he must have known that it was possible that some spark of life still remained. If he really and *bona fide* did enquire, and after examination believed him to be dead, when he was not dead, and killed him by hanging him, it is clear, that all the party might be convicted under s. 338. The hanging him up was at least a rash act, and wholly inexcusable.(24)

3471. But the Bombay High Court who had to deal with a precisely similar case did not take the same view. In that case the accused had struck his father-in-law, who was then in his hut, three blows on the head with a stick with the intention of killing him. He fell down senseless on the ground. The accused took him for dead, and with a view to destroy evidence of the deed he set fire to the hut which was the real cause of his death. The accused was convicted of murder, but on appeal Birdwood and Parsons, JJ., differed as to the nature of the accused's offence, and the case was referred to Sargent, C. J., who appears to have cut the gordian knot by convicting him of an attempt to murder.(25) The Calcutta case was not referred to by the learned Judges, whose opinion has already been the subject of comment elsewhere.(1) For the present purpose these cases may be regarded as instructive, in so far that law subordinates the effect caused by a voluntary act to the consideration of the offender's *actual* intention. If that intention was merely to cause hurt, the legal effect of the act is to fasten on him a responsibility only for the causing of the hurt and nothing more. But if the intention was to cause murder the causing of hurt coupled with the more criminal intention would take the case out of this category, making it a more heinous act judged by the presence of the more criminal intention.

This appears to have been the guiding principle of decision of the case in which the accused had an altercation with the complainant on a dark night at whom he aimed a blow, which, however, accidentally fell on his child whom his wife was carrying on her arms as she intervened to ward off the blow. The child died. It was held that inasmuch as the blow, if it had reached the complainant, would have caused simple hurt, the accused could not be punished for anything more serious.(2) So where the accused surprised the deceased carrying on an intrigue with his mistress, tied him up to a post and gave him a thrashing in order to teach him a lesson, and the deceased who was of a weak constitution and had an enlarged spleen died as a result of the thrashing he had received, the Court convicted him of this offence holding that the accused intended to do no more than what he said, namely, give him a thrashing.(3) In another similar case the Court convicted the accused for grievous hurt.(4)

3472. Rioting and Hurt.—In the foregoing cases, which were cases of individual assaults, the question of intention does not present the

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(24) *Per* Norman, J., in *Gour Gobindo Thakoor*, 6 W. R. 55 (56, 57).

(25) *Khandu*, 15 B. 194, followed in *Palani Goundan*, 42 M. 547 F. B.: *Dalu Sardar*, 18 C. W. N. 1179; 26 I. C. 107.

(1) S. 299 Comm.

(2) *Chatur Nath*, 21 Bom. L. R. 1101 54 I. C. 485.

(3) *Sahez Ali*, 57 I. C. (C.) 826; *see Satya Deva*, 5 Pat. L. W. 109, 46 I. C 525.

(4) *Dayal Singh*, 5 L. L. J. 228, 71 I C. 52.

same difficulty as may arise where a number of persons commit rioting, in the course of which some persons cause hurt or grievous hurt. In such a case having regard to the provisions of s. 149 a question may arise as to the joint and several responsibility in respect of the offences caused by any of them. The general question of the liability has been already considered (§§ 1437-1450). But the question of the liability of all for the hurt caused by one remains. It was at one time held in Calcutta that since the use of criminal force or violence is necessary to constitute the offence of rioting,(5) persons who actually cause hurt cannot be convicted both of rioting as well as of causing hurt.(6) But this view was modified in later cases(7) in which it was laid down that (*a*) it was not legal to pass separate sentences for rioting as well as hurt where the convicted person is only statutably liable for hurt by application of s. 149, but (*b*) where he is proved to have individually caused hurt, he may be separately sentenced for the two offences.

But in a Full Bench case of the Allahabad High Court the same question was considered, and the legality of separate convictions for the two offences affirmed.(8) It was observed in that case that the offences of rioting and causing hurt or grievous hurt each of the two latter offences being committed against a different person, are all distinct offences. The offence of voluntarily causing hurt or grievous hurt can be obviously committed without the commission of the offence of rioting; and in like manner, rioting can be committed without the commision of the two other mentioned offences.(9) But this case was cited as an authority by the Calcutta High Court in which it was said: "If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoner could not be punished both for causing hurt, and for rioting."(10) This conflict of views was noticed by Jardine, J., in a Bombay case,(11) which he consequently referred to the Full Bench which upheld separate sentences in either case as equally legal, provided that in the case(12) the total punishment did not exceed the maximum prescribed for any one of the offences(13) for instance, the maximum sentence prescribed in s. 323 is one year, and that prescribed in s. 147 is two years, so that a person convicted of the two offences might be sentenced to three years, if he is proved to have individually caused hurt; but if he is convicted of that offence merely by application of s. 149, then he could not be sentenced to more than two years.

The solution of the question really depends upon the interpretation of s. 71 and of s. 235 of the Procedure Code; and as such, it has been already sufficiently considered (§§ 519-520).

(5) S. 146.
(6) *Goomance*, 17 W. R. 50 (51).
(7) *Nilmoney Paddar*, 16 C. 442, F. B.; *Mohur Mir*, *ib.* 725; *Ferasat*, 19 C. 105; *Harbans Pandey*, 40 C. 511; *Keamuddi*, 51 C. 79.
(8) *Ram Sarup*, 7 A. 757, F. B., following *Dungar Singh*, 7 A. 29; followed in *Bisheshar*, 9 A. 645; *Zor Sing*, 10 A. 146; *Sakharam*, 10 B. 493; *Bana Punja*, 17 B. 260, F. B.
(9) *Dungar Singh*, 7 A. 29 (34) F. B.
(10) *Lokenath Sarkar*, 11 C. 349; overruled in *Nilmony Poddar*, 16 C. 442; reasons set out in §§ 519, 520, *ante* (q. v.).
(11) *Bona Punja*, 17 B. 260, F. B.
(12) *Ram Sarup*, 7 A. 757, F. B. followed in *Bana Punja*, 17 B. 260, F. B.
(13) *Bana Punja*, 17 B. 260, F. B.

3473. Measure of Punishment.—This offence presents the greatest diversity in the degree of its criminality. It may, on the one hand, be so trivial as to pass unnoticed under the salutary rule embodied in section 95. On the other hand, it may in its gravity assume a proportion when even the section itself becomes inapplicable (§ 3456). This section does not provide for such extreme cases. It only prescribes a penalty for the offence when it consists of simple hurt and nothing more. Even then its heinousness may vary in accordance with the circumstances of each case. For example, while drunkenness, not excepted under s. 86, is no ground for exoneration, it is still a factor to be taken into consideration in judging whether the act was "voluntary," and in meting out the sentence,[14] other facts reflecting upon intention and knowledge and the degree of justification are equally relevant. So are the nature of the injury caused, the weapon used, and the forbearance displayed. So is the relative position of the parties. A person in a subordinate position, hitting his official superior, even though with an umbrella across the chest causing probably an inconsiderable pain, may call for something more than a nominal sentence.[15] So a professional *lathial* would probably receive less mercy than one who was a casual offender, led to commit the crime on some provocation or with some justification, though they may not be sufficient to exonerate him entirely. In such cases, the Court would not improperly resort to the provisions of section 562 of the Procedure Code. Indeed, in England, such cases are in the case of first offenders let off with a warning.

Session: Pres. Mag or Mag. of 1st or 2nd class. Cognizable. Summons. Bailable. Comp. with Court's sanction.

Voluntarily causing hurt by dangerous weapons or means.

324. Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument, for shooting, stabbing or cutting, or any instrument, which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[*Voluntarily*—s. 39. *Animal*—s. 47.]

Synopsis.

(1) *Analogous Law* (3474).
(2) *Procedure and Practice* (3475-3476).
(3) *Proof* (3477).
(4) *Charge* (3478).
(5) *Form of Charge* (3479).
(6) *Principle* (3480).
(7) *Aggravated Hurt* (3481-3484).
(8) *Fire or Heated Substance* (3485-3486).
(9) *Hurt by Noxious Thing* (3487-3488).
(10) *Corrosives* (3489-3490).
(11) *Hurt by an Animal* (3491).

(14) *Nga Pa Gyaw*, (1911) U. B. R. 4th Qr. 105, 15 I. C. 311.

(15) *Sheo Gholam Lalla*, 24 W. R. 67.

3474. Analogous Law.—The terror which the use of lethal weapons or means excites amongst people, the danger which their handling forebodes to the party aggrieved and the great malignity which it evidences, are reasons for prescribing the enhanced penalty here provided. So the framers of the Code in justifying this section said: "Bodily hurt may be inflicted by means, the use of which generally indicates great malignity. A blow with the fist may cause as much pain, and produce as lasting an injury, as laceration with a knife, or branding with a hot iron. But it will scarcely be disputed that in the vast majority of cases, the offender who has used a knife or a hot iron for the purpose of wreaking his hatred is a far worse and more dangerous member of society than he who has only used his fist. It appears to us that many hurts which would not, according to our classification, be designated as grievous, ought yet, on account of the mode in which they are inflicted, to be punished more severely than many grievous hurts. We propose, therefore, that where bodily hurt is voluntarily caused by means of any sharp instrument, of fire, of any heated substance, of any corrosive substance, of any explosive substance, of any poison internal or external, or of any animal, the maximum of imprisonment may be increased, in cases of grievous bodily hurt, to fourteen years, in other cases to three years."(16)

3475. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable, and compoundable only with leave of the Court before whom the prosecution is pending. It is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class.

3476. This section is the first of those in which the complainant possesses the qualified right of composition. The object of enabling the complainant to compound the case with the accused is, of course, to enable him to bargain for a pecuniary compensation for the injury suffered by him. In such cases, the complainant cannot be charged with the compounding of a felony—an offence, which is in any other case punishable.(17) The Procedure Code provides for the compounding of this offence with the permission of the Court in which the prosecution is pending.. Obviously, the stage at which the offence may be compounded is only so long as the case is not decided, after which the right of the complainant to compromise does not survive. But during the pendency of the case the parties may place themselves upon terms which they are not bound to disclose to the Court, nor are they to influence it in according its sanction to the composition. The Procedure Code does not give any indication of what should guide its discretion. But it is evident that the facts which would weigh with it are those which appeal to its leniency in passing a sentence on conviction. The extreme youth or senility of the accused, the existence of some provocation, the finding of the weapon handy, the absence of malignity, or in fact any mitigating circumstance may be taken into consideration in giving the necessary permission. But the giving of the requisite permission is a matter purely within the discretion of the Court. It cannot be insisted upon and if refused, it affords by itself no ground for appeal.

(16) Note M. Reprint, pp. 153, 154. (17) S. 213.

3477. Proof.—The points requiring proof are:—

(1) That the accused caused bodily pain, disease or infirmity.

(2) That it was caused to another person.

(3) That it was caused intentionally or with knowledge of its likelihood.

(4) That it was caused with a lethal weapon or with fire, poison or corrosive substance, an explosive, or deleterious substance or an animal.

(5) That it was unprovoked.

3478. Charge.—The charge should specify and describe the weapon used or means employed in causing hurt and which brings the case within the higher penalty provided by this section. It is not sufficient to describe the hurt as caused by a "dangerous weapon,"[18] for it can give the Appellate Court no idea of the nature of the weapon, so as to enable it to judge for itself whether the weapons used falls under the description here given so as to bring the case within the scope of this section. It is the duty of the Court to find whether the means employed in causing hurt were such, and it should be stated in the charge.[19] It should at the same time be considered if the offence is not one falling under the mitigated provision of s. 334, but if it does not, it is not necessary to set that fact out in the charge.[20]

A person charged with this offence being only statutably liable by application of s. 149, cannot be convicted under this section alone (§ 3461).

3479. The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of———at———you voluntarily caused hurt to A B by means of a gun, Exhibit——*or* which is an instrument for stabbing or cutting, or which used as a weapon of offence is likely to cause death, etc.,) and thereby committed an offence punishable under s. 324 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried (by the said Court) on the said charge."

3480. Principle.—The object of the section is to provide a higher penalty for the offence of hurt, when it has the *differentia* of one of the modes of infliction described in the section.[21] It is, of course, not necessary that the deadly weapon should be used in a manner as is likely to cause death. If it is so used the offence committed is then very different. This section deals only with the causing of simple hurt by deadly means.

(18) 2 W. R. (Cr. L.) 20, 8 W. R. (Cr. L.) 1.
(19) 3 W. R. (Cr. L.) 15.
(20) 4 M. H. C. R. (App.) 5
(21) 7 M. H. C. R. (App.) 11.

3481. Aggravated Hurt.—This section presents one aggravating feature which may be present in a case of hurt. It presupposes that all the other circumstances remain the same as in the case of an offence described under the last section. The only circumstance which enhances the crime is the dangerous character of the instrument employed in causing hurt. They are stated to be firstly instruments for shooting, stabbing or cutting. An instrument for shooting may be a gun or a revolver, or it may be a bow and arrow, for, the word "shooting" is not necessarily confined to its modern usage, but includes anything driven with force, whether it be a dart or a bullet.

3482. An instrument for stabbing need not be so *sui generis*. For it includes not only instruments specially designed and made for stabbing such as a dagger, a rapier, a bayonet or a *kurki*, but all sharp-edged or pointed instruments which are capable of stabbing, such, for instance, as a sword or a knife, which are not ordinarily instruments for stabbing, but which may be put to that use. Such instruments would, however, be more appropriately termed instruments for "cutting." But here, again, it is not necessary that the instrument should be primarily and solely intended for that purpose. A hatchet or an adze is not an instrument for cutting, though the former is used for chopping wood. But they are both instruments for cutting within the meaning of this clause. A small pen-knife is such an instrument.[22] But would a pointed stick be classed as such? This question was put to the Law Commissioners, who said: "The instrument must be a *sharp* instrument with an edge, which will cut, or a *point* which will stab; any instrument which answers to this description, we apprehend, will be within the definition whether made of metal or not."[23] These terms will scarcely present any difficulty in their interpretations.

3483. But the next clause dealing with an instrument, which, used as a weapon of offence is likely to cause death, is more general, and not so easily definable. It is not used *ejusdem generis* with the preceding instruments. It is rather used to supplement them. Such instruments may be of any kind or description: they are lethal if they are used as a weapon of offence, likely to cause death. They need not be necessarily adapted to that use. But if when turned to that use they are likely to prove lethal, they are sufficiently within the rule. For instance, a hammer or a crowbar is an instrument of this description. They are ordinarily adopted for the peaceful occupations of men, but from their weight and character they would be as deadly as any instrument specially designed for slaying men. They are, therefore, lethal weapons for the purpose of this section.

3484. The question whether a stick answers that description depends upon its quality, weight, length and thickness. It is clear that the ordinary walking cane or stick cannot be so described but even an ordinary cane with a loaded top may become formidable and even deadly if adroitly used as a weapon of offence. But it is apprehended that the clause was not intended to embrace such cases. For it is notorious that even an ordinary ruler has been sometimes used with

(22) *Abdul Rahiman*, 16 B. 580. (23) First Rep., § 380.

deadly effect. But the clause was certainly not intended to include instruments which may become deadly by deft handling. It was rather intended to refer to such instruments as are deadly both to appearance as well as when used as a weapon of offence by an ordinary person. Such are, for instance, the long bamboo ferruled sticks called Mirzapuri lathis, used by professional lathials. Indeed, an ordinary stick, though not by itself lethal, may become so if iron-bound, or otherwise made secure and heavy. An ordinary bamboo stick about five feet long and two inches thick is such an instrument. The question whether a stick or other instrument used in causing hurt answers the description of a deadly instrument here given is a question of fact, which it is the duty of the Court or the jury to decide in each case.

3485. Fire or Heated Substance.—Hurt caused by means of fire or a heated substance is subject to the penalty here provided, irrespective of the degree of heat or the extent of the injury thereby occasioned. Injury caused by a heated substance is not necessarily caused by fire. Such injury may, for instance, be caused by branding one with a red hot poker or a scythe, or even a glass bangle, the latter two being commonly used in this country for branding to exorcise evil spirits, and in the treatment of certain diseases such as, rheumatism, lumbago or the like. It is also done to revive a sinking patient in whom it is reputed to produce nervous re-action. Branding in such cases may or may not amount to causing voluntary hurt. When it is done for treatment it would probably be protected, unless it is done without that care and caution which the circumstances of the case may require.

3486. But the branding of one to exorcise the evil spirit from his body is in no way excusable. It will, therefore, be punishable under this section. But, of course, in such a case some regard would be had to the superstitious belief of the accused and the absence of all malignity. But if the character of the assault is cruel or brutal, these considerations cannot weigh with the Court in apportioning the sentence commensurate with the cruelty evinced and the hurt caused. The three prisoners were residents of a village which was visited by cholera. Thereupon in accordance with the widespread superstition, believing it to be due to the witchcraft of three woman they poured hot oil over them with a view to make them confess that they were witches, as a result, one of the woman succumbed to her injuries. The accused were convicted under this section, and the first offender was sentenced to rigorous imprisonment for three years the other two being sentenced to imprisonment each for two years.(24)

3487. Hurt by Noxious Thing.—The causing of hurt by means of a poison or a corrosive substance or by means of any substance deleterious to the human body to inhale, swallow or receive into the blood falls into the same category. All these are substances noxious to life. The term "poison" is used here to denote any poisonous substance, that is to say, a substance, which when administered is injurious to health or life.(25) A thing may vary in its poisonous

(24) *Baboo Koondu*, 13 W. R. 23.

(25) *Per* Lord Coleridge, C. J., in *Cramp*, 5 Q. B. D. 307 (309).

strength and property; some things become poisonous only when taken in overdoses, and others are poisonous, but are still given in small doses as medicine. There is really no such thing as an absolute poison. But at the same time certain things have come to be classed as such. When it is so, an offence may be committed, though the quantity administered may be ever so small as to be incapable of doing harm.(1) But in such case the offence committed, will not be hurt, unless it causes 'bodily pain, disease or infirmity' within the meaning of s. 319.

3488. But if it does not produce the effect to constitute hurt, it may still be an offence of a much higher kind, if it was administered with an intention to kill. In that case the fact that the poison was administered in a form which was innocuous is immaterial. For the offence then consists of the doing of an act with a certain intention, and in the act done producing a certain result.(2) So where the accused was indicted for an attempt to commit the murder of a child nine weeks old by administering it two poisonous berries, one of which it vomited and the other passed through its body in the course of nature, whereupon the question was whether the accused could be convicted of administering poison with intent to kill within the requirements of 1 Vict., c. 85, s. 2. It was proved that the berries in question were classed as poisonous on account of their kernels being poisonous. It was also shown that their pods are hard and require much force to break, and that if administered with broken pods they are calculated to cause death, but not otherwise. It was contended for the accused that he may have had an intention to kill, but he could not be convicted of administering poison.

As it was put for him by Alderson, B., in the course of argument: "Suppose arsenic is given in a globule of glass, could that be an administering of a destructive poison?" But eventually all the Judges agreed that the accused was rightly convicted of administering poison. As Wilde, C.J., said: "It is admitted that the kernel is poison, though not the pod; part of the berry is therefore admitted to be poison, though not the whole. The whole berry was administered, and with intent to kill. The act, therefore, of administering poison with intent to kill is proved, the effect of that act is beside the question; the act was an administering poison, which failed to produce the intended effect. We all think the conviction is right."(3) But so far as this decision is material for the present purpose, the administration of poison in such a form would certainly not amount to the causing of hurt, but it may be an attempt to murder or nothing at all. But in order to amount to hurt, it must answer a different test.

3489. Corrosives.—A corrosive substance is a substance which irritates the system, such as corrosive sublimate, which is a compound

(1) *Per* Field, J., in *Cramp*, 5 Q. B. D. 307 (309, 310), in which the accused had administered half an ounce of oil of juniper to procure an abortion, which is duly punishable in England (under 24 & 25 Vict, c. 100, s. 58), if it is procured by the administration of a "noxious thing." The ruling turned on the meaning of that phrase, *see* s. 312, Comm.

(2) S. 307.

(3) *Cluderoy*, 1 Den. C. C. 514.

of chlorine and mercury, forming a white crystaline solid, an acrid poison of great virulence. Such are the acids which corrode the system if taken internally and in an undiluted state.

3490. The noxious things here enumerated may be administered in their crude state or in any other form, whether singly or as mixed with food or drink. In any case, if they produce disease or infirmity, the offence here described would be complete.

3491. Lastly, this offence may be committed through the agency of an animal. Such would be the case if one sets one's dog to bite another, and it then bites him, in which case he who sets the dog will be criminally liable for the bite. Hurt caused by other animals, such as horses and cattle would, however, scarcely fall within the comprehension of the definition of hurt, though such acts would be otherwise punishable as a public nuisance,(4) or under s. 336 or 337 for causing hurt by doing a rash or negligent act, the difference between the two cases being that while in the one case the animal causes hurt in obedience to the order of the accused, in the other the hurt, if any, is caused not by the animal obeying the order, but out of its own mischief and in consequence of the criminal negligence of the person held liable therefor.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Summons. Bailable. Comp. with Court's sanction.

Punishment for voluntarily causing grievous hurt.

325. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Grievous hurt*—s. 320.]

Synopsis.

(1) *Analogous Law* (3492).
(2) *Procedure and Practice* (3493-3496).
(3) *Proof* (3497).
(4) *Charge* (3498).
(5) *Grievous Hurt* (3499-3501).
(6) *Measure of Crime* (3500).
(7) *Murder: Homicide: Grievous Hurt* (3502).
(8) *Rioting and Grievous Hurt* (3503).
(9) *Measure of Punishment* (3504).

3492. Analogous Law.—Between the several kinds of hurt still to be dealt with the Code interposes two sections dealing with the higher offence of greivous hurt, and which would have been better placed after exhausting the sections relating to simple hurt. However, as they stand, they refer to only two cases of grievous hurt: (*i*) grievous hurt unaggravated and unmitigated, and (*ii*) grievous hurt aggravated by being caused with deadly weapons or means. In this respect the phraseology of this section is identical with the last section which deals with simple hurt caused in the same manner.

(4) S. 289, §§ 2841-2850.

3493. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable, but is only compoundable with the leave of the Court before which the prosecution is pending. It is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class.

3494. The general observations made under section 323 (§§ 3457-3459) as to the procedure to be adopted in a case of hurt resulting in death, *a fortiori* apply to cases when the hurt caused is grievous. For instance, if a person is killed in consequence of a single violent blow dealt him, the offence may as conceivably be murder as culpable homicide or grievous hurt, in which case the proper procedure for the Magistrate is to commit the case to the Court of Session, rather than take upon himself the trial of the case and punish the offender for a minor offence.(5) Before convicting a person under this section it is the duty of the Court not only to find that grievous hurt was in fact caused, but that it was caused by the accused voluntarily, that is, intending to cause it, or knowing it likely that it would be caused.(6)

3495. In cases of hurt or grievous hurt—more particularly in the latter which are cognizable—it becomes necessary to examine a medical witness to ascertain whether the injuries are any of those specified in s. 320. It is not the business of the medical officer to classify a hurt as grievous or simple; his duty is merely to describe facts, upon which it is the duty of the Magistrate to find whether the hurt is grievous or otherwise.(7) It is perhaps needless to add that the bare certificate of a medical witness is not evidence, he must be examined in the presence of the accused, who has then the right to cross-examine him.(8)

It is illegal to pass separate sentences under s. 147 and s. 325-149 even when they are made to run concurrently.(9)

3496. This offence is compoundable only "by the person to whom hurt is caused" with the permission of the Court; consequently, if the person hurt is dead, his heir is not entitled to compound it.(10) The Court views with leniency the offence of one who has exceeded his right of private defence;(11) on the other hand since nose-cutting requires a deterrent sentence on account of its calculated brutality, the Court enhanced a sentence of imprisonment for two years into one for 4 years including solitary confinement for three months.(12)

3497. Proof.—The points requiring proof are:—

(1) That the accused caused hurt.

(2) That the hurt caused was "grievous."

(3) That he intended, or knew that he was likely to cause grievous hurt.

(5) *Narayan Pasi*, 24 W. R. 24.
(6) *Nga Tune*, 8 L. B. R. 166, 30 I. C. 133.
(7) *Po Maung*, (1906) 3 L. B. R. 196.
(8) *Kaminee Dossee*, 12 W. R. 25.
(9) *Keamuddi*, 51 C. 79 following *Nilmony Poddar*, 16 C. 442 F. B.
(10) S. 345 Cr. P. C. *Rahmat*, 37 A. 419; *Labhu*, (1919) P. R. No. 25, 52 I. C. 797 (Charge does not abate on death of the complainant), *see* under s. 323, *post*.
(11) *Giyan Singh*, (1914) P. L. R. 182, 24 I. C. 948.
(12) *Sikandar*, (1915) P. R. No. 20, 31 I. C. 382.

(4) That he caused it voluntarily.

3498. Charge.—In describing this offence, the proper term that should be employed is "voluntarily" and not "willingly,"[13] as the former is a technical term used in a technical sense, and means something more than and different from the other word. It is not necessary to specify the kind of grievous hurt committed by the accused; but if the accused is made liable by reason of section 149 it should be so stated (§ 3461). A person charged under section 397 may be convicted under this or the next section,[14] and one charged under s. 149 and this section may be convicted of this offence if the accused would not be prejudiced by the alteration.[15]

The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you voluntarily caused grievous hurt to A B, and thereby committed an offence punishable under section 325 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."[16]

3499. Grievous Hurt.—The constituting elements of this offence are enumerated in section 320, under which the term will be found to be expounded (§§ 3437-3451). It will be sufficient here to describe the offence as it is met with in practice, and the evidence required to establish it. In one sense this offence has an intermediate place between hurt and homicide. In point of criminality it also stands midway between those two offences. It has, therefore, to be distinguished from either of them. For while on the one hand, it is an offence which may easily merge into homicide, it is also one which may fall short of its exact requirements as enumerated and described in s. 320. Take for instance, an ordinary case of hurt caused by a single blow of a stick. Here if the blow was given with moderate severity it would be hurt; if it was a severe blow it may be grievous hurt; if it ended in death of the sufferer it may be homicide, or even murder—it all depends upon the intention and knowledge of the assailant, the *quantum* of injury inflicted and caused, and the nature of the effect whether natural or otherwise. Of course, it is no part of the definition of this offence that the injury should have been caused to endanger life.[17] Nor is it necessary that it should have been the result of a measured blow struck by the assailant. Many such offences are caused in anger and passion when persons forget the nature and consequences of their acts. But law holds them criminally answerable for their acts, because of the knowledge of likelihood which their passion may cloud, but cannot eclipse.

(13) 2 W. R. (Cr. L.) 20.
(14) *Adabala*, 37 M. 237.
(15) *Theethumalai*, 47 M. 746 F. B., dissenting from *Reazuddi*, 16 C. W. N. 1077.
(16) Cr. P. C., Sch. V, XXVIII, 8.
(17) *Purmanund Dhulia*, 18 W. R. 22.

Measure of Crime.

3500. Intention and knowledge are therefore the first essentials of this—as of most other crimes. But they can be only determined by overt acts. And one of them is the violence of the blow which is at any rate a *prima facie* proof of an intention to cause at least grievous hurt.(18) But the violence of the blow is not all in all. The part of the body where it is inflicted is equally important. A person striking another a blow on the stomach with a light bamboo stick not more than an inch in diameter, causing the rupture of his enlarged spleen in consequence of which death ensues, would be guilty of grievous hurt, because of the part of the body struck.(19) In such cases the criminal liability of the accused cannot be justly apportioned without the medical examination of the person assailed, or of his body in the case of his death. If the body is cremated before the autopsy is held, it becomes difficult to establish the cause of death—the burden of proving which is still on the prosecution; for in such cases, it will not do to say that the accused beat the deceased and the latter died, and he was hurriedly cremated at the instigation of the accused; the prosecution have, therefore, done their duty; the accused should be convicted of grievous hurt, because his violence caused the death of the deceased. Of course, in such a case, no presumption can be made from the mere absence of a *post-mortem* examination. If the accused is guilty of causing disappearance of the body by cremation or otherwise, he might be separately tried for it. But it does not relax the strict proof required to bring home to him his offence under this section. The fact that the accused gave the deceased a violent blow, after which he died, does not make his offence "grievous hurt," for the mere giving of a violent blow is not what is defined as "grievous hurt."(20) Nor can in such a case, grievous hurt be presumed from the mere suddenness of the death.(21) The only conviction possible in such a case is one for simple hurt.(22)

Where a man received only one blow on the head and died, and there was no evidence to show which of the two assailants struck it, neither of them could be convicted of homicide, though the Court convicted both of them of grievous hurt on the ground that when they joined in the attack they must have known that they would be likely to cause grievous hurt.(23) The facts of the following case resemble *Khandu's*,(24) though the finding was different. The accused had kicked and slapped his wife which made her unconscious. Believing her to be dead, he hanged her by the neck to the roof of his house to create a semblance of suicide. The medical evidence showed that she died of hanging, and the question was what offence the accused had committed. Without referring to any cases it was held to amount to no more than grievous hurt because the accused had kicked the deceased below the navel, a place it is most especially dangerous to kick a woman"; but inasmuch as he had not intended to kill her when he took her for dead when he hanged her, he could not, it was said, be convicted of murder.(25) This view has already been animadverted upon elsewhere, and it is sufficient here to add that the absence of intention alone is not sufficient to exempt

(18) *Narayan Pasi* 24 W. R. 24.
(19) *Megha Meah*, 2 W. R. 39; *Idu Beg*, 3 A. 776.
(20) *Budri Roy*, 23 W. R. 65; *Ghulam Jilani*, 26 P. L. R. 430, 88 I. C. 286, (1925) L. 559.
(21) *Ib.*, p. 66.
(22) *Ib.*, p. 66.
(23) *Agra*, (1914) P. R. No. 37, 27 I. C. 833.
(24) 15 B. 194.
(25) *Dalu Sardar*, 18 C. W. N. 1179; 26 I. C. 107; *Palani Goundan*, 42 M. 547 F. B.

one from liability for murder, for if the act fell under the fourth clause of s. 300 it would be murder though there was no intention (§ 3309).

3501. In order to constitute grievous hurt, the test is not that the hurt was grievous, in the sense that the body was severely hurt, but whether some specific hurt, voluntarily inflicted fell within any of the eight kinds of such hurt as are enumerated in section 320.(1) For this purpose the evidence of the medical attendant who examined and treated the person hurt should, if obtainable without unreasonable expense or delay, invariably be taken,(2) for the definition of the offence is a highly technical one, and requires the assistance of the medical testimony. It is specially so where a person strikes another who falls down on the ground and then dies, in which case a very material question may arise, whether the death was due to the blow or the fall. If to the latter the accused is not answerable for it, though he is, of course, liable for the blow. Many cases arise in practice where the blow was followed by a fall which had the effect of rupturing the enlarged spleen or liver and thus of causing death.

3502. Murder; Homicide: Grievous Hurt.—While there is a clear difference in the definitions of the three offences of murder, culpable homicide and grievous hurt, the Courts have in some cases attempted to evolve some working rules for their own guidance. But if such rules were possible, the legislature would not have failed to incorporate them in the Code. For example, it has been stated that where a number of persons set upon one and hit him on his head or other vital parts with *lathies*, it is murder because the necessary intention must be presumed. And so it might be in the generality of cases by a process of induction. But it is not an invariable rule. Nor can it be so laid down. Take for instance, the case which frequently occurs. Several persons take part in assaulting a man who dies from the cumulative effect of their assault. What offence have the accused committed? If there is evidence that the blow of any of the accused caused the death of the victim, he would be held guilty of homicide; but if he cannot be identified then all would be held liable for hurt,(3) or grievous hurt,(4) or homicide,(5) or even murder,(6) according to the nature and violence of the assault and the intention and knowledge imputable to the accused.

3503. Rioting and Grievous Hurt.—Where grievous hurt is caused in the course of rioting it may be a question whether all the rioters are equally responsible for the act, or whether the responsibility is undivided and falls on the actual offender. This question has already been fully considered elsewhere, and it is only referred to here to draw attention to that discussion (ss. 337, and *see* s. 323, Comm.) (§§ 3472-3473).

3504. Measure of Punishment.—The quantum of punishment to which an offender under this and its cognate sections would be justly liable, depends upon the judicial discretion dependent upon the circumstances of

(1) *Budri Roy*, 23 W. R. 65; *Vasta Chela*, 19 B. 247.
(2) *Nga Chet*, 1 Bur. L. R. 292.
(3) *Chandan Singh*, 40 A. 103.
(4) *Ramzan*, (1920) P. W. R. 2, 54 I. C. 51; *Waryam Singh*, 72 I. C. (P.) 611; *Soogoor Basanna*, 22 I. C. (M.) 768; *Jhandu*, 6 L. L. J. 268; *Bhola Singh*, 29 A. 282; *Duma Baidya*, 19 M. 483.
(5) *Gulab*, 40 A. 686; *contra* in *Hanuman*, 35 A. 560 dissented from.
(6) *Kanhai*, 35 A. 329; *Hanuman*, *ib.* 560; *Ram Newaz*, *ib.* 596.

each case. A hurt which disfigures a person for life, *e.g.*, when the husband cuts off his wife's nose, would merit a much severer punishment than one who gives his errant wife only a sound thrashing which results in the fracture of a finger or the wrist. In the former case the disfigurement is wantonly cruel and merits condign punishment which in one case was assessed at 4 years' rigorous imprisonment.(7)

Voluntarily causing grievous hurt by dangerous weapons or means.

326. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Session. Pres. Mag. or Mag. of 1st class. Cognizable Summons. Not bail. Not comp.

[*Voluntarily*—s. 39. *Grievous hurt*—s. 320.]

Synopsis.

(1) *Analogous Law* (3505).
(2) *Procedure and Practice* (3506-3507).
(3) *Proof* (3508).
(4) *Charge* (3509).
(5) *Grievous Hurt with Lethal Weapons* (3510-3511).
(6) *By Poison* (3512).

3505. Analogous Law.—This section bears the same relation to the last as section 324 bears to its predecessor. They are both aggravated species of the offences of hurt and grievous hurt where the means employed for causing them are deadly (§§ 3481-3484).

3506. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

3507. There is an increasing necessity for the exercise of caution in disposing of cases sent up under this section, and in which the causing of grievous hurt may have resulted in death or serious mutilation of person. Even if the offence is otherwise one in which the Magistrate thinks that he would not be able to award an adequate sentence, it should be committed. The accused one night tied his wife up to a bedstead and then with a penknife cut off the whole of the soft parts of her nose and a portion of her upper lip. He confessed to having done so, because as he said, the woman had admitted having misbehaved during his absence, and because she used

(7) *Sikandar* (1915) P. R. No. 20, 31 I. C. 382.

to run away from the house. There was no evidence of her misconduct, but it was a fact that she had twice run away from the house. The Presidency Magistrate sentenced the man to imprisonment for two years, but the High Court ordered a commitment, and the man was committed and sentenced to rigorous imprisonment for eight years.(8) This case suggests caution on the part of Magistrates in disposing of cases of aggravated grievous hurt under this section, the maximum penalty for which is transportation for life. In the Central Provinces and Burmah where there are Magistrates empowered to try all cases not punishable with death, a reference to such Magistrate before the commitment is enjoined, so that they may, if so advised, try the case themselves and thus avoid unnecessary commitment.(9)

3508. Proof.—The points requiring proof are:—

(1) The causing of grievous hurt to some person.

(2) That it was caused by the accused.

(3) That it was caused by one of the means mentioned in the section.

3509. Charge.—A person charged under s. 397 may be legally convicted under this section.(10) The accused, armed with deadly weapons, committed house-breaking by night with intent to commit theft. But before he could do so an alarm was raised, whereupon he ran to make good his escape. In the courtyard of the house he stabbed a person who had tried to seize him. It was held that as the accused had stabbed after the house-breaking was complete, Section 460 was inapplicable, but that the accused could be convicted under ss. 457, 458 and this section.(11) The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you voluntarily caused grievous hurt to A B by means of exhibit——which is an instrument for shooting (or stabbing, etc., *and as the case may be*), and thereby committed an offence punishable under section 326 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

And I hereby direct that you be tried (by the said Court) on the said charge.

3510. Grievous Hurt with Lethal Weapons.—This section is the same as section 324, with the only difference that the hurt here caused is grievous instead of its being simple, to which that section applies.

This section approaches in its gravity culpable homicide not amounting to murder, both the offences being punishable with transportation for life. Indeed, there are cases of mutilation which evoke a greater horror than homicide itself, and they are to be regarded as cases calling for condign punishment. Such are cases, not uncommon in this country where husbands

(8) *Abdul Rahiman*, 16 B. 580.
(9) (1902) L. B. Cr. C., s. 431.
(10) *Adabala*, 37 M. 237; *Anga Vala. yan*, 22 M. 15; *Krishna*, 24 M. 641; *Pattikadan*, 26 M. 243.
(11) *Sedrasul*, (1916) P. R. No. 27.

inflamed by just or unjust suspicion against their wives' fidelity resort to the brutal method of disgracing them for life by chopping off their noses, thereby proclaiming to the world their incontinence and dishonour. In one such case the accused one night tied his wife by her arms and legs to a bedstead, then with a penknife cut off the whole of the soft parts of her nose, and a portion of her upper lip, afterwards confessing that the woman had admitted having had an intrigue with another man during his absence from home, and that she was in the habit of running away from the house to her sister. There was no evidence of her infidelity, but it was a fact that she had twice left for her sister's. The man was placed before the Presidency Magistrate who sentenced him to two years' rigorous imprisonment, observing that the man was an honest working man, and not a criminal, and that he was led to the commission of the act feeling himself grossly wronged by his wife's misconduct. The High Court held the sentence passed wholly inadequate. It deprecated the extenuating circumstance alleged for not committing the case to the High Court; Parsons, J., adding, "I may add that, according to my experience, cases of cutting off a woman's nose are invariably throughout the Presidency committed to the Court of Session, and the punishment awarded is much more than two years' rigorous imprisonment." The case was then ordered to be committed, and tried before Bayley, J., and a common jury, the accused being eventually sentenced to rigorous imprisonment for eight years.(12)

3511. But this was a case of a cold-blooded outrage, and as observed by Glover, J., the amount of punishment for cutting off a wife's nose for intriguing with another man depends on the time of the commission of the grievous hurt, whether at the instant, or long after the husband found himself dishonoured.(13) Of course, it cannot be predicated that nose-cutting is nose-cutting under all circumstances. For if it were so, law would not make allowance for grave and sudden provocation which mitigates even the capital crime (s. 300). This was conceded by Glover, J., who said: "The prisoner's statement is that his wife had an intrigue with Sheekut Rajooa; that he had caught her in the act of dishonouring him; and that he had remonstrated with her over and over again, but that, notwithstanding his remonstrances, on awakening one night he saw his wife's paramour running out of the room. Now, taking this to be true, which I conceive the Court was bound to do, inasmuch as confessions, when they form the sole evidence against a prisoner, must be taken as a whole, I should have considered a very light punishment sufficient for the ends of justice, had the prisoner attacked his wife at the instant of finding himself again dishonoured..... But it is clear from the prisoner's own confession that he took time to cool down, and allowed his wife to go to sleep (and that not immediately, but after subjecting her to a storm of reproaches) before committing the assault upon her." The same consideration could not then apply to him, and his conviction under this section was consequently upheld.(14) In another case the accused had in the course of a petty quarrel stabbed the deceased in the abdomen with a penknife 4 inches long. It was found that the injury proved fatal as it injured the liver of which the accused could not have foreseen. He was sentenced to imprisonment for 3 years under this section.(15) A similar view was taken in another case in which the deceased

(12) *Abdul Rahiman*, 16 B. 580.
(13) *Sulamut Russooa*, 4 W. R. 17.
(14) *Salumut Russooa*, 4 W. R. 17.
(15) *Gulam Mohiuddin*, 3 L. L. J. 581; 63 I. C. 480; *Allah Din*, 73 I. C. (P.) 695.

was struck on the shoulder and legs with a cutting instrument from which as a result of shock and bleeding the deceased died in 12 hours.(16)

By Poisons.

3512. The administration of poison or other deleterious substance may have the effect of causing death after only causing such bodily pain, disease or infirmity, as to amount to grievous hurt, as that term is defined in section 320. In the former case, the question may arise whether the act does not amount to murder or culpable homicide. But whether it does so or not, must depend upon the same considerations which distinguish those offences from that punishable here. It may be that the accused had no intention of causing death—his sole object may be to rob his victim, but if the substance administered to him is such as the accused knew was likely to cause death, he may then be justifiably convicted of murder,(17) though that may not have been his primary intention, but in that case it may be said that having regard to the agency employed he could not but be aware of the imminent likelihood of death, which is sufficient to bring his case within clause 4 of s. 300 (§§ 3077-3084). The question whether the substance used in causing hurt is "so imminently dangerous that it must in all probability cause death" must depend upon its nature, and the quantity given. So while *dhatura* is not ordinarily lethal, still if it is recklessly given in large doses causing death, the giver would be justifiably convicted of murder,(18) otherwise he may be only charged for grievous hurt under this section.(19)

Session. Cognizable Warrant. Not bail. Not comp.

Voluntarily causing hurt to extort property or to constrain to an illegal act.

327. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Valuable security*—s. 30. *Voluntarily*—s. 39. *Offence*—s. 40. *Illegal*—s. 44. *Hurt*—s. 319. "*Voluntary hurt*"—s. 322.]

Synopsis.

(1) *Analogous Law* (3513).
(2) *Procedure and Practice* (3514).
(3) *Proof* (3515).
(4) *Form of Charge* (3516).
(5) *Hurt to Extort or Constrain an Illegal Act* (3517-3521).
(6) *Exceptional Cases* (3518).

3513. Analogous Law.—This section describes a still more aggravated form of hurt than what is punishable under section 324. In

(16) *Ram Asre*, 26 O. C. 18, 73 I. C. 49, (1923) A. I. R. (Oudh) 97.
(17) *Gulali*, 31 A. 148; *contra* in *Bhagwan Din*, 30 A. 568; commentary on Introduction, s. 59.
(18) *Gulali*, 31 A. 148.
(19) *Bhagwan Din*, 30 A. 568; *Shahrah*, (1919) P. R. No. 19, 51 I. C. 670; *Muruga Goundan*, 25 I. C. (M.) 351.

effect it describes an offence in which not only the act but the motive or object is highly criminal. The hurt is there a means adopted to facilitate the perpetration of a crime or of an illegal act.

3514. Procedure and Practice.—This offence is cognizable and warrant should issue in the first instance. It is both non-bailable as well as non-compoundable and is triable by the Court of Session.

3515. Proof.—The points requiring proof are:—

(1) That the accused caused hurt.

(2) That he did so—

(*a*) to commit extortion, or,

(*b*) to compel the doing of anything illegal, or

(*c*) to facilitate the commission of an offence.

3516. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you voluntarily caused hurt to A B for the purpose of extorting from the said A B (*or* from a certain person interested in the said A B, to wit—) a certain property, to wit——, and thereby committed an offence punishable under s. 327 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3517. Hurt to Extort or Constrain an Illegal Act.—This section reverts to simple hurt inflicted in order to commit extortion or to facilitate the commission of an offence, or in order to compel the sufferer to do anything illegal. In each case the hurt inflicted is a crime subservient to the commission of another crime. The act is thus made doubly criminal—less by the harm actually done, but more by the greater harm proximately threatened. The section is so generally worded that it will apply equally to hurt caused by robbers, dacoits and thugs in the commission of their crime. But in such cases the offenders will be more appropriately dealt with under the special sections enacted for that purpose. For instance, robbery is defined to be nothing more than extortion accompanied by intimidation.[20] And it is provided in s 394 that if any person in committing or in attempting to commit robbery voluntarily causes hurt, such person shall be punished with transportation for life. In such a case all the elements described as essential for the commission of an offence under this section are present, but it would be wrong to convict him under this section, for the rule *Specialia generalibus derogant*[21] applies to such cases. There are other sections in which the same elements are present, but in which the resultant offence is specially provided for, in all of which this section should be held to be inapplicable. So again, there may be cases in which the

(20) S. 390.

(21) "Things special derogate from things general."

commission of hurt merges into the higher offence, for which if a conviction is had, the accused could not at the same time be convicted of this offence. Such would be the rule in the case of compound offences described under s. 71 (§ 523). But in any other case there would seem to be no objection to punishing the offender both for the substantial offence committed as well as for the hurt by which its commission was preceded.

Exceptional Cases.

3518. This section appears to have no application to cases in which hurt is caused by a person for the assertion of his claim of right to property in the possession of the sufferer; as is the case where one person being in possession of the property, another claiming to be the rightful owner beats him off and takes possession of the property. Here of the two claimants assaulting each other, neither can be said to constrain the sufferer to do anything illegal, nor can such beating be said to have been given "to facilitate the commission of an offence." The section is really intended to reach extortioners and others *ejusdem generis* who use the *argumentum baculum* to obtain property or thing to which they have no right whatever. It is not necessary that the property should have been obtained, but it should have been the object, and with that object the hurt in question should have been inflicted.

The term "property" is evidently used here in its large *generic* sense as connoting not only objects and things which may be the subject of ownership, but also all interests therein which law protects and regards as property. The term "valuable security" has been, of course, used here in the sense in which it is defined in section 30. It is also used in its largest sense as including all documents of title. A person who causes hurt to another to compel him to sign a deed of title would then fall within the penal visitation of this section. In such a case the result would be the same whether the hurt is caused to the person from whom the assailant wishes to extort any property or valuable security, or whether it is caused to another who is "interested" in him. The word "interested," again, is used in its largest sense as implying interest of any kind, whether tie of blood or relationship by marriage, service or even friendship. But in this case it is on the prosecution to establish the *nexus* between the person assaulted, and the other from whom the benefit is expected. Naturally the hurt is a screw put upon him to influence the other, to conform to the wishes of the complainant. If so, evidence of it should be forthcoming.

Operation Cl. (2).

3519. The second clause refers to hurt caused to constrain another to do anything illegal or which may facilitate the commission of an offence by the assailant. These are all general words, and are intended to exclude a contention that the hurt caused was not intended to *extort* any property or valuable security, as that term is defined and understood in the Code.[22] It may be that the intimidation intended or proved lacks some of the attributes of extortion, in that case the offender cannot escape punishment if he had exercised "constraint" by causing hurt, which means compulsion or coercion in the wide popular sense of the term. That coercion or compulsion may be exercised on the sufferer directly or indirectly through another interested in him. And the

(22) S. 383.

object may then be the doing of anything "illegal"—a term which, as defined in s. 44, would embrace not only the two cases of extortion of property or valuable security specified, but many other cases as well.

3520. The last object mentioned is the commission of an offence. This evidently means commission of an offence by the assailant. As such, the clause would embrace a wide range of cases, some of the most important of which have been separately made punishable by the Code.

3521. A thief disabling a night watchman by striking him a blow on the head and threatening more if he does not keep quiet would be causing hurt to facilitate the commission of theft. But a thief causing hurt to his pursuers after he has committed the offence and is running away to evade pursuit would not be liable under this clause. The section contemplates an offence intended and not an offence already committed.

Causing hurt by means of poison etc. with intent to commit an offence.

328. Whoever administers to or causes to be taken by any person any poison or any stupefying intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cognizable Warrant. Not bail. Not comp

[*Offence*—s. 40. *Hurt*—s. 319.]

Synopsis.

(1) *Analogous Law* (3522-3523).
(2) *Procedure and Practice* (3524-3525).
(3) *Proof* (3526).
(4) *Form of Charge* (3527).
(5) *Meaning of Words* (3528).
(6) *Principle* (3529).
(7) *Administering Poison* (3530-3531).
(8) *What is "caused to be taken"* (3532).
(9) *Swallowing Necessary* (3533-3534).
(10) *Liability for Indirect Act* (3535).
(11) *Intention or Knowledge* (3536-3540).
(12) *Aggravated Acts* (3538).
(13) *Degree of Criminality* (3539).
(14) *Where Quantity Unknown* (3540).

3522. Analogous Law.—This section should have come after section 324, of which it is a continuation, and from which it is only on one material point distinguishable. That section deals with hurt *actually caused* by means of a noxious thing, such as poisons and the like. This section deals with the mere administration of poison whether it does or does not cause hurt, provided that the poison is administered with the intention or knowledge of the likelihood of causing hurt. . So far the two sections, though placed somewhat apart, must be read together, as being supplementary to each other. The present section, however, contains an additional clause, which makes the section also supplementry to the last section. It being so, it would have been probably more logical to add these clauses to the two sections, rather than enact an independent section.

3523. As it is, it deals with the administration of a noxious thing with intent or knowledge of the likelihood of causing hurt; or with intent to commit or facilitate the commission of an offence. As such, its provisions correspond to the following provision of the English Statute[23]:—

"S. 24. Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other persons any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for a term of five years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

3524. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

3525. It should be noted that the maximum punishment awardable under this section is rigorous imprisonment extending up to ten years. But as this section is not a part of Chapters XII or XVII any penalty beyond the maximum here provided is out of place.[24] But a person stupefying his victim in order to commit robbery or dacoity, and afterwards robbing him may be proceeded against for robbery or dacoity, as the case may be, and the provisions of section 75 as to enhanced punishment, would then be of course applicable.

3526. Proof.—The points requiring proof are:—

(1) That the accused administered or caused to be taken by any person a thing—

(2) That thing being a poison or other noxious thing specified in the section.

(3) That the accused did so—

(*a*) intending to cause hurt, or

(*b*) knowing it likely to thereby cause hurt; or

(*c*) intending to commit or facilitate the commission of an offence.

3527. Charge.—The charge should run thus:

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you administered to A B a certain poison, to wit——[*or* any stupefying thing, etc. (*or* caused the same to be taken by A B)] with intent to cause hurt to the said A B (*or* knowing it to be likely that you will thereby cause hurt to the said A B, or with intent to commit or facilitate the commission of the offence of—— upon the said A B), and thereby committed an offence punishable under section 328 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

(23) 24 & 25 Vict. c. 100, s. 24. (24) S. 75.

3528. Meaning of Words.—"*Administers to or causes to be taken by any person*": These words include both those who directly or indirectly administer poison, etc. In this respect the words here are wider than of the English Statute referring to the administration of a noxious thing[35], but even in a case decided under that Statute the word "administering" was held to include "causing to be taken."[1] The latter phrase has, however, been added to remove any doubt that may exist on the subject. *Unwholesome drug or other thing*": There is a verbal variation in the use of this clause. Under sections 324 and 326 the words used are "any corrosive substance ... or by means of any substance which is deleterious to the human body to inhale, to swallow or receive into the blood." The meaning is in each case the same. "*Or other thing*" means *ejusdem generis*, and not a thing innocuous to take. "*To facilitate the commission*": There may be, in fact, no facility offered, but it must be intended to be obtained by that means.

3529. Principle.—The administration of poison can only be justified on medical grounds. In other cases, it is in itself an offence. The fact that the section requires that its administration should be accompanied by an intention or knowledge of the likelihood of causing hurt, is no deviation from the rule. For that object will in ordinary cases be presumed. But being a part of the definition it is on the prosecution to prove such facts as may lead to the inference that the intention of the person administering the poison was not benevolent. This section speaks of a poisoner intending merely to cause hurt, and one intending to commit any other offence in the same breath. The reason is that law endows such a desperado with that malignity which calls for no mitigating discrimination. It therefore treats an would-be robber, a ravisher, and an would-be murdered on the same footing, subjecting each to the same penalty.

3530. Administering Poison.—The offence here made punishable consists in administering or causing to be taken a noxious thing with one of the two objects specified in the section, that is, (*i*) with the intention of causing hurt, or the knowledge of its likelihood, or (*ii*) with the intention of committing or securing facility for the commission of an offence.

3531. The object of the section is obviously to punish persons who rob and ravish others by putting them out of their senses by means of stupefying drugs, which not only facilitates the commission of the crime but also in a great measure prevents its detection.

In the first place then, there must be the administering of any poison, etc., or causing it to be taken by another. The word "any person," of course, means any other person besides the offender. If he himself takes, say, liquor to put on more courage and thus secure facility for the commission of an offence, which he dare not otherwise attempt, he could not be convicted under this section, for administering himself an intoxicating thing with intent to facilitate the commission of an offence.

(25) 9 Geo. IV, c. 31, s. 11: since amended and re-enacted as 24 & 25 Vict., c. 100.

(1) *Lewis*, 6 C. & P. 161.

What is "caused to be taken."

3532. The words "administer" and "cause to be taken" are, no doubt, here intended to apply to two distinct methods of imparting poison. The first refers to the giving of poison directly to the sufferer, while the phrase "causes to be taken" refers to a taking by the sufferer under circumstances when he was no a free agent to do otherwise. In such a case, it is apprehended that the poison could as well be said to have been administered by the accused,(2) though it would not be a correct application of the term in its literal sense. However, the two clauses leave no room for doubt as to what they are intended to convey. They make a man criminally answerable not only for what he has directly given, but what he has made the other to take, provided that he has done so with the criminal intent specified in the section. So where the prisoner mixed poison in coffee which he prepared for his mistress, and told her that it was for her, and the mistress took some of it and drank it, it was held to amount to administering poison, or at all events causing that poison to be taken.(3) In another case of attempting to administer poison, it appeared that the accused had purchased some salts of sorrel, and put it in a sugar basin in order that the prosecutor might take it with his tea, and the prosecutor and his wife took some of it with their tea, when it was detected, it was held that if the prisoner put the poison in the sugar intending that it should be taken, it amounted to an attempt to administer it.(4)

So where the accused, intending to detect the thief, placed in his toddy pots the juice of the milk-bush, knowing that if taken by a human being it will cause injury, and it was sold to and drunk by certain soldiers making them ill, it was held that the offence of the accused fell under this section in that he had caused the soldiers to take an unwholesome thing, namely, the poisonous juice of the milk-bush, though he was not directly responsible for the sale of poisoned toddy to them.(5) This case is explicable on the principle that mistake cannot be pleaded in exoneration of an offence. So if A mix poison to kill B, and C happen to take it, and die, A will be guilty of the murder of C in the same way as if he had directly compassed his death. So where the prisoner left a parcel of sugar and tea with poison in it, directed "to be left at Mrs. Daws Fawnhope," and it was by mistake delivered to a Mrs. Davis, who used some of the sugar and was made very ill, Gurney, B., told the jury: "The question is, whether the prisoner laid this poison on the shop counter intending to kill some one. If it was intended for Mrs. Daws, and finds its way to Mrs. Davis, and she takes it, the crime is as much within the Act of Parliament,(6) as if it had been intended for Mrs. Davis. If a person sends poison with intent to kill one person, and another person takes that poison, it is just the same as if it had been intended for such other person."(7)

Swallowing Necessary.

3533. The question whether in order to constitute administration or the causing to be taken, it is necessary that the poison should be taken into the stomach, or it will suffice if it is only put into the mouth, though not swallowed, came up before the Judges in England, and according to Park, J., their opinion was that in order to constitute administering or causing to be taken

(2) *Harley*, 4 C. & P. 369.
(3) *Ib.*
(4) *Dale*, 6 Cox 14.
(5) *Dhania Daji*, 5 B. H. C. R. 59.
(6) 9 Geo. IV, c. 31, s. 11.
(7) *Lewis*, 6 C. & P. 161.

the poison must reach the stomach. If it is thrown out from the mouth, it will not be within the meaning assigned to those expressions,[8] much less if there was merely procuring or supplying poison to another who wishes to take it.[9]

3534. But in this case the procurer would in any case be guilty of abetment of whatever substantive offence the other may be guilty. The question really depends upon intention and knowledge. If there was the requisite intention, manual delivery or direct administration are immaterial. The cases arising out of the offence of causing miscarriage[10] amply illustrate this. According to the wording of the English Statute, a person administering an abortive or causing it to be taken is deemed guilty of the offence of procuring abortion.[11] Where, therefore, the accused Wilson being requested by Emma Cheney who had conceived by him to procure her an abortive, and which he obtained and gave it to her directing her to take one-half of the quantity in gin, Cheney procured the gin in the absence of the prisoner and took the dose as directed, it was held on a case reserved that the prisoner was properly convicted as there was a "causing to be taken" within the meaning of the Statute.[12] And the offence was held to be the same where the prisoner brought one Chuter, who complained of having conceived, a bunch of savin, and told her that if she put it in some gin, and took it in a certain dose two or three times a week, she should abort, which she took as directed; but as she did not abort, she told the prisoner to get her some blue pills from a chemist's, which he obtained and made up into pills with some flour and tea, of which she took twenty or thirty, and which caused her miscarriage.[13]

Liability for Indirect Act.

3535. The question, therefore, by whom the poison was given is not material so long as the accused was instrumental in getting it for the purpose and delivered it to the other, knowing that the latter would take it. He must, of course, give what is a "poison or any stupefying, intoxicating or unwholesome drug, or other thing." The "other thing" must be necessarily *ejusdem generis* with the proceeding, that is to say, it must be a noxious thing deleterious to human health. The accused gave a woman a certain thing as a charm to facilitate an intrigue which her husband wished to establish with her sister. There was nothing to show that the charm when internally taken was deleterious to health. It was held that its administration did not amount to an offence under this section, as the "other thing" mentioned referred to a thing of the same kind as an unwholesome thing.[14]

3536. Intention or Knowledge.—The giving of the noxious thing must be with one of the intentions specified in the section, that is to say, with the intention or knowledge of likelihood of hurt or with the intention of committing or facilitating the commission of an offence.[15] The causing of hurt must here mean the causing of voluntary hurt which is an offence under the Code. It could not, of course, punish hurt under any

(8) *Cadman*, R. & M. C. R. C. 114; explained *per* Park, J., A. J. in *Harley*, 4 C. & P. 369.

(9) *Fretwell*, 31 L. J. M. C. 145.

(10) *Lewis*, 6 C. & P. 161.

(11) This is the language of the English Statute. The language of the Code is different; *see* s. 312, § 3348.

(12) *Wilson*, D. & B. C. C. 127.

(13) *Farrow*, D. & B. C. C. 164; to the same effect *Gaylor*, D. & B. C. C. 288; *Fretwell*, 1 L. & C. 161.

(14) *Jotee Ghoraee*, 1 W. R. 7.

(15) *Muruga Goundan*, 25 I. C. 351.

circumstances. For instance, the administration of quinine produces a temporary deafness called quinism. It is infirmity and, therefore, hurt within the meaning of section 319, but if quinine were given to cure one of malaria the fact that it produced quinism could not be punished as an offence under this section. The administration of anæsthetics is justifiable on the same ground.

3537. But where a person employed a "medicine man" to detect a person who had stolen his money, and the medicine man who had a local reputation for skill in detecting such cases told him that he would administer the juice of some leaves to all the villagers, that it would "cause the belly of the thief to swell." He did so and three of the villagers were taken seriously ill. The quack had stipulated for half the money which might be recovered. His employer was convicted under this section and the Court held that his conviction was right. The fact that the drug was reputed to swell the stomach of the thief gave him notice of its deleterious character. He had caused the quack to administer it. His offence under this section was complete, but in view of the fact that he, as an ignorant rustic, believed in the discriminating potency of the drug and the villagers had willingly submitted to the ordeal, the sentence passed on him was reduced from a year's imprisonment to imprisonment for four months.(16) The report does not say what became of the quack, unless he had made himself scarce in the meantime.

This case is not unlike that of the toddy-seller in Bombay who finding his toddy constantly stolen resolved upon a ruse to catch the thief, by placing in his toddy-pots juice of the milk-bush, knowing that it will make any one drinking his toddy ill, and thus facilitate detection. The thief stole the toddy and sold it to some soldiers to drink, who drank it and were soon afterwards seized with purging and vomiting and a burning sensation in the throat. The surgeon instantly applied the stomach pump and they then recovered. The accused was convicted under this section and his conviction was affirmed on appeal, the Court holding that in mixing a poisonous drug with the toddy, the accused knew it to be likely that it might be drunk by others and that they would suffer in consequence.(17) He therefore "caused it to be taken" by the soldiers who actually took it and as both the elements of criminality were thus present his conviction under this section was upheld,(13) but as, probably the object of the man was honourable, the Court was content to pass the short sentence of simple imprisonment for two months.

Aggravated Acts.

3538. A very different treatment would await one who administers a stupefying drug to overpower another with a view to rob him.(19) The prisoner affirmed he had, unknown to the prosecutrix, put cantharides into a cup of tea which she drank, and was very ill in consequence. The jury found that the prisoner had administered the cantharides with intent to excite the sexual passion and desire of the prosecutrix, in order that he might obtain connection with her, and on a case reserved, on the question whether the intent above

(16) *Dasi Pitchigadu*, (1883) 1 Weir 335 (336).

(17) But *he*, at any rate, knew that the thief would drink it and so get "hurt."

(18) *Dhania Daji*, 5 B. H. C. R. 59.

(19) *Nanjundappa*, Weir, 3rd Ed., 197; *Joy Gopal*, 4 W. R. 4.

stated was an intent to injure, aggrieve or annoy within the Statute,[20] it was held that conviction was right.[21] But under which clause of this section would such a case fall, it may be asked. The provisions of the English Statute are undoubtedly wider for they refer not only to injury but also to "aggrieve and annoy" If the lady were a married woman, to have intercourse with her would not be a criminal offence, for adultery is not criminally punishable under English Law. If the lady was unmarried, it would be seduction, which again is not an offence. The only clause then possible is the last which refers to "knowing it to be likely that he will thereby cause hurt," under which the conviction might be also justifiable here.

Degree of Criminality.

3539. It may be asked that if a poison or a stupefying drug is administered, how can it be said that the intention or knowledge was to cause only hurt and not grievous hurt or murder. If the drug given endangers life it does not necessarily follow that its administration in any case and under any circumstance amounts to attempted murder or the causing of grievous hurt. As regards the attempt to commit murder, the question does not depend upon the hurt, but upon the intention,[22] and as regards the applicability of section 326, the question depends not so much upon the intention as upon the effect produced, for unless the hurt caused is "grievous," as defined in section 320, the applicability of that section is out of question. In such a case then the question is: Did the drug administered endanger the life?[23] This is a question of fact upon which the evidence of a medical witness should be useful. But in considering the criminality of the accused in such cases, "we must not look to what might have happened, or to the fact that drugs of the kind administered in this case are dangerous to life, but to the effect produced upon the parties,"[24] to whom the drug was administered. The prisoners inveigled two men to be their companions in travel. On the way they drugged their food with intent to rob them. They, however, soon went to a hospital where they were treated and recovered the next day. The prisoners were convicted under section 326 of having caused grievous hurt with a stupefying drug, but it was held that having regard to the hurt actually caused, and the medical opinion that without medical assistance the accused would have recovered in a week or so, the High Court held the offence to fall under this section, but it was, naturally, one in which the Court felt justified in awarding the full measure of the punishment.[25]

Where Quantity Unknown.

3540. A person cannot be convicted of this offence unless there is evidence of the quantity and the effect of the poison administered. For instance, where the accused was found to have mixed some coarsely powdered *dhatura* seeds into the food of the complainant, but there was no evidence of their quantity, the Court altered the accused's conviction from this section to one under this and s. 511.[1]

(20) 24 & 25 Vict., c. 100, s. 24; quoted *ante* (§ 3523).
(21) *Wilkins*, 31 L. J. M. C. 89; 9 Cox 20.
(22) S. 307, Comm.
(23) S. 320, "*Eighthly.*"
(24) *Joy Gopal*, 4 W. R. 4.
(25) *Per* Loch and Kemp, JJ., in *Joy Gopal*, 4 W. R. 4 (5).
(1) *Mi Pu*, 5 L. B. R. 79, 3 I. C. 721. This was conceded in *Aushi Bibi*, 20 C. W. N. 512, 33 I. C. 828.

Session. Cognizable. Warrant. Not bail. Not comp.

Voluntarily causing grievous hurt to extort property or to constrain to an illegal act.

329. Whoever voluntarily causes grievous hurt for the purposes of extorting from the sufferer or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis.

(1) *Analogous Law* (3541).
(2) *Procedure and Practice* (3542).
(3) *Proof* (3543).
(4) *Charge* (3544).

3541. Analogous Law.—This section is the same as section 327 after which its place would have been more appropriate. It refers to the same offence, only the hurt caused is grievous all other elements of the two offences being the same.

The commentary under that section should, therefore, be read as a commentary under this section.

3542. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Court of Session.

3543. Proof.—The points requiring proof are:—

(1) That the accused caused grievous hurt.

(2) That he caused it to extort from the sufferer or a person interested in him, some property or valuable security, or to constrain him to do something illegal, or to facilitate the commission of an offence.

3544. Charge.—The charge should follow the form given under section 327, substituting "grievous hurt" for the word "hurt" used therein (§ 3516).

ession. Cognizable Warrant. Bailable. Not comp. Sanction. (S. 197, Cr. P. C.)

Voluntarily causing hurt to extort confession or to compel restoration of property.

330. Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or

demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Illustrations.

(*a*) *A*, a police-officer, tortures *Z* in order to induce *Z* to confess that he committed a crime. *A* is guilty of an offence under this section.

(*b*) *A*, a police-officer, tortures *B* to induce him to point out where certain stolen property is deposited. *A* is guilty of an offence under this section.

(*c*) *A*, a revenue officer tortures *Z* in order to compel him to pay certain arrears of revenue due from *Z*. *A* is guilty of an offence under this section.

(*d*) *A*, a Zemindar, tortures a raiyat in order to compel him to pay his rent. *A* is guilty of an offence under this section.

[*Valuable security*—s. 30. *Voluntarily*—s. 39. *Offence*—s. 40. "*Person interested in the sufferer*"—s. 327. *Constraining*—s. 327 (§ 3517).]

Synopsis.

(1) *Analogous Law* (3545-3547).
(2) *History of Torture* (3546).
(3) *Procedure and Practice* (3548).
(4) *Proof* (3549).
(5) *Form of Charge* (3550).
(6) *Principle* (3551).
(7) *Meaning of Words* (3553).
(8) *Torture* (3554-3556).
(9) *Discovery of Facts, or Property* (3555-3556).
(10) *Intention Negativing Homicide* (3557).
(11) *Satisfaction of Any Claim or Demand* (3559-3560).

3545. Analogous Law.—This section is, again, the same as section 327 with this difference, that while that section punishes the causing of hurt for the purpose of extorting *property* or *valuable security* or constraining one to do an illegality or to commit or facilitate the commission of an offence, this section deals with the same offence when it is committed for the purpose of extorting a *confession* or *information* leading to the detection of an offence or misconduct or for constraining the sufferer or another to *restore* any property or valuable security or to satisfy any claim or demand or do anything subservient thereto.

The section is somewhat generally worded and if literally construed it would cover all that is contained in section 327, for the words "claim or demand" are wide enough to include all that is specified in the earlier section. These words would have, therefore, to be construed contextually, so that it may not overlap the former section which prescribes a materially higher penalty.

History of Torture.

3546. In England, as in all countries, torture was at one time, as in many countries it is even now, the approved form of detecting crime and of bringing them to justice. Indeed, the trial by torture, variously called the ordeal or judgment by penance, was a species of trial in which the offender directly invoked the vengeance of Heaven for his crime. In carious countries human ingenuity has devised various forms of torture for the purpose of practising exquisite cruelty upon persons who were suspected of any crime. Of these the

rack is probably the most notorious. It was erected in England in the reign of Henry VI, but though it was occasionally used as an engine of State, it has never been used as an engine of law. Indeed, the Judges were at one time consulted as to whether it would be legal to use it on an assassin to discover his accomplies, but they unanimously declared against its legality.

The use of torture was not only sanctioned, but regarded as a necessary *finale* of all trials in the civil law, in which the offence of the accused was doubtful, because the laws could not endure that any man should die upon the evidence of false or even a single witness, and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession,(2) as Blackstone adds—"thus rating a man's virtue by the hardiness of his constitution, and his guilt by the sensibility of his nerves!" Cicero, however, declaimed against this inhuman species of mercy.(3) Lord Hale speaks of a mode of torture practised in England if the prisoner stood his trial mute without pleading which was called the judgment of penance, in which the prisoner was shut up in a low dark chamber and there laid naked on the bare floor and an unbearably heavy weight laid on his chest the prisoner being fed on alternate days with three morsels of the worst bread and a draught of water till he died or answered.(4) But by a Statute passed in 1772, this penance was abolished.(5)

3547. The gruesome history of torture is a long and painful one. It is still the chief weapon in the hands of the police and the Judges of semi-barbaric countries. Its abolition is a matter of refined jurisprudence, which judges of a man by his guilt and not by his sensibility to pain. And this section is a legislative pronouncement against its employment in any form in this country.

3548. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable and is exclusively triable by the Court of Session. In a case falling under section 197 of the Procedure Code, no prosecution can be instituted under this section without the sanction of the local Government. What these cases are must depend upon the status of the accused, and the nature of his act whether committed in the execution of his duty or otherwise.

3549. Proof.—The points requiring proof are:—

(1) That the accused voluntarily caused hurt. [For which prove all that is required under section 322].

(2) That the accused caused such hurt to extort from the sufferer or other person interested in him—

(*a*) a confession or some information which may lead to the detection of an offence, or misconduct; or

(*b*) to constrain such person to restore or to cause the restoration of any property or valuable security; or

(2) Dig. 48, 18, 1, 1; Hunter's Rom. L., p. 1066; 4 Black, 326.

(3) *Pro Sulla*, 28.

(4) 1 Hale P. C. 329; 2 Hawk. P. C. 239.

(5) 12 Geo. III, c. 20.

(*c*) to satisfy any claim or demand, or

(*d*) to give information which may lead to the restoration of any property or valuable security.

3550. Charge.—The charge under this or the next section should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you voluntarily caused hurt (*or grievous hurt*) to A B, for the purpose of extorting from him (*or* from a certain person, interested in the said A B, namely, C D), a confession (or information) which may lead to the detection of the offence of—(*mention it*) or misconduct (*mention it*) or for the purpose of constraining the said A B (*or* C D) to restore (or cause the restoration of any property or valuable security), or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, to wit——(*specify it*), and thereby committed an offence punishable under s. 330 (or s. 331) of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3551. Principle.—This section is manifestly directed against the police and other officers engaged in the detection of crime and who subordinate their detective skill to the easier means of torturing suspected persons to obtain from them the clue they want for the success of their investigation.

3552. But though the persons who mostly offend against its provisions are the police-officers, still the section is not confined to them alone, but being generally worded, extends to any person whether a policeman or not. The section extends to all torture in any shape or form and for whatever purpose or from whatever motive. It will not tolerate it whether it be applied to an undoubted thief to compel him to restore the property which he has stolen, or to disclose the names of his confederates, or to a suspected person to ascertain his guilt or innocence (§ 3545). It may be that the information sought for is required for the advancement of justice, nay more, it may be such information as cannot be withheld without offending against public justice—the property, the extortion of which is sought, may be property which the sufferer has borrowed from the offender, and which he illegally refuses to restore, the claim or demand may be a righteous one—but law will not tolerate the application of torture for subserving its purpose, no less because of its inhumanity than because it falls most unequally upon different persons. It is for this reason that many States have abolished the infliction of corporal punishment and its abolition in this country is only a matter of time.

3553. Meaning of Words.—For the meaning of terms employed in this section reference should be made to section 327 where the terms used are identical. Such terms as are not there used will however, be explained here. "*Any confession or any information*": A confession is an admission of one's guilt. It can only be made by the person accused of

the crime. Information is a wider term, and refers to anything said which offers a possible clue to the apprehension of the criminal. "*Or misconduct*": This may refer to a departmental delinquency or a social crime not necessarily punishable under the Code. For instance, torturing a man to discover if he has misbehaved with the torturer's unmarried female relation, would be causing hurt to obtain information relating to a misconduct. "*To cause the restoration of the property*": The word "restoration" is important and refers to the use of pressure to recover property once lost. If the torture relates to the *obtaining* of property it will amount to the higher offence provided in section 327. "*Or to satisfy any claim or demand*": These words must be understood *ejusdem generis*, otherwise they will go beyond the legitimate scope of the section. Evidently the claim or demand must then be with respect to property.(6)

3554. Torture.—This section punishes the offence of causing hurt when the object of causing it is to coerce the sufferer to confess to his guilt or give information respecting the commission of a crime or a misconduct, or to restore property or satisfy any claim or demand respecting thereto.

The object of the section is to prevent, it may be, the securing of lawful end by employing unlawful means. The end intended, however, may or may not be lawful. It may be to detect crime or it may be to secure a bribe; it may be to recover property or it may be to misappropriate it. Whatever the object, it must, however, be one of those enumerated in the section. So where the three prisoners resident of a village in which cholera had made its appearance, tortured three women, believing them to have practised witch-craft, so that they may confess to their being witches, it was held that as hurt was caused with none of the objects here specified, the only offence of which the accused could be convicted is one under section 324, as they had poured heated oil over the women from the effects of which one of them had died, and they were convicted under that section.(7)

Discovery of Facts or Property.

3555. The section enumerates two principal objects which aggravate the causing of hurt under this section: (*i*) discovery of facts or property, and (*ii*) satisfaction of a claim or demand. The former includes the obtaining of confessions by the accused, and information relating to the detection of the offence and restoration or recovery of any property which may be the subject of investigation.

3556. The obtaining of a confession is, however, a purpose against which the provisions of this section are mostly brought into requisition. Indeed, such is the temptation to which police-officers anxious to make a short work of their inquiry, are exposed, and such is their tendency that law would not admit in evidence anything said to the police,(8) unless it is substantially corroborated by the discovery of something in consequence of the confession.(9) In other words, having regard to the infirmity of human nature and the temptation to which police-officers are exposed, all such confessions are irrebuttably presumed to be involuntary, unless they are made to a Magistrate. It is this which induces the police-officers

(6) *Ella Boyan*, 11 M. 257.
(7) *Baboo Moondu*, 13 W. R. 23.
(8) S. 26, Indian Evidence Act (I of 1872).
(9) *Ib.*, s. 27.

to torture persons to confess—for if confessions were wholly inadmissible, a great incentive for obtaining them would be gone. Persons who cause hurt to obtain confessions are, however, subject to the special rigour of the law. As such confessions are admissible against the accused at a subsequent stage of the proceeding against him, he who secures a false confession is guilty of an atrocious crime—for he perverts justice, and for which justice shows him no mercy.[10] But while the accused are in such cases exposed to the full vengeance of the law, some discrimination is made between those who actually took part in the beating, and those who are only constructively liable as aiders and abettors. Such would be the liability of all policemen then present who do nothing to prevent the torture, but either stand unconcerned or withdraw from the scene for fear of getting themselves implicated therein[11] (§ 1027).

Intention Negativing Homicide.

3557. Sometimes persons thus subjected to maltreatment succumb to their injuries. The lower Courts sometimes construe the case to be then one of culpable homicide, but it is forgotten that a person who tortures another to confess can never intend the other to die, nor can he be presumed to know that death is likely. His object is to make him admit his guilt and which he cannot secure if he knowingly kills the sufferer.[12] Where therefore the beating, however violent, was clearly to extort a confession from the sufferer and the latter dies in consequence of the assault, the appropriate section for punishment of the crime is either this or the next section, under which of course the maximum penalty should be imposed in such cases.[13]

3558. Other cognate cases presented under this section are those in which the assault is committed to suborn witnesses, or obtain information from persons likely to be cognizant of the commission of a crime, and are reluctant to impart it. The question whether the offence or misconduct in respect of which the information is sought, was or was not committed is wholly immaterial.[14] In fact, as was remarked by Markby, J., "Some of the worst cases that have come before this Court, of causing hurt, for the purpose of extorting a statement or confession by police-officers, have been cases in which no offence has been committed."[15] Indeed, the fact that there is no offence makes the beating all the more unjustifiable, because it is the beating of persons who are wholly innocent. Persons who cause hurt to secure restitution of their property may or may not be officers of the police. For, a creditor or a rightful owner may just as well cause hurt for that purpose as any other person interested in the investigation of crime. The section is, of course, subject to the general exceptions, which legalize the use of force in such cases.[16] Where, therefore, the causing of hurt is protected by the general exceptions, this section has no application (§§ 906-991). It only punishes the use of unjustifiable force for the recovery of property.

(10) Cf. *Meher Ali*, 11 C. 530.
(11) *Latif Khan*, 20 B. 394.
(12) In *Tarini Churn Chattopadhya*, 7 W. R. 3, the facts of which were stated by the same Judge (Markby, J.) in *Nimchand Mookerjee*, 20 W. R. 41 (44), the conviction of the accused for homicide was affirmed. But the case is not fully reported.
(13) *Meeah Mahomed*, (1866) P. R. No. 86.
(14) *Nimchand Mookerjee*, 20 W. R. 41 (44).
(15) *Nimchand Mukerjee*, 20 W. R. 44.
(16) S. 105.

3559. Satisfaction of Any Claim or Demand.—The closing words of the section "to satisfy any claim or demand" are intended to cover other cases not specifically mentioned. Such claim or demand may be of the nature supposed in illustrations (*c*) and (*d*). Illustration (*c*) is evidently intended to refer to a claim, while the last illustration is intended to refer to what is assumed to be a demand. But really speaking, both are instances of a claim—the one is no less a claim because it is for current rent than the other because it is for rent overdue. The word "claim" would, however, suggest the existence of some real or supposed right, but it does not alter the nature of the offence. For the section no more authorizes the forcible seizure and an assault on a runaway fraudulent debtor than on one upon whom the demand is unjustly made. The word "demand" is wider than the term "claim." It would include any requisition legal or illegal, proper or improper—but not for anything unconnected with the delivery of property. It would not, for instance, include a demand for personal gratification, or one unconnected with property. So where the accused assaulted his wife because she would not return home, and thereupon he was convicted under this section for causing hurt in order to constrain the wife to obey a demand of the prisoner to return to his house, sentencing him to five years' rigorous imprisonment, the High Court held this section inapplicable and consequently altered the conviction to one under section 324, as the accused appeared to have cut her "though slightly" with a stabbing or cutting instrument, and his sentence was reduced to three years' rigorous imprisonment.(17) Therefore, though the demand addressed under this section should be one with respect to property it need not have any connection with any offence or misconduct. Nor, indeed, need the demand be an illegal one. But if it is illegal it will only aggravate the crime. Such would be the case of a person torturing one for the purpose of extorting a bribe.

3560. Where several persons join in an assault with a common purpose, each is guilty as a principal whatever may have been his individual contribution to the hurt actually caused.(18) In this case, decided by Markby, J., who stated its facts while deciding another case,(19) the prisoners had beaten several persons in consequence of their being suspected of being implicated in the commission of a murder, and as a result of which one of the men so beaten died, whereupon all were convicted of culpable homicide, the man alleged to have been murdered being found alive afterwards. The question whether a person is a principal or merely an abettor depends upon the nature of his participation in the crime.

Session. Cognizable Warrant. Not bail. Not comp.

Voluntarily causing grievous hurt to extort confession or to compel restoration of property.

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause

(17) *Ella Boyan*, 11 M. 257.
(18) *Tarini Churn Chuttopadhya*, 7 W. R. 3.
(19) *Nimchand Mookerjee*, 20 W. R. 41 (44).

the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Person*—s. 11. *Public servant*—s. 21. *Valuable security*—s. 30. *Voluntarily*—s. 39. *Offence*—s. 40. *Grievous hurt*—s. 320.]

Synopsis.

(1) *Analogous Law* (3561).
(2) *Procedure and Practice* (3562).
(3) *Proof* (3563).
(4) *Charge* (3564).
(5) *Grievous Hurt to Extort Confession* (3565).

3561. Analogous Law.—This section is the same as the last, with only this difference that the hurt herein caused is grievous. In other respects the two offences are the same. For commentary *see* the last section (§§ 3545-3560).

3562. Procedure and Practice.—This offence is cognizable, but warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable and is triable exclusively by the Court of Session.

3563. Proof.—The points requiring proof are the same as for an offence under the last section, only the hurt caused must amount to grievous hurt.

3564. Charge.—*See* last section (§ 3550).

3565. Grievous Hurt to Extort Confession.—This section punishes torture resulting in grievous hurt. Where the police had tortured the deceased with a view to extort a confession, but their offence did not amount to murder, they were held liable to a conviction under this section.[20] The extortion of a promise to restore a woman who had been abducted is not an extortion of a promise to satisfy a demand, which must be with respect to property. Consequently, the causing of grievous hurt for this purpose is not punishable under this section.[21]

Voluntarily causing hurt to deter public servant from his duty.

332. Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful dis-

Session. Pres. Mag or Mag. of 1st class. Cognizable. Warrant. Bailable. Not comp.

(20) *Moran Baksh*, (1917) P. W. R. 12. (21) *Mula Baksh*, 5 L. L. J. 375 73 I. C. 272.

charge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis.

(1) *Analogous Law* (3566).
(2) *Procedure and Practice* (3567).
(3) *Proof* (3568).
(4) *Form of Charge* (3569).
(5) *Principle* (3570).
(6) *Meaning of Words* (3571).
(7) *Criminal Assault or Hurt to Public Servants* (3572).
(8) *Protection Confined to Lawful Duty* (3573-3574).
(9) *Qualified Protection when Act Illegal* (3575-3576).
(10) *Conflict of Views* (3577-3579).
(11) *Want of Good Faith* (3580-3583).
(12) *Acts Flagrantly Illegal* (3584-3585).
(13) *Intent to Prevent or Deter* (3586).
(14) *Assault in consequence of Legal Act* (3587-3588).

3566. Analogous Law.—This section is word for word the same as section 353 which deals with the same offence, when the injury caused falls short of hurt but amounts only to criminal force. The two sections have been placed far apart, but in logical sequence the section 353 should have preceded this.

3567. Procedure and Practice.—This offence is cognizable but warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

3568. Proof.—The points requiring proof are:—

(1) That the accused caused voluntary hurt.

(2) That the person hurt was a public servant.

(3) That when the hurt was caused—

(*a*) the public servant was discharging his duty as such; or

(*b*) that the hurt was caused with intent to prevent or deter him or any other public servant to discharge his duty as such;[22] or

(*c*) it was caused in consequence of anything done or attempted to be done by the public servant or another public servant in the lawful discharge of his duty.

3569. Charge.—The charge should run thus:—

"I (*name and office of Magistrate etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you voluntarily caused hurt to one A B, a public servant, in the discharge of his duties as such public servant [(*or* with intent to prevent (*or* deter) that person (*or* any

(22) *Kishan Lal*, 22 A. L. J. 501.

other public servant, to wit—) from discharging his duties as such public servant (*or* in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant)] and thereby committed an offence punishable under section 332 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

3570. Principle.—This is not an isolated provision dealing with an offence committed against a public servant. A number of offences in Chapter X deal with offences relating to resistance or obstruction offered to public servants in the lawful discharge of their public duties when the act is confined to resistance or obstruction, those sections provide punishments; when the opposition takes the form of an aggressive assault, section 353 prescribes the penalty. When the assault committed causes hurt, this section becomes then applicable. In each case the punishment is graded according to the degree of criminality and nature of the resistance. In the section relating to contempts (sections 172-190) the opposition is offered to the acts done by public servants; under sections 353 and this section, the opposition is offered to the public servants themselves. And as they are then in the execution of their duty, law deems it an aggravation, and for which the two sections prescribe specially drastic punishments.

3571. Meaning of Words.—"*In the discharge of his duty as such public servant*": This means the same thing as "in the execution of his duty"—a phrase used in section 353; but they do not mean merely acting in good faith under colour of their office[23] (§§ 929-931). The duty need not be to do a specific act. It may, for instance, be merely to keep a watch.[24] "*As such public servant*": Consequently, a public servant assaulted whilst protecting his private property cannot prosecute his assailant under this section.[25] "*With intent to prevent or deter*": "Prevention" probably refers to a stage when the execution of the duty is entered upon; "*deter*"[1] refers to a stage when it has not been yet entered upon. "*Or any other public servant*": This means that the intention of the assault or hurt must be to checkmate either the sufferer or another public servant entrusted with the same mission and then in the execution of his duty. It does not refer to the striking of terror amongst public servants as a body which may be the remote result of such an assault. "*Or in consequence of anything done*," in which case the assault would be committed by way of retaliation: but it must, it is apprehended, be committed immediately after the execution of the duty. If it is committed long afterwards the offence committed will scarcely fall under this section though it may be the motive of the crime.[2]

(23) *Dalip*, 18 A. 246; *Mukhtar Ahmad*, 37 A. 353.
(24) *Mahomed Yakoob*, 7 M. L. T. 386, 6 I. C. 12.
(25) *Hardit Singh*, (1911) P. L. R. 161, 10 I. C. 278.

(1) From Lat. *de*, from, and *terro*, to frighten—lit., to frighten from; hence, to prevent from acting or proceeding, the preventing agency being something anticipated as difficult, dangerous or unpleasant.
(2) Ss. 76, 79.

3572. Criminal Assault or Hurt to Public Servants.—It will be more convenient to consider the effect of the two sections (section 353 and this) which deal with the criminal assaults on or the causing of hurt to public servants in the execution of their duty. The two offences are in fact the same: they only differ in degree owing to the nature of the personal affront upon the public servants concerned. Both the sections protect public servants in the execution of their duty, before, during and after they enter upon it, and the two sections refer to the three stages of their immunity, for they speak of (*i*) "to prevent or deter," (*ii*) "in the discharge of his duty," and (*iii*) in consequence of anything done or attempted to be done in the lawful discharge of duty. The necessity of this protection is obvious. Public servants, in the execution of their duty, are often exposed to considerable risk and danger. They have often to act singlehanded and without sufficient escort. They are, therefore, entitled to special protection, as they are entitled to special privileges and immunities[2]—and, it may be added, they are at the same time subject to special restrictions and liabilities. It goes without saying that these special privileges and liabilities only belong to persons who are "public servants" as that term has been defined in section 21 (§§ 160-208).

Persons other than public servants who may accompany them for aid and guidance are not entitled to claim the special protection here implied.[3] They can only have recourse to the ordinary law, for which they must resort to the ordinary procedure. So where the accused, who were charged for assaulting a police constable in the execution of his duty, were on inquiry found to have really assaulted the chokidar who was with him, and whereupon the Court convicted them for assaulting the chowkidar under section 352, the High Court quashed the conviction, holding that in the absence of a complaint by the chowkidar the accused could not be convicted of assaulting him.[4] But in this case it is clear that the accused could not have been convicted even if the chowkidar had been a public servant. Indeed, the *ratio decidendi* of the case amounts to this, an accused could not be convicted for assaulting B when he was charged for assaulting A. But all the same the proposition that a private person assisting a public servant is not entitled to the special protection of these sections still holds good.

Protection Confined to Lawful Duty.

3573. As regards the public servant himself he must be acting in the execution of his duty. In this respect the phraseology of the two sections is somewhat different, but the difference does not imply any variance in sense, for the phrase in the *execution* of his duty conveys the same sense as the *discharge* of his duty. But the important question that arises in this connection is, should he have been acting in the lawful discharge of his duty or is he clothed with the same immunity whether the duty he was discharging was or was not lawful. Some argument may be made in support of the latter view from the fact that while the first clause speaks only of the execution of his duty, the third clause expressly mentions its lawful-

(2) Ss. 76, 79.
(3) *Akbar Momin*, 6 C. W. N. 202.
(4) *Ib.*

ness. But it is evident that in each case the duty must be lawful, otherwise the public servant cannot appeal to these sections for protection. This is the view taken by the Courts at Allahabad[5] and Calcutta,[6] and so Sir John Edge, C. J., and Burkitt, J., observed: "The words in the discharge of his duty can have only one meaning, and that is that the officer has a duty to discharge, and is discharging it at the particular time. They cannot mean that the officer is acting under colour of his office. He must be acting at the time as a police officer and in the particular matter discharging a duty incumbent upon him as police officer. A police officer may, of course, occasionally exceed what his duty requires of him when in the discharge of his duty, or may, in the course of the discharge of his duty, be guilty of an act unlawful in itself; and not required to be done by the police officer for the purpose of performing the duty which he is then engaged upon. It is to cover acts which the police-officer may have to do when in the discharge of his duty that in our opinion 'lawful discharge' are introduced in the concluding portion of section 332. We can best explain our meaning by an illustration. A warrant is handed to a police-officer for the arrest of a particular person. That warrant, on the face of it, does not direct him to break open premises, for instance, in order to effect the arrest and yet it may be necessary for the officer in discharge of his duty in arresting the accused under the warrant to break into the accused's house, or to do some other act without the doing of which the warrant could not be executed. Such acts would be properly described as done or attempted to be done by the police-officer in the lawful discharge of his duty, if it was unnecessary to do such an act, and yet it was done, the act would not be done by the police-officer in the lawful discharge of his duty, and therefore, would not be covered by the concluding portion of section 332."[7]

3574. The facts of the case in which these observations occur were these: A warrant was issued by a Magistrate for the arrest of the accused, one Dalip, under section 114 of the Procedure Code. The warrant was sent to a certain police station-house for execution. It was there copied in a book kept for the purpose and then made over to a constable for execution. After the constable had left the police-office, it was discovered that Dalip was in a different village. Thereupon the police-officer in temporary charge of the office made a copy from the book and endorsed it over for execution to Nazir Husain and some other constables. They arrested Dalip, but as they were returning with him, they were attacked by Dalip and his friends who rescued him and caused hurt to the police. Dalip and his rescuers were thereupon prosecuted under this section. They challenged the

(5) *Dalip*, 18 A. 246; *Mukhtar*, 37 A. 353.

(6) *Raman Singh*, 28 C. 411; *Chunder Coomar Sen*, 3 C. W. N. 605.

(7) *Dalip*, 18 A. 246, following *Roxburgh*, 12 Cox 8, followed in *Raman Singh*, 28 C. 411; *Chunder Coomar Sen*, 3 C. W. N. 605; distinguished in *Nowrangi Singh*, 5 C. W. N. 135; *Mahomed Yakoob*, 7 M. L. T. 386, 6 I. C. 12; *Yusuf*, (1910) P. R. 18; *Dalip*, 18 A. 246, refers to *Nand Kishore*, (1892) A. W. N. 1 (2), but in that case Knox, J., plainly intimated that this section protects even acts which are *not* legal. As such, the case must be considerted as now overruled; see *Mukhtar*, 37 A. 353; *Madho* 40 A. 28; *Mir Shah Nawa Khan*, 8 S. L. R. 1, 26 I. C. 319.

legality of Dalip's arrest on the copy of the warrant made out as before stated.

Taking the view of the law which it did, the question about the applicability of this section then clearly rested upon the legality of the arrest. Now the arrest of a person proceeded against under section 110 of the Procedure Code, may be effected either under a warrant of a Magistrate, or by the Police independently of the warrant under section 56 of the Procedure Code. In this case, the Magistrate had issued the warrant, and the police had been ordered to execute it. And the question then was whether the order delivered to Nazir Husain and his associates could be justified under any provision of law. It was held that it could not: because the magisterial warrant had already been made over to the constable previously deputed for its execution. The other warrant only purported to be, and was in fact its copy. The police could have issued an independent warrant acting under section 56 of the Procedure Code, but they did not, and the copy issued could not be taken to be a warrant so issued. The arrest of Dalip and his confederates was, therefore, illegal, and being illegal they could not be convicted under this section. But failing this, could they be convicted under the ordinary provisions of law? This depended upon the question of the legality of resistance to an illegal arrest—in short, the right of private defence.

Qualified Protection when Act Illegal.

3575. Now the right of private defence available against a public servant is not the same as is generally available against the public at large. As is enacted in section 99, that right does not avail against a public servant acting in good faith *under colour of his office, though that act may not be strictly justifiable by law,* if the act does not reasonably cause the apprehension of death or of grievous hurt. In this case, therefore, the accused's assault was not justifiable and they could, therefore, only be, and were convicted of simple hurt and rioting.

The same view was taken in Calcutta in a case in which the facts were these: At the beginning of the year 1900, plague broke out in the village of Bahadarpur in the Patna district. The Magistrate thereupon put in force the measures then sanctioned for the prevention and suppression of plague. The villagers combined to resist them. The Magistrate apprehended a riot and thereupon appointed the three accused to be special constables, and a Police Inspector was sent to take charge of them. He went to the village, but found himself confronted by a large assemblage of men. He, however, informed the three accused of their appointments. One of them, Nawrangi, when asked his name, gave a false name. The Inspector ordered his arrest, but on making the arrest the villagers became riotous and the Inspector thereupon withdrew. The three men were then prosecuted under section 353 read with section 149 and they were all convicted. They applied to the High Court in revision, and the question which that Court had to consider was whether in ordering the arrest of Nawrangi which led to the riot, the Inspector was in the execution of his duty. It was held that under no law could the Inspector have ordered Nawrangi's arrest merely because he had given a false name, or that he and the other two newly appointed special constables refus-

ed to obey his directions to accompany them to the police lines. Eventually the Court affirmed the conviction of the men for rioting under section 147 of the Code.(8)

3576. In another case the petitioners were found gambling in a verandah abutting on a public land, and were accordingly arrested by the police constables, who were resisted and one of them was beaten. They were thereupon prosecuted under this section, and it was pleaded for them that the act of the police was illegal. The prosecution supported their action on the ground that the arrest was justified by a warrant, and that in any case it required no warrant to justify the arrest. As to the former, the Court found that the warrant had already been executed upon other persons who had been already convicted, and as to the latter the arrest was held to be unjustifiable on the ground that there was nothing to show that the accused were gambling in a place which was public or was a common gaming house. They could not, therefore, be convicted under this section, but presumably for reasons already considered, their conviction was altered to one under section 323.(9)

A similar conviction was recorded in another case, in which the accused, an Excise Inspector, had been guilty of many irregularities in making a search of the house of the complainant, whom he suspected of possessing cocaine. He had no warrant authorising him to make the search, he had brought only one search witness, and he had directed a constable to scale the outer wall of the house. The accused beat both the Inspector as well as his constables; but though they were held not to be acting in the discharge of their duties as public servants, still their assailant was convicted under s. 323, on the ground that though the public servants were not acting in discharge of their duty, still they were acting in good faith under colour of their office, so that the assault upon them could not be justified under s. 99.(10) Other cases also take the same view.(11)

Conflict of Views.

3577. In all these cases, the act of the public servant was clearly illegal, and the resistance offered took the form of an assault and battery. The view of the Court in each case was that the offence though not of the aggravated form here prescribed, was still an offence. But there are cases in which the harmony of this uniformity has not been maintained. For in some of them the assault itself has been held to be justifiable, and it will have, therefore, to be considered, how far these cases have the effect of modifying the rule before set out. Some of them may certainly be reconciled to the cases before considered, on the ground that the act of the accused must be held to be justifiable on the ground that the injury threatened transcended the justifiable limit prescribed in section 99. Some may be explained on the ground that the use of force was so small that the Court did not take it to be an aggression: but there still remain cases which cannot be explained away on either hypothesis. For instance, the case in which a licensed vaccinator

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(8) *Raman Singh*, 28 C. 411.
(9) *Abdool Karim*, 4 C. L. J. 92.
(10) *Mukhtar Ahmad*, 37 A. 353.
(11) *Mir Shah Newaz Khan*, 8 S. L. R. 1, 26 I. C. 319; *Kandaswami*, 46 M. L. J. 45, 76 I. C. 962.

attempted to take lymph from the child of the petitioner, and who thereupon resisted his taking and assaulted him, causing slight injuries, the accused were acquitted on the ground that the taking of the lymph being unlawful, the accused were justified in resisting it, but the question of the justifiability of an assault and the legal limits to which it may be carried was not considered.(12)

3578. In another case the same Court had to consider the effect of an assault directed against the Nazir of a Civil Court attempting to attach the assailants' property in execution of a decree on the strength of a warrant which did not describe the area of the search and was not in the form prescribed by the Code of Civil Procedure. That such an attachment is illegal admits of no doubt, for a civil warrant, unlike a criminal warrant, the party it is to be served upon has a right to sue, and in any case being an authority to legalize a trespass, it must define the area to be searched for the property of the judgment-debtor. If, therefore, the warrant was illegal, the Nazir had no right to execute it. So far there can be no doubt, but if so, would resistance to it *per vi et armis* be justifiable. In the case under reference, the resisters were all convicted of rioting, but their conviction was set aside on the ground that the charge did not specify the common object of the assembly. It also appears that the force used was inconsiderable.(13) But the question does not depend upon the degree of force, but upon the use of force however small. For if the right of using force is justifiable at all, its sufficiency would then be determined by the necessity of the case. If it is not justifiable it is punishable whatever may be its extent or nature. This was conceded in Madras where the view taken is that the use of any criminal force to a public servant in the discharge of what he conceives to be his duty is punishable, not as a special offence under this section or section 353, but as one under section 323 or 352 as the case may be, since having regard to the provisions of section 99 no person can set up the illegality of the public servant's proceeding as a justification for his resistance or obstruction, unless it is shown that the public servant was acting otherwise than in good faith and with malice.(14)

3579. The accused who was a second class Magistrate, gave a general direction to his orderly constable to bring to him persons found selling fruit unfit for human consumption and in execution of which order, the constable endeavoured to compel two persons to accompany him to the Magistrate. They refused to go and assaulted him, when he attempted to lay hold of them. They were convicted under section 353, but on revision the High Court altered it to one under section 352, holding that if the accused were guilty of an offence under section 273 of the Code, it did not justify the police constable to arrest them, as that offence was non-cognizable. All he could do was to take down their names and addresses and apply for a summons for their appearance. The order to arrest being illegal, the constable was

(12) *Mangobind Muchi*, 3 C. W. N. 627.
(13) *Chunder Coomar Sen*, 3 C. W. N. 605.
(14) *Pukot Kotu*, 19 M. 349; *Poomalai Udayan*, 21 M. 296; *Doraisami Pillai*, 27 M. 52; to the same effect *Perumalu*, (1885) 1 Weir 344.

not bound to obey it and he was not protected unless by a mistake of fact and not by a mistake of law he in good faith, believed that he was justified in obeying such order.(15) His act was, therefore, clearly illegal, but that fact alone did not legalize the assault upon him, unless the accused could bring their act within the exonerating provisions of section 99.(16) The same view was maintained in another case in which a police constable who had been only deputed to investigate a non-cognizable case, arrested two persons and asked the accused, a village munsiff, for the services of a taliari to arrest two others, which was contrary to the provisions section 155 of the Procedure Code. The accused remonstrated with him against the illegality of his act and assaulted him. His conviction under section 353 was altered to one under section 352.(17) The facts leading up to the assault in this case are, however, not reported.

Want of Good Faith.

3580. But according to this view, the absence of good faith would be presumed from little more than the doing of an illegal act. The accused was registered in the books of the police as a bad character, and the complainant, a police constable, was ordered to check his presence. In order to comply with this direction, he went at midnight, in uniform with another constable, entered upon the premises of the accused and knocked at his door, to see if he was there. The accused thereupon, resented the intrusion, pushed the constable and lifted a stick as if to strike him. The constable's turban fell to the ground. The accused was convicted under section 353, but on revision Sir Bhashyam Ayyangar J., set aside his conviction on the ground that no police circular authorized the trespass, and that the surveillance ordered did not and could not legalize it. The act of the constable was, therefore, illegal, and it could not be said to be *bona fide*, having regard to the definition of that term in section 52. The accused had, therefore, the right of private defence as enunciated in section 104, and it justified his assault.(18)

3581. A similar case came up before Stevens and Harrington, JJ., of the Calcutta High Court. The petitioner was a registered bad character and was one night visited by a Sub-Inspector to ascertain if he was at home. He called to the petitioner who came out, whereupon the Inspector wished to take an impression of his thumb. He objected to it, but on the Inspector extending his hand to take the impression, the petitioner went into his house and brought out a stick saying that he would not allow the impression to be taken, and would break the head of anyone who asked for it. He was convicted, but the High Court quashed his conviction, holding that the threat did not constitute an assault, though they gave it as their opinion that if it had been, his act could not have been justified under section 99.(19) But in view of their finding, the rest of their pronouncement became an *obiter*.

But even as such it is not consistent with the view taken by another Bench (Ghose and Stephen, JJ.) of the same Court in which the bailiff who had attempted to deliver possession of property on a time-expired

(15) S. 79.
(16) *Perumalu*, (1885) 1 Weir 345.
(17) *Latchmana*, (1883) 1 Weir 343.
(18) *Dorasami Pillai*, 27 M. 52.
(19) *Birbal Kalifa*, 30, C. 97.

warrant of the Civil Court, was resisted and assaulted by the judgment-debtor and his allies, whereupon they were convicted of rioting and assault on a public servant under section 353. It was contended for them that as the warrant was returnable on or before the 21st April, and as in fact it was executed on the 22nd April, the executing officer had no authority, and it was so held by the Court who added: "If he had no such authority, it seems to us that the petitioners could not be convicted of the offences with which they were charged."[20] No reference is made in this case to the earlier case decided by the same Court, nor is, indeed, section 99 alluded to. At any rate, this view finds support in a judgment of the Chief Court of the Punjab in a case in which an excise peon, anxious to detect the contraband preparation of *chandu*,[21] went up to the house of the accused up a ladder and peeped in through a door where, he said, the accused was preparing *chandu*. The accused saw him and came out of the door and shoved him down, when another accused came up and hit him, but the peon was not injured. The two accused were convicted under section 353, but their case being reported to the Chief Court, the Chief Judge quashed their conviction, holding with the Sessions Judge that the trespass of the peon was unwarranted, and that the assault was therefore justifiable.[22]

3582. There can be, of course, no assault where a person merely fetches a stick and threatens to strike any one who dared to annoy him.[23] The accused was called upon by a vaccinator to produce his child for vaccination. The accused refused, whereupon the vaccinator ordered a pariah woman to enter his house and fetch the child. The accused then took hold of a spade and threatened to strike with it anybody who should enter his house. It was held that there had been no assault.[24] Even if there had been an assault such a case would have been justifiable, for no vaccinator has the right to insist upon the compulsory vaccination of a child without the consent of its parent or guardian.[25]

3583. In certain cases it has been held that the accused is justified in resisting an illegal search of his house, made by a person under colour of his office.[1] But these cases are only reconcilable with those already considered, if it be held that the Court found in them also the absence of good faith; otherwise the two sets of cases must be held to expound two contrary doctrines. It would, however, appear that the right of private defence to be available, must conform to the provisions of section 99, and that section does not warrant the use of force to repel an unlawful entry by a public servant.

3584. Acts Flagrantly Illegal.—All the same, it is the duty of public servants to see that the authority they exercise is not manifestly

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(20) *Amninash Chandra Adaitya* v. *Ananda Chandra Pal*, 31 C. 424.

(21) A highly intoxicating preparation from opium used for smoking. Its preparation for sale is prohibited everywhere.

(22) *Per* Clark, C. J. in *Allah Baksh*, (1904) P. L. R. 390, 1 Cr. L. J. 956.

(23) *Birbal Khalifa*, 30 C. 97.

(24) *Pethan Kovan*, (1900) 1 Weir 345.

(25) *Babal*, 3 A. L. J. R. 327, following *Mangobind Muchi*, 3 C. W. N. 627.

(1) *Narain*, 7 N. W. P. H. C. R. 209; *Brikhbhan*, 13 A. L. J. 979, 31 I. C. 995; *Jagernath Mandhata*, 1 C. W. N. 233.

illegal. For though their act is protected by section 99, if it is not *strictly* justifiable by law,[2] it does not protect an act wholly unjustifiable or illegal. This will be another point to consider in determining the applicability of section 99. But this has not only been considered in some cases, but the doctrine of official immunity has been extended to an unwarrantable length in certain cases, in which one would almost think, the doctrine of *lese majestie* had been brought into play, in considering the effect of resistance to the flagrantly unlawful acts of public servants. In one such case, the forest-settlement-officer ordered his peon "to impress fifteen carts for his use," and the former accordingly seized the accused's carts who assaulted him to prevent the seizure. He was convicted under section 353, and his conviction was held to be justifiable under section 352[3] which, it is submitted, it was not. For, in forcibly seizing the accused's cart, the peon was guilty of an offence under section 374, and he could not justify his act on the ground that he was acting in good faith for his act was *strictly* not justifiable. This case was referred to without comment by Ghose and Gordon, JJ., in a case in which they came to an opposite conclusion. There the District Magistrate had issued a warrant for the arrest and production of a witness for the purpose of giving evidence before the police. No Magistrate is empowered to order such arrest and it was held that resistance to it by assaulting the officer executing such warrant would be justifiable.[4]

3585. Such acts done in violation of law are clearly distinguishable from those which may be appropriately called not strictly justifiable. Such would be acts done in execution of a legal warrant, which, instead of being signed, bore the initials of the officer issuing it,[5] or case in which the warrant did not bear his official seal, or those in which a warrant was issued without complying with the requirements of section 82 of the Civil Procedure Code (now Or. V, rr. 19, 20) as to examination of the serving officer that the summons has been duly served,[6] or the like (§§ 927-953). It does not protect acts which are apparently illegal, unless the public servant can uphold them on the ground of good faith. But the present trend of the case-law on the subject is anything but harmonious. For, as has been seen, there are precedents which justify an assault to prevent an illegal act merely because it is illegal, there are others in which the illegality is held to be no justification, there are others in which the absence of good faith is inferred from the want of illegality, while there are those in which the most outrageously illegal acts are held to justify no assault.

It cannot be said that the same Courts are throughout consistent with themselves; but the following propositions of law may probably afford a good working rule:—

(1) That as a rule the two sections are intended only to apply to acts done by public servants in the *lawful* discharge of their duty.

(2) S. 99.
(3) *Rakhmaji*, 9 P. 558.
(4) *Jogendranath Mukerjee*, 4 C. 320.
(5) *Abdul Gafur*, 23 C. 896; *Janki Prasad*, 8 A. 293; *Diwan Singh*, (1885) A. W. N. 244.
(6) *Narbodeshwar*, 27 A. 491.

(2) That those who maintain the accused criminally liable under the two special sections must show that their act was legal.

(3) That the accused cannot be convicted under *these* two sections unless the act was strictly legal.

(4) That failing these sections, it does not follow that the accused may not be convicted under the general law. But in order to be exempted from its operation he may appeal to section 99 under which he may claim exemption.

(*a*) if he had reasonable apprehension of death or grievous hurt; or

(*b*) if the act of the public servant was wholly illegal; or

(*c*) if his act was done otherwise than in good faith.

Lastly, the question whether an act is done in good faith is a question of fact dependent upon the proved circumstances of each case.

For a further commentary on this subject, *see* ss. 99, 186 and 353.

3586. Intent to Prevent or Deter.—Hurt caused to a public servant in the discharge of his duty must necessarily be to prevent or deter him or another public servant from discharging his duty, or it may have been caused by way of retaliation. These two clauses are intended to meet a case where two or more persons are told off to discharge a public function, and when hurt is caused to one, to overawe the rest. The second clause speaks of an *intent* to prevent or deter the public servant from discharging his duty. Such intention would be necessarily present where the public servant is armed with his authority. If he is in official uniform or is well known to the accused as a public servant, an inference to that effect would be naturally drawn. If, on the other hand, a public servant is mistaken for a thief and is then beaten back or maltreated, these words afford the assailant the necessary protection for his mistake. The section is necessarily applicable only when the assault and battery is directed against the public servant with the object of turning him away from his purpose. It is not intended to shield public servants on every occasion. Suppose a public servant legally empowered to arrest one were to enter his house and whilst effecting the arrest commit the theft of his property and is then assaulted, he could not then refer to this section or section 99 in justification of his theft, nor would those who thereupon assaulted him be liable for assaulting a public servant in the execution of his duty.

3587. Assault in Consequence of Legal Act.—This is perfectly clear from the example supposed by the Allahabad High Court to which reference has been already made.[7] Other illustrations may be easily multiplied. Suppose a police constable is ordered to effect the arrest of a person charged with an offence. He enters his house and finding the accused sitting with his chums, and fearing a rescue he commences an unwarranted assault upon them. They beat him back. Could they

(7) *Dalip*, 18 A. 246.

be punished under this section? Certainly not; because in effecting the arrest of one he was not justified in assaulting the rest. But the case would be very different if after he had effected a legal arrest he had had to face his captive rescuers, in which case the offence of the latter would be an aggravated offence not only under this section, but also under section 225.

3588. These cases are comparatively simple. But suppose in the last case the friends of the prisoner were to vow a vengeance upon the constable for having arrested their confederate. They were to wait for their chance, and to assault the constable after the expiration of several months, it may be several years. Could they be dealt with under this section, as persons who had caused hurt in consequence of the constable having arrested their confederate. It would seem that there is nothing in the section to prevent their being so convicted; but with lapse of time the presumption that the assault was in consequence of the arrest would lose in strength, as after some time some other causes may intervene to influence the action of the accused which may be the proximate cause of the assault.

3589. When it is sought to be proved that an assault directed against one public servant was intended to deter another public servant from discharging his duty, the connection between them must be clearly established. Again, it would seem that if a public servant were to employ another, not a public servant, to assist him in the discharge of his duties, an assault upon the former to overawe the latter would not fall within the rule which is intended only to punish hurt caused to a public servant and not one acting with him or under his direction, unless he is himself a public servant.(8)

Voluntarily causing grievous hurt to deter public servant from his duty.

Session. Cognizable. Warrant. Not bail. Not comp.

333. Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Public servant*—s. 21. *Voluntarily*—s. 30. *Grievous hurt*—s. 320.]

Synopsis.

(1) *Analogous Law* (3590).
(2) *Procedure and Practice* (3591).
(3) *Proof* (3592).
(4) *Charge* (3593).

3590. Analogous Law.—The offence under this section is an aggravated form of the same offence which has been dealt with in the

(8) *Venkattigadu*, (1879) 1 Weir 342.

last section. In fact the two sections are the same except for the hurt which under this section is grievous. Hence the enhanced penalty.

3591. Procedure and Practice.—This offence is cognizable, but warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Court of Session.

3592. Proof.—The points requiring proof under this section are the same, except that the hurt caused must be proved to be grievous as defined in s. 320.

3593. Charge.—The charge should follow the form given under the last section (§ 3569).

Any Mag. Non-cog. Summons. Bailable. Comp. Summary.

Voluntarily causing hurt on provocation.

334. Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

[*Voluntarily*—s. 39. *Hurt*—s. 319.]

Synopsis.

(1) *Analogous Law* (3594).
(2) *Procedure and Practice* (3595).
(3) *Proof* (3596).
(4) *Causing Hurt on Grave and Sudden Provocation* (3597-3599).

3594. Analogous Law.—This section is an attenuated form of the offence of causing hurt punishable under sections 323 and 324. As both those sections refer to this as a proviso, it is immaterial for the present purpose whether the instrument used for causing hurt was simple or deadly.(9)

This section as well as the next are subject to all the provisos of Exception 1, s. 300.(10)

3595. Procedure and Practice.—This offence is non-cognizable, and summons should ordinarily issue in the first instance. It is both bailable as well as compoundable and is triable by any Magistrate, and may be tried summarily.

3596. Proof.—The points requiring proof are:—

(1) The causing of bodily pain, disease or infirmity.

(2) That it was caused by the accused.

(9) *Bhala Chula*, 1 B. H. C. R. 17. (10) Expl., s. 335

(3) That he caused it on account of the grave and sudden provocation.

(4) That he intended or knew it to be likely to cause it only to the person who gave him the grave and sudden provocation.

3597. Causing Hurt on Grave and Sudden Provocation.—The mitigating effect of grave and sudden provocation has been already considered in discussing the elements which reduce the crime of murder to culpable homicide[11] (§§ 3087-3114). It plays an equally important part in mitigating the offences of grievous and simple hurts. And the principal subjects to which these offences are alleviated are in each case identical. In the first place it is required in each case that the provocation received should be both grave as well as sudden. It is not sufficient if it is one without the other (§§ 3087-3114). In the second place it must come from the person assaulted and not from a third party. For it is no excuse to hit A because B had aggravated the assailant. It will be an excuse but only in the case if A had set up B to provoke him or if the two had made a common cause against him, in which case the provocation given by one would be equally a provocation given by the other. Thirdly, the assailant must direct his blow against his provoker—if it falls upon another by mistake or accident, he is liable, but to no greater extent than if he had hit the right person.

3598. The question what amounts to a grave and sudden provocation so as to mitigate the offence is a question of fact which the Court will have to decide, having regard to the circumstances of each case. And in considering the sufficiency of the provocation, the Court will have to take into consideration the adequacy of the cause (§§ 3085-3134).

3599. It will be observed that in connection with the nature and effect of provocation, the next section refers to matter contained in the three provisos to section 300, Exception 1. These provisos lay down rules so reasonable and just as to be equally applicable to this section. Indeed, it must be necessarily so, for otherwise the section would lead to a *reductio ad absurdum*. For example, suppose a constable is legally empowered to arrest a person A. He goes to arrest him and does arrest him. A feels incensed at his arrest and feeling provoked thereby assaults the constable. Would he be liable under section 332 or this section? It is abundantly clear that his offence would in such a case fall under the former section. If so, the reason for the rule is proviso 2 to s. 300, exception I. Similar reasoning would justify the other two provisos, which must then be read as qualifying this section.

For a fuller commentary on this subject, *see* s. 300, Exception 1 (§§ 3085-3113).

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Summons. Bailable.

Voluntarily causing grievous hurt on provocation.

(11) S. 300, Excep. 1.

Comp. with Court's sanction.

person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.—The last two sections are subject to the same provisos as exception 1, section 300.

[*Voluntarily*—s. 39. *Grievous hurt*—s. 320.]

Synopsis.

(1) *Analogous Law* (3600).
(2) *Procedure and Practice* (3601).
(3) *Proof* (3602).
(4) *Form of Charge* (3603).
(5) *Grievous Hurt on Provocation* (3604).

3600. Analogous Law.—The word "voluntarily" was for the first time inserted by the amending Act of 1882.[12] The explanation makes both the last and this section subject to the three provisos qualifying Exception 1, s. 300. Their necessity has been explained under the last section (§§ 2828). As both section 325 as well as section 326 refer to this section as qualifying their provision, the nature of the weapon used in causing grievous hurt under this section is immaterial. It may be a simple or deadly weapon, but the section does not recognize the use of a lethal weapon as any more an aggravation than the use of a simple weapon.

3601. Procedure and Practice.—This offence is cognizable but summons should ordinarily issue in the first instance. It is bailable but is compoundable only with the permission of the Court before whom the prosecution is pending. It is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class.

3602. Proof.—The points requiring proof are:—

(1) That the accused caused bodily pain, disease or infirmity to another.

(2) That he did so with the intention or knowledge of thereby causing grievous hurt.

(3) That the hurt he caused was in fact grievous hurt.

(4) That he caused it on grave and sudden provocation.

(5) That he intended or knew himself likely to cause it only to the person from whom he had received that provocation.

3603. Charge.—The charge should run thus: -

"*I (name and office of Magistrate, etc.)* hereby charge you *name of the accused*) as follows:—

"That on or about the——day of——at——you voluntarily caused grievous hurt to A B on grave and sudden provocation given to you by

(12) Act VIII of 1882, s. 8.

the said A B [(*or if the person hurt is another*) say, on grave and sudden provocation given to you by C D and not intending to (*or* knowing it to be likely that you would thereby) cause hurt to A B] and thereby committed an offence punishable under section 335 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

3604. Grievous Hurt on Provocation.—This section deals with the causing of grievous hurt under the same circumstances as the offence causing hurt punishable under the last section. Except for the gravity of the hurt the two sections are identical. They are, therefore, necessarily subject to the same rules. It will be observed that both sections 325 as well as 326 refer to this section as qualifying their provisions. The nature of the weapon used in causing grievous hurt under this section would then appear to be immaterial. The fact that the accused was *ex hypothesi* maddened by provocation makes the choice of weapon a matter of convenience. If he ran out of his way to fetch a specially lethal weapon, it may be a sign of malignity which the Court would, of course, take into consideration in considering how far his act was spontaneous and done under the influence of provocation. A person who by a single blow with a deadly weapon (*dao*) kills another entering into his room at dead of night, where he and his wife were sleeping for the purpose of having criminal intercourse with her, would be fittingly punished under this section.[13] But one who deliberated about the choice of a weapon, and selected one peculiarly lethal, or though not lethal, used it on the deceased in a brutal or cruel manner, would not be entitled to the compassionate provisions of this section.[14] So where the particular act, such as nose cutting, or other designed personal disfigurement is one which imports calculated cruelty, it would aggravate the offence as much as the plea of grave and sudden provocation would mitigate it.[15]

The subject has been exhaustively considered under s. 300, exception I, to which reference should be made for a further commentary on this section (§§ 3085-3113).

Act endangering life or personal safety of others.

Any Mag. Non-cog. Summons. Bailable. Not comp. Summary.

336. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

[*Act*—s. 32. *Hurt*—s. 319. *Rashly or negligently*—s. 304-A, §§ 3240-3244.]

(13) *Chullundee*, 3 W. R. 55.
(14) *Yasin Sheikh*, 12 W. R. 8; *Beechoo Saont*, 19 W. R. 35; and cases under s. 300, Excep. 1.
(15) *Bhagwan Chagan*, 17 Bom. L. R. 68, 27 I. C. 552.

Synopsis.

(1) *Analogous Law* (3605).
(2) *Procedure and Practice* (3606).
(3) *Proof* (3607).
(4) *Principle* (3608-3610).
(5) *Endangering Life and Personal Safety* (3611-3613).
(6) *Negligence Without Danger* (3614-3615).

3605. Analogous Law.—A rash and negligent act endangering human life or the personal safety of others is a public nuisance. As such it is punishable under the exhaustive provisions of sections 268-294-A which constitute Chapter XIV relating to public nuisances. But an act may fail to be a public nuisance and yet endanger the life and limb of others. Such cases are intended to be made punishable under the provisions of this and the next two sections. These three sections then deal with the offence of criminal negligence when it does not possess any of the attributes defined in section 268, or entail the consequences therein stated. In that case it is an offence, though it is not then a public nuisance. But in many cases it would be both an offence as here described as well as a public nuisance as made punishable under the provisions of Chapter XIV. When it is so, the Code offers a choice of sections under which the accused may be charged and punished. The section has nothing to do with the actual causing of hurt. When it is so caused, the offence is heightened into one under the next section, and when the hurt caused is grievous, it is punishable under s. 338, when death, it is punishable under s. 304-A.

3606. Procedure and Practice.—This offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate, and may be tried summarily.

3607. Proof.—The points requiring proof are:—

(1) That the accused did an act.

(2) That it was done rashly or negligently.

(3) That its rashness or negligence was such as to endanger human life, or the personal safety of others.

3608. Principle.—This section applies only to an act done either intentionally or knowingly, but merely rashly or negligently. Where there is something more than a mere inadvertence, the act is punishable under a more serious section, and where it causes death, then the offence committed is that made punishable by s. 304-A.

3609. It has been already remarked that law punishes the doing of an act, whenever, it is done rashly or negligently, endangering the life or limb of others. It does not matter whether the act is done in respect of one's own property, or in respect of a right which the accused enjoys in common with others. The accused has no more right to trot out his vicious horse in a crowd of men than he has to create a false alarm by putting out all the lights of a theatre and thus create a panic imperilling the lives of those who rush for the exits.

3610. If the right belongs to the accused, *sic uteri tuo ut alienum non laedas.*[16] If it is a right he shares in common with others, he has reason to be all the more careful. But though it is so, all rashness and negligence is not necessarily criminal, for there is a margin of sufferable negligence, because all human nature is not the same; then there is the negligence, which is only civilly actionable; criminal negligence comes last of all, and it must be something so gross as almost to amount to reckless disregard of the consequences.[17] The difference between these sections (ss. 336-338) and those classed under public nuisances appears to be that while these sections refer to a danger or injury caused to any individual singly, the group of sections dealing with public nuisances deals only with cases when such injury affects the public or a person as a member of the public. The Code recognizes four degrees of criminality in criminal rashness or negligence irrespective of its being a public nuisance: (*i*) When it endangers human-life or limb without causing hurt, in which case the offence is punishable under this section; (*ii*) when the same act causes hurt, when it is punishable as provided in the next section; (*iii*) when it causes grievous hurt, when it is punishable as provided in section 338; and (*iv*) when it causes death, when it is punishable as provided in s. 304-A. In all these four offences the essential ingredients of rashness or negligence are common, but the enormity of the crime varies with the effects produced.

3611. Endangering Life and Personal Safety.—In the first place this section has no application, where the act is directed to the causing of positive harm as in the case of assault and hurt. It only applies when the act is done "rashly or negligently" but not with intent or knowledge to injure some one in particular or the humanity in general. It is an exception to the general foundation of criminality in most other cases in the Code, inasmuch as it is based neither on knowledge nor on intention, but may just as well be based on ignorance and nescience. It is not the act but the *manner* of doing it that is made punishable by this section. The act may itself be lawful, but it is done so rashly or negligently that it becomes a positive nuisance.[18] It may consist of either the positive doing of a thing or it may be the illegal omission of a thing which a party was bound to do. For example, a person may rashly drive through a crowded street. It is a positive act. He may ply a rotten ferry which sinks in midstream and causes loss of life. It is an illegal omission. In either case he is equally liable, for the danger to the public is in each case the same.

3612. In order to determine whether an act was done rashly or negligently within the meaning of this section, no distinction could, therefore, be made between the act and the instrument with which it is done. So the managers of a temple who had in a car festival driven a car out of repair, which endangered the lives of those attending the procession, were held to have brought themselves within the penal visitation of this section.[19] So an engine-driver who took an engine, which was letting

(16) "Use your own property in such a manner as not to injure that of another."

(17) Ss. 268, 304-A.

(18) *Nga Tha Ku*, (1879) S. J. L. B. 91.

(19) *Thipanna*, (1890) 1 Weir 337 (338).

off steam, along a public thoroughfare at a time when the traffic was exceptionally heavy and within a few yards of a large number of horses and carriages which had been parked together in spite of warnings from the police that to do so would endanger the public safety, was held to have brought himself within the mischief of this section, though he might have been permitted by his superior officer to take it out. The fact that he had believed that no danger would in fact be caused was immaterial, for the imputability of culpable rashness arises from acting despite the consciousness that mischievous consequences may follow but with the hope that they will not, and often with the belief that sufficient precautions have been taken to prevent them happening.[20] In such cases it is not necessary that the act should have actually caused hurt or injury to human life. For the offence consists in *endangering* human life, not in injuring it. The fact that it was injured may be a very good evidence of the dangerous nature of the act, and it will then be punishable under the next section, but it is not a *sine qua non* for the completion of this offence.

So it has been held that the mere pelting of stones on a person's house may not amount to any offence, if it does not possess the elements of mischief, unless it was done so rashly or negligently as to endanger human life or the personal safety of others,[21] but if a person intentionally throws them at or on a house under such circumstances that although he does not intend to cause hurt, and does not in fact cause hurt, he yet must know that he is likely to cause hurt, he commits an offence punishable under this section.[22] But a person who fires his gun in the air and hurls brickbats to keep off the rioters stands on a different footing.[23]

3613. Any act, whatever its nature and character, may become punishable under this section if it has the tendency to and does in fact endanger human lives.[24] The accused was the manager of a temple visited by the worshippers in large numbers on a certain day every year. There was a well near the gate of the outer courtyard of the temple, which though surrounded by a masonry platform about two feet high and another parapet about a foot above the platform was otherwise unprotected. On one such day at 8 or 9 P.M. a visitor had fallen into the well when the Police had a light placed on the one foot parapet. Later on this light was removed with the result that another man fell into the well a few hours later. The accused was clearly guilty of gross negligence and the Court had no difficulty in upholding his conviction.[25] Where the accused was found to have stored a great quantity of gunpowder or other dangerous ignitable or combustible matter or fluid such as wood, naphtha,[1] near a large town, the Court held the act to be indictable though the Court did not state that any noxious effluvia issued from the naptha, or that the air was corrupted by it, or that any bodily harm was done by it to any one; but to deposit and keep such a substance in such large quantities in a warehouse so situate, to the danger of the lives and property of the Queen's subjects, was held to be an indictable offence.

(20) *George Loveday*, (1886) 1 Weir 337.

(21) *Nga Tha Ku*, (1879) S. J. L. B. 91; *Ma Nyein* v. *Nga Sein*, 5 L. B. R. 100 F. B., 4 I C. 293.

(22) *Nga Myat Thin*, (1898) P. J. L. B. 426; *Maung Po Nyan*, 36 I. C. 145.

(23) *Babu Ram* 47 A. 606.

(24) *Williams*, 2 Str. 1167; *Taylor*, 2 Str. 167.

(25) *Narsing*, 18 C. W. N. 1176, 27 I. C. 195.

(1) *Lister*, 26 L. J. M. C. 196

The substance must be of such a nature, and kept in such large quantities and under such local circumstances, as to create real danger to life and property. The well-founded apprehension of danger, which would alarm men of steady nerves and reasonable courage, passing through the street in which the house stands, or residing in adjoining houses, is enough to show that something has been done which the law ought to prevent.(2) So the blasting of stones in a quarry and thereby projecting large pieces of stones so as to endanger the safety of persons in houses and on the high-ways adjoining the quarry, was held to be a misdemeanour indictable at common law.(3) So taking or conveying dangerous and combustible goods by public ways is an offence in consequence of the danger which it is likely to cause to the public. So the accused who was indicted for putting on board a ship an article of a combustible or dangerous nature, was held to be indictable, but to make him liable, he must be cognizant of its dangerous quality, and being cognizant, he should have refrained from giving notice of it.(4)

3614. Negligence Without Danger.—The negligence or rashness is only punishable under this section if it endangers human life or safety. A licensed taxi-driver was required by his license to wear spectacles when driving a car. He drove his car without spectacles and there was a serious collision. He was convicted of this offence but on revision his conviction was set aside on the finding that the accused was not responsible for the accident and that as a matter of fact the defect in his eyesight was not very great, so that if he drove without spectacles he could be held to have done a rash or negligent act.(5)

3615. This group of sections only deal with the offence of criminal negligence when it is wholly *involuntary*, in the sense that the hurt inflicted or threatened is not voluntarily caused or intended. The fact that it was voluntarily directed against one, but negligently inflicted on another, would not make the offence punishable under this section, but will be punishable as much as if the effect caused had been really intended.

For other cases on the subject, *see* s. 268 (§§ 2649-2677).

Causing hurt by act endangering life or personal safety of others.

337. Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Summons. Bailable. Comp. Summary.

[*Act*—s. 32 *Rashly or negligently*—s. 304-A, §§ 3240-3244.]

Synopsis.

(1) *Analogous Law* (3616).
(2) *Procedure and Practice* (3617).
(3) *Proof* (3618).
(4) *Form of Charge* (3619).
(5) *Principle* (3620-3622).

(2) *Lister*, 29 L. J. M. C. 196.
(3) *Ib.*
(4) *Williams* v. *The East India Co.*, 3 East 192 (201).
(5) *Abas Mirza*, 42 B. 396.

3616. Analogous Law.—This section occupies an intermediate place between the last and the next sections, punishing as it does an act in which without intention or knowledge of the likelihood of causing hurt to any one in particular, hurt is caused to some one by means of an act done rashly or negligently. The hurt so occasioned is, therefore, caused involuntarily though it is yet caused culpably. There may have been no design to cause hurt, no expectation that hurt would be caused, yet there may have been a want of due care not to cause hurt.(6) The fact that hurt was caused, and that there was a want of care, may be evidence of the insufficiency of care, but it is not conclusive. A person cannot be held criminally accountable for his rashness or negligence, merely because evil consequences flow from his act, and which was not done with the utmost degree of caution and circumspection which was necessary to safeguard it. He is only bound to use such a reasonable degree of caution for the exclusion of mischief as was appropriate to the nature of the act and the probability of danger in the particular case. There is really no clear line of demarcation between sufferable negligence and an actionable negligence, and the latter and criminal negligence. They differ rather in degree than in kind.

3617. Procedure and Practice.—This offence is cognizable but summons should, ordinarily, issue in the first instance. It is both bailable as well as compoundable and is triable by the Presidency Magistrate or a Magistrate of the first or second class, and may be tried summarily.(7)

3618. Proof.—The points requiring proof are:—

(1) That the accused did an act.

(2) That the act was done rashly or negligently.

(3) That it was done so as to endanger the life or safety of others.

(4) That it, moreover, caused hurt to some one in particular.

3619. Charge.—The charge should run as follows:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you caused grievous hurt to A B——by doing any act, to wit——so rashly or negligently as to endanger human life or the personal safety of others, and thereby committed an offence punishable under section 338 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3620. Principle.—The Code views criminal rashness or negligence from two distinct stand-points: (*i*) the stand-point of the public; and (*ii*) the stand-point of the individual considered as distinct and apart from the public. In the former case, it punishes it only when it amounts to a public

(6) Note M, Reprint, p. 154. (7) S. 260 (*a*), Cr. P. C.

nuisance; in the latter case it punishes the act because it injures the individual, it being immaterial whether it does or does not amount to a public nuisance also. Regarding it from the latter point of view, there are four sections in the Code which deal with negligence the criminality of which is graduated according to its degree and effect. The simple case is presented by the last section, in which the criminality depends upon the threatened danger and not on a danger causing any bodily hurt. The next stage is reached by this section when the act actually causes hurt; the case is aggravated when the hurt caused is grievous. If it results in death the section applicable may be 304-A. In point of criminality the last two offences are deemed equal, for the amount of evidence which ends in grievous hurt may equally result in homicide. Each offence is, therefore, punishable with the same amount of maximum punishment of two years.

3621. All these four offences possess the same elements in common —rashness or negligence and absence of "voluntariness" in causing hurt to any one (§ 3605). As such, they take a lower place in point of criminality than a voluntary criminal act in which there is either intention or knowledge of the consequence. The mental elements controlling criminality are thus fourfold: (*i*) rashness or negligence, (*ii*) voluntariness, (*iii*) knowledge or likelihood, and lastly (*iv*) intention. They each mark an ascending scale in point of criminality as determined by the actor's mentality which is the sole or almost the sole criterion of criminal capacity in the Code.

3622. The accused, a native Hakim, performed an operation on the outer side of the upper lid of the complainant's right eye causing it permanent injury. The instruments used were a pair of scissors and the wound was sutured with an ordinary needle and thread. The accused had neglected to take the most ordinary precautions, such as disinfecting and sterilizing the instruments for the operation, or using antiseptics. The medical evidence showed that the operation was needless and performed in a primitive way. The defence was s. 88; but the Court overruled it holding that when he consented to the operation the complainant could not realize the nature of the accused's act, and the harm and risk incidental to that act so as to consent to the operation in whatever manner it might be performed. In the result, it altered the conviction from s. 338 to one under this section, reducing the sentence to one of fine.[8] The administering of an injurious drug or potion to a person to induce love, in ignorance of its nature or effect and without care and caution and enquiry as to its properties, which causes serious illness to such person, is an offence under this section. The first accused received a potion from her lover the second accused which she administered to her husband to make him cease quarrelling with her. The potion was prepared by the second and third accused, who was his go-between and who knew that it contained *dhatura*. They were convicted under s. 307. But on appeal the conviction of the wife was altered to one under this section on the ground that she had merely acted carelessly in administering the drug to regain her husband's love.[9]

(8) *Gulam Hyder*, 39 B. 523.

(9) *Bhagava Giriyappa*, 19 Bom. L. R. 54, 38 I. C. 1003, following *Nidamarti* 7 M. H. C. R. 119 (where the subject will be found fully discussed); *Ramava*, 17 Bom. L. R. 217; *Pika Bewa*, 39 C. 855 (861).

Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Bailable. Summons. Comp. with Court's sanction.

Causing grievous hurt by act endangering life or personal safety of others.

338. Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

[*Person*—s. 11. *Act*—s. 32. *Rashly or negligently*—s. 304-A, Comm. *Grievous hurt*—s. 320.]

Synopsis.

(1) *Analogous Law* (3623).
(2) *Procedure and Practice* (3624).
(3) *Charge* (3625).
(4) *Grievous Hurt by Criminal Negligence* (3626-3629).

3623. Analogous Law.—The only difference between this section and the last is the difference of degree, the injury caused under the last section being hurt, while the injury here caused is grievous. In other respects the two sections are identical.

3624. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable and compoundable with the permission of the Court before which the prosecution is pending, and is triable by the Presidency Magistrate, and a Magistrate of the first or second class.

3625. Charge.—For form, *see* under the last section (§ 3619).

3626. Grievous Hurt by Criminal Negligence.—The main feature of the offence made punishable here is the causing of grievous hurt, by doing an act which was rash or negligent, but which was neither designed nor voluntary. The degree of culpability is, therefore, judged here by applying the objective test of effect produced by the negligence. The meaning of "grievous hurt" here is, of course, the same as it bears in section 320 in which the term is defined. There must be hurt answering in point of gravity to that description of hurt, added to which there must be evidence that it was *caused* by the accused. This raises a question as to the legal import of causation in cases of criminal liability, upon which reference had to be made in several places in the foregoing discussions (§§3007, 3008). It will, therefore, suffice here to summarise the result there arrived at. The accused who owned a paddy field in a jungly tract discharged a gun in the direction of a footpath close to his field wounding the complainant who was then passing along it in the leg which had to be amputated. The accused knew that the footpath was generally used by the public. The High Court confirmed his conviction but reduced the fine to Rs. 55.(10)

3627. In cases of criminal negligence, law regards the act irrespective of the contributory negligence, which cannot be pleaded to rebut criminal liability, though it is a recognized defence to rebut civil liability upon the same cause of action.(11) But though contributory negligence is by itself

(10) *Chandu*, 16 I. C. (M.) 511; following *Nidamarti*, 7 M. H. C. R. 119.
(11) *Per* Maule, J., in *Haines*, 2 C. & K. 368, followed in 6 M. H. C. R. (App.), 31; *Kanshi*, 28 P. L. R. 99, 100 I. C. 831; (1927) L. 165.

no offence, it may be proved to show that the negligence complained of was not such as should have in ordinary cases caused the hurt—in other words, that the cause imputed is too remote.[12] Take, for instance, the ordinary case of a driver of a carriage along a public street. Suppose that the regulations of the town require that no carriage should ply after sunset without light. The accused, however, drove his cart through the streets after sunset, in fact between 7 and 8 P.M., without lights, but he took care to drive it cautiously, shouting as he drove along to the people in front to get out of the way. Many got out of the way, but one foot-passenger who was old and deaf, could not probably hear the shouting: he was consequently knocked down, run over and killed. Could the accused be convicted either under section 304-A, or this section? The Magistrate had convicted him under this section, but the High Court quashed the conviction, holding that the death had not been caused by the rash or negligent driving: "That the driving was temperate and ordinary driving, there seems no doubt. That there was ample time for any person endowed with the fair exercise of his natural faculties to get out of the way, seems also undoubted. The driver and the passenger must necessarily assume that ordinary state of faculties. Then will the absence of lights supply that evidence of negligence and rashness? The Court are of opinion that it will not. That the absence of the candles was due to a violation of a distinct order of the accused is in her favour. That she directed careful driving when she discovered their absence, rebuts any possibility of inferring that rash driving was due to her directions, even if it existed, as it did not."[13] In the result the Court quashed the conviction. So the Bombay High Court refused to entertain the plea of contributory negligence in a case in which the accused, a driver, by allowing his cart to proceed unattended along a road, ran over a boy who was sleeping on the roadway. The boy may have contributed to his own injury by going to sleep on the side of the road, but it is obvious that the defendant by his negligence caused such injury. The Court, however, held the case to be one calling for nominal sentence and a fine of one rupee was imposed under this section.[14]

On the subject of rash or negligent driving, *see* section 279 and §§ 2759-2770 thereunder.

3628. Culpable rashness or negligence is not here confined to any of the specified acts mentioned in Chapter XIV. It may be displayed in any act irrespective of its nature or character. In one case, the prisoner was charged under this section along with several others for causing the death of his wife by holding sexual intercourse with her. He was a fully developed adult man, married to a young girl about 11 years and 3 months old, who had not attained puberty. Her death was caused by hæmorrhage from a rupture of the vagina caused by the prisoner's intercourse with her. The defence was that the prisoner had had sexual intercourse with the girl on several occasions before, and the circumstances of the case showed that this was possible, and even not improbable, though the medical evidence was to the effect that if such intercourse had previously taken place, the penetration was probably not so complete nor with so much sexual vigour as on the occasion when the injury was caused. The medical evidence was further to the effect that the girl had not attained puberty, and was immature and wholly unfit for sexual intercourse; that under such circum-

(12) 6 M. H. C. R. 31.
(13) 6 M. H. C. R. 31.
(14) *Mackaji*, (1884) B. U. C. 198.

stances sexual intercourse between the prisoner and the girl was likely to be dangerous to her, and to cause injuries more or less serious according to the degree of penetration effected.

The grievous hurt, for the causing of which the prisoner was tried by the High Court Sessions, was a dangerous lacerated wound in the vagina. And Wilson, J., told the jury that the previous acts of cohabitation of the prisoner with the deceased, though a proper matter for consideration, was not a defence to the same extent to this charge as it would be to a charge of culpable homicide; because an act may be a rash or negligent act, an act which a man with a proper regard for the safety of his wife and giving proper attention to what he was doing would not do, and yet the state of his mind may be very far short of knowledge that he is likely to cause her death or serious injury. What the jury had to consider was whether the act done was a rash and negligent act in that sense. As to the prisoner's marital right over the deceased the same learned Judge said: "Under no system of law with which Courts have to do in this country, whether Hindu or Mahomedan, or that framed under British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her, as for instance, if the circumstances be such that it is certain death to her, or that it is probably dangerous to her life. The law, it is true, is exceedingly jealous of any interference in matters marital and very unwilling to trespass inside the chamber where the husband and wife live together, and never does so except in cases of absolute necessity. But, as I have said, the criminal law is applicable between husband and wife wherever the facts are such as to bring the case within the terms of the Penal Code." The jury convicted the prisoner under this section, and the Judge thereupon sentenced him to rigorous imprisonment for one year.[15]

3629. So criminal negligence may be shown in the performance of a duty which a person undertakes for another. But in this as in other cases, the degree of care required is only reasonable and such as is customary among people undertaking similar duties. So it was held by the Allahabad High Court that the performance of an operation upon a woman with her consent for cataract according to the recognized method of Indian Surgery, the result of which was that she lost her eyesight, could not be held to constitute an offence under this section, though it might be civilly actionable,[16] but the case was held to be different where such an oculist performs a surgical operation upon an eyelid by means both primitive and negligent[17] (§ 3622).

See this subject further discussed under ss. 268, 290 (§§ 2649-2677, 2854-2857).

Of Wrongful Restraint and Wrongful Confinement.

339. Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Wrongful restraint.

(15) *Huree Mohun Mythee*, 18 C. 49.
(16) *Suraj Rali*, 5 A. L. J. 155.
(17) *Ghulam Hyder*, 39 B. 523.

Exception.—The obstruction of a private way over land or water, which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration.

A obstructs a path along which *Z* has a right to pass, *A* not believing in good faith that he has a right to stop the path. *Z* is thereby prevented from passing. *A* wrongfully restrains *Z*.

[*Voluntarily*—s. 39.]

Synopsis.

(1) *Analogous Law* (3630-3631).
(2) *Principle* (3632).
(3) *Meaning of Words* (3633).
(4) *What is "Wrongful restraint"* (3634-3637).
(5) *What is Obstruction* (3638).
(6) *No Obstruction* (3639-3643).
(7) *What is a Voluntary Obstruction* (3640).
(8) *The Act must be to Obstruct a Person* (3641).
(9) *Persuasion is Not Obstruction* (3642).
(10) *Restraint implies Desire* (3643).
(11) *Resistance under Claim of Right* (3644).
(12) *Exception* (3645-3646).

3630. Analogous Law.—This section defines "wrongful restraint" and the next section "wrongful confinement" which are then declared to be offences punishable under the provisions of sections 341 and 342; more aggravated cases being met by subsequent section. Both the concepts have many elements in common—in fact the two terms convey the same import, for wrongful confinement implies and is only a form of wrongful restraint, the only difference being that in confinement the restraint is complete and not a partial one. In the orginal Draft Bill this section was intended to be illustrated by the following examples, all of which with the exception of the first, which is now in its modified form the sole illustration, were subsequently dropped :—

"(*a*) *A* builds a wall across a path along which *Z* has a right to pass. *Z* is thereby prevented from passing. *A* wrongfully restrains *Z*.

"(*b*) *A* illegally omits to take proper order with a furious buffalo which is in his possession (*see* clause 273), and thus voluntarily deters *Z* from passing along a road along which *Z* has a right to pass. *A* wrongfully restrains *Z*.

"(*c*) *A* threatens to set a savage dog at *Z*, if *Z* goes along a path along which *Z* has a right to go, *Z* is thus prevented from going along that path. *A* wrongfully restrains *Z*.

"(*d*) In the last illustration, if the dog is not really savage, but if *A* voluntarily causes *Z* to think that it is savage, and thereby prevents *Z* from going along the path, *A* wrongfully restrains *Z*."

As to these illustrations, it may be added that they were intended to illustrate the section of which the following explanation was then a part:—

"*Explanation.*—A person may obstruct another by causing it to appear to that other impossible, difficult or dangerous to proceed, as well as by causing it actually to be impossible, difficult or dangerous for that other to proceed."

These illustrations were objected to by the critics of the Bill as being "remarkable for perverted ingenuity not unfrequently displayed in this work."[18] They were defended by the Law Commissioners, but the force of the criticism was subsequently felt, entailing their deletion from the Code.

3631. The two offences described in this and the next section are instances of what is designated "false imprisonment" in English Law. Hawkins classifies an unlawful imprisonment under the head of assault: for he says it is a wrong done to the person of a man, for which besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the King's peace, a loss which the State sustains by the confinement of one of its members, and an infringement of the good order of society.[19] Evidently the codifiers took the same view, and hence the enactment of these sections under this Chapter.

3632. Principle.—Following the principle that every man's person is sacred and that it is free, law visits with its penalties those who abridge his personal liberty, though he may have no design upon his person. But the fact that he controls its movements for ever so short a time is an offence against the King's peace, for no one has the right to molest another in his free movements. This right may, however, accrue under legal process of a Court or other officer empowered in law to order personal arrest conditional or unconditional, or from a circumstance stated in the explanation, that is in good faith under a claim of right to property. In any other case the offence is complete if one's freedom of movement is suspended by an act of another, done "voluntarily," that is to say, done with that intention or with the knowledge or belief in its likelihood.[20] The accused may not be punishable for the act, for it may be that his act was protected by any of the general exceptions before set out, but his act nevertheless amounts to "wrongful restraint," as that term is here defined.

3633. Meaning of Words.—"*Voluntarily obstructs*": The word "obstruct" is used here in its secondary metaphorical sense as implying prevention whether by means of physical obstacle, or otherwise. This is the sense in which the term has been used in sections 184, 224, 225 where its use in a narrower sense as confined to physical obstruction is evidently out of place.[21] "*Proceeding in any direction*," even vertically.[22]

3634. What is "Wrongful restraint."—Unlike the definitions of many other terms used in the Code, this definition defines not only a term but a complete offence which is punishable under section 341. The principal ingredients of this offence are voluntariness and obstruction, the only obstruction excepted being of a private way under a claim of right.

3635. The term "voluntarily" has been already defined[23] (§§ 334-343). It implies the exercise of volition or will in causing the

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(18) First Report s. 387.
(19) 1 Hawk, P. C. C. 60 s. 7; 4 Black, 218.
(20) S 39
(21) S. 39.
(22) *Chhagam*, 29 Bom. L. R. 494, (1927) B. 369.
(23) *Shamlal*, 4 Bom. L. R. 81 (82).

effect with the intention of causing it, or at least, with the knowledge that it was likely to be so caused.

3636. In ordinary cases the act of a conscious human being is a voluntary act. But it is not the act alone that law looks up to. Its character depends upon the nature of the act no less than upon the intention of the actor. The fact that a person did a certain act believing himself justified in doing it does not make the act any the less criminal unless the belief is such as justifies the act under the provisions of section 76 or 79. Those sections only justify a mistake of law and not a mistake of fact. The only mistake of law justifiable is that referred to in the exception, and the effect of which is to enlarge the operation of these sections so far as they apply to the offence here defined. The operation of the exception is, however, limited within a narrow compass, inasmuch as it only extends to a mistaken belief in a right of way. Any other belief, if arising out of mistake of law, is not protected.

3637. The accused, a Sub-Inspector of Police, having lost his horse found a similar horse tied up openly in one Baku's premises. His wish being made at once the father to his thought, he jumped to the conclusion that the horse was his, whereupon he forthwith charged Baku for being either a thief or a receiver of stolen property. He was told that Baku had purchased the horse from Sheo Saram Sahai, whom he sent for and ordered to give bail for his appearance whilst an investigation was pending. Sheo Saran wanted to go home, but the accused would not permit him to leave the Thana till he had given bail. He was prosecuted for wrongful restraint, and the High Court confirmed his conviction on the ground that his act as a public servant in detaining Sheo Saran was not done in good faith, as there was no reason to suspect him to be concerned in the theft of the horse,[24] and, therefore, his detention was illegal and as he prevented him from proceeding in a direction (*i.e.*, his own house) in which he had a right to proceed, his act amounted to wrongful restraint within the meaning of this section.[25]

As was observed in a Madras case : "The slightest unlawful obstruction to the liberty of the subject to go *when* and *where* he likes to go, provided he does so in a lawful manner, cannot be justified, and is punishable as an offence under section 341 of the Indian Penal Code."[1] The complainant in this case was a wanderer, and the police thereupon put him down as a "suspect" and passed him on in charge of policemen from one police beat to another until he reached a certain place where his identity being established he was set at liberty. The accused was prosecuted for wrongful restraint, but the Sessions Judge acquitted him, holding that there was no "physicial compulsion or restraint" or any act indicative or "suggestive of such." The High Court held that the fact that he was taken under a police escort from one police station to another, the freedom of his movment was at all events wilfully obstructed, and this amounted to wrongful restraint.[2] The rest of this judgment is unintelligible, for the Court goes on to say : "As the finding of the Judge amounts in sub-

(24) S. 54, "*Fourthly*," Cr. P. C.
(25) *Sheo Saran Sahai*, 10 W. R. 20.
(1) *Saminanda Pillai* (1882) 1 Weir 339 (340).
(2) *Saminanda Pillai*, (1882) 1 Weir 339.

stance to a finding that the complainant was a free agent, and that the police only observed him without interfering with his liberty, we are unable to interfere." But if the "observation" guided the complainant's steps to the successive police stations where he had no option but to go to, one fails to see why the High Court were unable to interfere.

3638. What is Obstruction.—The obstruction here spoken of must be a physical obstruction, though it may be caused as much by the use of physical force, as by the use of menaces and threats. As the Law Commissioners put it: "Suppose that A presents a pistol at Z and threatens to fire at him if he goes in a certain direction in which he has a right to go, and thereby prevents him from going in that direction, does not A wrongfully restrain Z though in truth the pistol is not loaded?"[3] This was said in defence of the two last illustrations appended to the Draft Bill, and in which the offence was said to lie in the threat to set a savage dog at Z, if Z went along a path along which Z has a right to go. A is stated to commit this offence, whether the dog be or be not savage if A induced Z to abandon the path by inducing in him a belief that the dog was really savage. These illustrations have been advisedly omitted, for the offence in such a case may as much be intimidation as wrongful restraint, and it is not wrongful restraint if A's case falls under the exception since added to this section. But assuming that there is no question about its applicability the illustrations are only useful so far as they show that the obstruction here spoken of does not necessarily mean a physical impediment, but may as much consist of the use of physical force to control one's movements as of a threat or order which operates on another's will, in consequence of which he changes its natural operation. In fact the offence is determined by the effect caused, and not by the nature of the act by which it is brought about. So where the accused removed a ladder and thereby detained a person on the roof of a house, the act was held to amount to "obstruction" within the meaning of this section.[4]

3639. No Obstruction.—The obstruction here referred to must be direct and actual, not indirect and ideal, such as putting pariahs on the way of a Hindu procession which deterred the latter from proceeding on its way,[5] or snatching away licenses from the boatmen with the result that the authorities did not permit their boats to proceed further up a channel[6]; or where the accused ploughs up a thoroughfare which renders it less passable but not impassable.[7] As was observed in a case: "S. 339 requires that the obstruction should be so complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed. The wrong here defined is a wrong against the person, and is not completed where the person is at liberty to go in any direction he pleases."[8]

What is a Voluntary Obstruction.

3640. Again an obstruction may be caused "voluntarily" as much by an act intended to cause it as by an act by which the accused knew that it was likely to cause it. In such a case the primary object of the accused may be

(3) First Rep., s. 389.
(4) *Telapolu*, (1884) 1 Weir 340.
(5) *Venkalasubba Reddy*, (1910) M. W. N. 72; 5 I. C. 851.
(6) *Venkataramiah*, 5 M. L. T, 207, 4 I. C. 1117.
(7) *Rama Reddi*, 2 M. L. W. 1035, 30 I. C. 749; *Ram Lala*, 15 Bom. L. R. 103; 19 I. C. 177.
(8) *Ram Lala*, 15 Bom. L. R. 103, 19 I. C. 177.

entirely different, but if it had the effect of suspending the freedom of movement of the other, it is a voluntary obstruction, and consequently, a wrongful restraint, whatever may have been the motive, object or the intention of the accused. The primary intention of the Police Sub-Inspector in Sheo Saran's case[9] was certainly not to obstruct Sheo Saran, but his high-handed act had that effect, and he knew it. He was, therefore, held responsible for it. So where the accused demanded a toll of fifteen rupees from the complainants for being permitted to take their carts across a certain ghaut, in consequence of which their carts were detained, it was held that as the demand of the accused was illegal their detention of the carts of the complainants was illegal, and it, therefore, amounted to a wrongful restraint within the meaning of this section.[10]

In this case the demand was presumably not *bona fide,* otherwise in view of the exception the accused could not have been convicted. This was the distinguishing feature of another case in which the accused, a bailiff of a Civil Court, went to execute a warrant of arrest of the judgment-debtor, and for which he proceeded to his house accompanied by some of the decree-holders men. On arriving there the bailiff noticed a *palki* with closed doors coming out of the male apartment of the judgment-debtor's house. The accused believing that the judgment-debtor was effecting his escape in that way, stopped the *palki* and examined it, notwithstanding the protests made by the men accompanying it. He found therein a pardanashin lady of quality who prosecuted him for wrongful restraint, but the accused was acquitted in view of the provisions of section 79 of the Code, the Court holding that his act though unjustifiable was *bona fide* and under the circumstances excusable.[11] But for the exceptional circumstances the act was a voluntary obstruction, which would have been punishable under section 341. The same view was taken in another case in which the accused, a toll-keeper, demanded a toll which the cartmen declined to pay and left the place with their bullocks leaving their carts behind, and in which case the act of the accused was held justifiable because it was done in good faith.[12]

The Act must be to Obstruct a Person.

3641. The question what amounts to a voluntary obstruction is a question of fact, but it is a question which depends upon the right interpretation of the legal concept "obstruction." Suppose, a person was threatened with a criminal prosecution if he persisted in going along a certain way, and fearing trouble he changed his course, would it be obstruction? It is apprehended not, because, in order to amount to an obstruction there must be the unconditional prevention of another's movements, and not merely a threat that if a movement is persisted in, it might entail certain legal consequences. In this case the person does no more than warn the other of the consequence of his persistency. He could not be said to obstruct him. So a person who remonstrates verbally about another man's trespass cannot be said to obstruct him.[13]

But suppose a man is taking his cart across a river. The accused demands a *ghat* toll, which he declines to pay for the cart, but pays for him-

(9) 10 W. R. 20; see *ante.*
(10) *Jowahir Shah,* 10 W. R. 35.
(11) *Padati Chenchu Reddi,* (1883) Weir (3rd. Ed.), 253.
(12) *Kanai Lal Gowala,* 24 C. 885.
(13) *Karaturi Nagamma,* (1882) 1 Weir 339.

self. He is permitted to go but not with the cart. He cannot leave his cart behind, and does not go. Can he complain of wrongful restraint? It is apprehended not; because all that the section protects is the *obstruction of any person,* which cannot be said of a person who is free to go but not with his impediments. This was evidently the view taken, though not expressed, in the case of a person who was loading his cart to proceed to another *hat* when persons interested in the *hat* he was leaving, upturned the cart, so that its contents lay on the ground. The complainant was, however, not molested. The Magistrate convicted the accused under section 341, but Pigot and O'Kinealy, JJ., altered it to one for mischief under section 425.(14) The case of the accused who had placed an obstruction, in a road over which the complainant had a right of passage for men and beast, so as to prevent the cattle from passing, but leaving a loop for men to pass through was decided on the same ground, the Court holding that as the act did not prevent a person from proceeding in a direction in which that person had a right to proceed, the act was not punishable under this section.(15)

Persuasion is Not Obstruction.

3642. So again, a person may persuade another to desist from a certain course of conduct, in which case it cannot be said that he had illegally obstructed him. So where a person invited another to his house to give evidence, which he did not like to give, and whereupon he wanted to leave the house, but which the accused verbally told him he should not do without giving the evidence for which he had been called, but used no physical coercion or threat of personal injury; and the complainant did not leave the house for fear of offending the accused, it was held that the act of the accused could not be construed into an obstruction. As the Court remarked: "The moral influence which could have operated under these circumstances must have been a mere general dislike or dread of giving offence to the accused but if through the existence of a feeling like this an expression of a desire of a mere silence is to be converted into the exercise of criminal restraint, no person of any social standing would be for a moment safe from criminal charges based on the weakness and folly of other people.(16)

Restraint Implies Desire.

3643. Again, the word "obstruction" or "restraint" implies a desire to proceed in a certain way—no movement of the body, but a desire to cause motion. If, therefore, there was never any such desire, there could be no obstruction, though the accused may have intended it, and even expressed his intention to restrain another should he move from his present position.(17) But in such a case how is the complainant's desire to be proved? It is apprehended by his evidence, and the circumstances of his case.

Lastly, this is an offence, which recalls the provisions of section 95. For though it is perfectly true, that any or the slightest obstruction causing another's detention for an infinitesimal period of time would bring the

(14) *Juggeshuar Dass,* 12 C. 55; *contra* in *Lahanu,* 27 Bom. L. R. 1419.

(15) (1889) 1 Weir 340; *Rama Reddi,* 3 M. L. W. 1035, 30 I. C. 749, 16 Cr. L. J. 701 (where the accused had ploughed up a path); *aliter,* where the accused restrained the horse which obstructed the rider, *Peria Ponnuswami,* 100 I. C. 544, (1927) M. 506.

(16) *Per* West and Nanabhai, JJ., in *Lakshman Kalyan,* (1875) B. U. C. 89; *Sreenath Banerjee,* 9 C. 221.

(17) *Muhammad Din,* (1894) P. R. No. 36.

obstructor within the penal visitation of this offence, still, it is not what the section was intended for. A person who detains another under circumstances in which a reasonable man in the position of the parties could not complain, was certainly not intended to be dealt with for an offence under this section. To hold otherwise would be to place crimes above the usual amenities of society (§ 3642).

3644. Resistance under Claim of Right.—This case draws attention to cases in which the obstruction though voluntary, is still not "wrongful." It is so, not by virtue of anything in the section, but because of the general exceptions which override all penal provisions of the Code and extenuate acts which are otherwise exposed to their penalties. The last case cited was an instance of this character. Other instances might easily be multiplied. A person who *bona fide* believing in his right to a property asserts his claim thereto cannot be convicted of this offence.[18] The complainant and his wife were in possession of a certain house which they claimed under a will. The accused claimed it from the same person by his right of adoption. As such, he took possession of it during the absence of the complainant, turning out the wife, and locking up the premises. He was prosecuted for wrongful restraint, but the Court dismissed the complaint, holding the accused's act to have been done under a *bona fide* claim to the property.[19] The same view was taken of the accused who had prevented the complainant from re-building a party-wall between his and the complainant's back-yard,[20] and of one who locked up the door of the complainant's house during his absence to prevent his entry therein.[21] The accused tied up and took to the police station a person who was found drunk and disorderly. It was held that the accused was justified by the common law of England which, in the absence of any Statutory prohibition, applied equally to this country.[22]

Sections 76, 79.

3645. Exception.—All these are cases decided independently of the exception made to this section. They have been decided on the minimum requirements of law to support a criminal liability. The cases contemplated by the exception are necessarily limited. For they refer only to a dispute over a *private* right of way, in which case a person acting under a *bona fide* claim of right is held to be protected. Such a case arose where the complainant claimed a right of way through the premises of the accused, which the latter denied, and built a wall-across to prevent the exercise of the right claimed by the complainant, in which case the Court was obviously justified in staying its hand under this section.[23]

(18) *Sheo Nath*, (1914) P. L. R. 34, 24 I. C. 844; *Kalidas*, 30 C. W. N. 192, (1925) C. 1214.

(19) *Howana* (1889) B. U. C. 451; *Jones* v. *Foley*, (1891) 1 Q. B. 730; *Bandu* v. *Naba*, 15 B. 238 (241); *Kanthappa* v. *Sheshappa*, 22 B. 898; distinguished in *contra*, in *Haji Gulam Muhd.*, 43 B. 531, following *Rudrappa*, v. *Narsingrao*, 20 B. 213 (submitted—*Haji Gulam Muhd.*, 43 B. 531 wrongly decided for reasons stated in the text).

(20) *Venkatachalam*, (1881) 1 Weir 339.

(21) *Arumuga*, 34 M. 547; *Samratti*, 20 Bom. L. R. 106, 44 I. C. 463.

(22) *Ramasami Aiyar* 44 M. 913, following *Potaraju*, 36 M. 216; *Timothy* v. *Simpson*, 4 L. J. (N. S.) Ex. 81, 40 R. R. 722; *Light*, 27 L. J. M. C. 1.

(23) *Haveli*, (1886) P. R. No. 25; followed *Natha Singh*, (1910) P. R. No. 22, 7 I. C. 493.

3646. The question whether what a person has done was done in good faith, is, of course, a question of fact and not of law. A person may have no right at all and yet he may believe in its existence. But there can be no *bona fide* belief after the question has once been decided by a competent Court.

Wrongful confinement.

340. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Illustrations.

(*a*) *A* causes *Z* to go within a walled space, and locks *Z* in. *Z* is thus prevented from proceeding in any direction beyond the circumscribing line of the wall. *A* wrongfully confines *Z*.

(*b*) *A* places men with fire-arms at the outlets of a building and tells *Z* that they will fire at *Z* if *Z* attempts to leave the building. *A* wrongfully confines *Z*.

[*Wrongfully restrains*—s. 339.]

Synopsis.

(1) *Analogous Law* (3647-3649).
(2) *Principle* (3650).
(3) *What is Wrongful Confinement* (3651-3659).
(4) *"Circumscribing limits"* (3653).
(5) *Imprisonment within an Imprisonment* (3654).
(6) *What is Wrongful* (3655).
(7) *Lawful Arrest may Become Unlawful* (3660).
(8) *Respondeat Superior* (3661-3663).

3647. Analogous Law.—"Wrongful confinement" is a species of "wrongful restraint" as defined in the last section. Wrongful restraint means the keeping of a man out of a place where he wishes to be, and has a right to be. Wrongful confinement is the keeping of a man within limits out of which he wishes to go, and has a right to go. In wrongful restaint there is only a partial suspension of one's liberty of locomotion: in wrongful confinement there is a total liberty, but it is confined to a circumscribed area beyond which there is a total suspension of liberty. The period of that suspension is immaterial for completing the offence; it is only material for the purpose of aggravating it. So is also the manner of the confinement.

3648. Both the last section as well as this, of course, refer only to a restraint or confinement which is "wrongful" in the sense of their being "illegal." They have no reference to restraints and confinements authorized by law or under colour of authority when they are justifiable under the provisions of section 79. Acts not so justifiable would, however, be punishable under this section whatever may have been the conception of his duty by the accused (§§ 584-590).

3649. This section defines the offence of "wrongful confinement" which is, as such, punishable under section 342. That section, however,

refers only to a confinement for less than three days, after which the penalty incurred for the offence is that provided in the next section (s. 343). That section, again, is confined to the offence, the duration of which does not exceed ten days, after which a still higher penalty as provided in the next section (s. 344) is incurred. Besides prolonged confinement there are other circumstances of aggravation, such as, for instance, confinement of a person for whom a writ for his liberation has been issued (s. 345), or confinement in secret (s. 346) or confinement for the purpose of extortion of property (s. 347) or a confession (s. 348) in which case the aggravating factors are the same which enhance the penalty ordinarily incurred for causing hurt (ss. 300, 331).

The procedure for redress in a case of wrongful confinement will be found set out under section 342.

3650. Principle.—This section carries the offence of wrongful restraint a step further. For while in the case of wrongful restraint there is only an abridgement of one's liberty, in a case of confinement there is an absolute suspension of liberty beyond certain prescribed limits. The difference between wrongful restraint and wrongful confinement is only the distinction between obstruction in one direction and obstruction on all sides. Law, therefore, esteems this offence as far more serious than wrongful restraint, and it has consequently made more exhaustive provisions for combating it.

It is sometimes difficult to say whether an act amounts to wrongful restraint or a wrongful confinement. And, indeed, this is not surprising, seeing that there is an element of wrongful restraint always present in wrongful confinement (§§ 3647-3649). But all the same the two offences are distinct and distinguishable (§§ 3651-3654).

3651. What is Wrongful Confinement?—Confinement is a form of restraint in which a person is restrained from going beyond certain prescribed limits, and it becomes "wrongful" if the restraint is illegal and the person is prevented from going where he has a right to go. If one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he is restraining him, it may be wrongfully, but it does not amount to confinement legal or illegal.(24)

As Coleridge, J., said speaking of the allied offence of false imprisonment: "A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed; but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning him would confine him, except by prison breach."(25) "In general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room, and it is not necessary in order to constitute an imprisonment that a man's person should

(24) *Per* Patteson, J. in *Bird* v. *Jones*, 7 Q. B. 742 (751, 752).

(25) *Bird* v. *Jones* 7 Q. B. 742.

be touched. The compelling a man to go in a given direction against his will may amount to imprisonment.....imprisonment is a total restraint of the person for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him."[1]

3652. The detention of the person wrongfully confined must then be involuntary. He must be unwilling to remain within the circumscribed limits prescribed for him. If he submits because he must, it is no willingness. For in order to neutralize the effect of the act the consent to leave must be free and not obtained under fear or misconception.[2] There can be no wrongful confinement when a desire to proceed has never existed, nor can a confinement be wrongful if the person confined chooses to remain where he is.[3] It may be that the other has in such a case exercised his influence or dominated his will, but the use of moral influence is not punishable, whatever may have been its effect upon the will of another[4] (§ 3642).

As Coleridge, J., said: "It is one part of the definition of freedom to be able to go whithersoever one pleases, but imprisonment is something more than the mere loss of this power: it includes the motion of restraint within some limits defined by a will or power exterior to our own."[5] The domination of that will or power must be direct so as to leave the other no option but to submit to it. It must be such as if disobeyed, the person knows that the other would enforce obedience by use of physical coercion. A policeman may, for example, intimate to a person that he must consider himself as in his custody. He may not touch his person, or use any force at all. It is enough, for the other knows the consequence of disobedience. In this sense moral force may do the work of physical coercion, which is then unnecessary.[6] Such was the case of the Police Superintendent who wrote to the plaintiff to proceed to and appear before the Court of a certain Magistrate, at the same time sending two constables to see that he spoke to no one, in which case the arrest was held to be as complete as confinement, because there was the moral suasion backed up by physical force to be put to use if necessary.[7]

Circumscribing Limits.

3653. This case shows, and as has been already remarked before, it is no part of a wrongful confinement that the person confined should remain in one place. As was observed by the Madras Court that "the retainnig of a person in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises that will."[8] "If in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside

(1) *Per* Patteson, J., in *Bird* v. *Jones*, 7 Q. B. 742.
(2) S. 90.
(3) *Muhammad Din*, (1894) P. R. No. 36.
(4) *Lakshman Kalyan*, (1875) B. U. C. 89.
(5) *Bird* v. *Jones*, 7 Q. B. 742.
(6) *Venkatachala Mudali*, (1881) 1 Weir 341.
(7) *Parankusam* v. *Stuart*, 2 M. H. C R. 396.
(8) *Ib.*, p. 398.

to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it."[9] This is evident from the use of the phrase "beyond certain circumscribing limits." But what should be the extent of such limits. Suppose the inhabitants of a walled city are not permitted to leave it, and their detention within the walls is secured by stationing an armed force at the gates, should all the inhabitants be said to have been confined? No! because though they were all confined within circumscribed limits, still their confinement would not be wrongful, unless (*a*) the power that ordered their detention had no authority to order it, and (*b*) the persons so detained wished to go out of the city, and which they were not allowed to leave. The "circumscribing limits" may thus be extensive so long as they are limited, but they may be so extensive as the limit placed may become indeterminate, as in the case of countries where the residents are not permitted to leave their boundaries without a passport, in which case the arbitrary refusal of a passport would not convert residence into a wrongful confinement.

Imprisonment within an Imprisonment.

3654. The fact that a person is in confinement does not preclude the possibility of this offence. For there may be an imprisonment within an imprisonment. For instance, a person rigorously imprisoned may be illegally confined in a solitary cell, in which case the person ordering his confinement would be as much guilty of this offence as if the person confined had been a free man. A prisoner confined in a jail was suffering from dysentery. The civil surgeon ordered the jail hospital assistant to give him some enemas, which the former tried to do. The prisoner objected, and the hospital assistant thereupon ordered his being confined in a solitary cell. He was held to have wrongfully confined him.[10] In this case the confinement was held to be wrongful because the accused had no power to order the confinement of convicts in solitary cells, and even if he had the power his order was perverse and harsh and as such, entitled to no protection under section 79.

What is Wrongful?

3655. There can, of course, be no *wrongful* confinement, unless the order of detention is illegal. If it was legal though improper, it may or may not be wrongful, for the question then depends upon the interpretation of section 79 which prescribes the limits within which such wrongful acts are condoned. If the power of arrest was legal the fact that it was exercised with undue harshness would not convert a legal arrest into an illegal one.[11] But if the arrest was illegal, it suffices to make the confinement wrongful: it is not then necessary to prove superadded malice or corrupt motive, as in the case of an offence under section 220.[12] This was clearly pointed out by Birdwood and Jardine, JJ., in a case of which the facts were these: The accused, an Abkari Inspector, visited

(9) *Per* Coleridge, J., in *Bird* v. *Jones*, 7 Q. B. 742 (746).
(10) *Baistab Charan Shaha*, 30 C. 95.
(11) *Amar Sing*, 10 B. 506.
(12) *Narayan Babaji*, 9 B. H. C. R. 346; *Dhania* v. *Clifford*, 13 B. 376.

a toddy shop where the complainant and one Dhanjibhai were employed as agents for the sale of toddy. Having reason to suspect that an offence under the Abkari Act[13] had been committed, the accused made an inquiry, in the course of which the complainant made certain statements implicating his fellow servants. The accused thereupon resolved to prosecute Dhanjibhai and make the complainant a witness in the case. But to prevent his being tutored, he ordered a peon to bring him to his camp, and there detained him during the night, and on the following morning sent him in charge of a sepoy to a Magistrate's Court where the complainant repeated the statements made by him before the accused. He was then set free. The accused prosecuted Dhanjibhai, and in the course of his trial admitted in his deposition that he had ordered his peon to bring the complainant to his camp, and had detained him there during the night.

After the conclusion of Dhanjibhai's trial, the complainant charged the accused with wrongful confinement under section 342 of the Code. The Sessions Judge upheld the discharge of the accused on the ground that he had acted "without malice and to the best of his judgment," but the High Court held both those considerations immaterial, and the case was, therefore, remanded for further inquiry.[14] This suggests another inquiry. The Magistrates are often in the habit of placing witnesses in a case to be examined before them under watch. There is nothing illegal in adopting this course, so long as the witnesses are merely watched against communicating with those already examined or interested in the case. They have also the power to restrain witnesses who have been examined if they have reason to suspect that they are likely to tamper with other witnesses. They may for the purpose even turn out persons from their Courts, for, as Lord Abinger, C. B., said: "Every person who administers a public duty has a right to preserve order in the place where it is administered, and to turn out any person who is found there for improper purposes."[15] But this would seem to be the limit of the inherent power of Court. It would not justify an act placing all persons present to be under restraint pending their examination. Such an act may be done from the best of motives, but motives do not count in crimes of this description. The only defence possible in a case of wrongful detention is good faith and mistake of fact protected by section 76 (§§ 581-598).

3656. But in judging of the exercise of good faith regard must be had to all the circumstances of the case, and motive is then a very material circumstance. So, where the complainant went to lodge a complaint with the accused, a Sub-Inspector of Police, and the latter for some reason or other detained him at the Thana, but after a short interval after consulting his superior officer, he discharged him, whereupon the latter prosecuted him for wrongful confinement, Jackson, J., held that though the act of the accused in detaining the complainant was wrongful, still his act was protected under section 79 inasmuch as he had consulted his superior officer, and there was no malice or motive

(13) Bom. Act V of 1878.
(14) *Dhania* v. *Clifford*, 13 B. 377.
(15) *Jewison* v. *Dyson*, 9 M. & W. 586.

shown for the act so as to explain it otherwise than on the ground of a *bona fide* mistake. "There was no voluntary obstruction or restraint, but there was probably excessive and mistaken exercise of powers, which, of course, is not civilly excusable in a police officer, and especially in one who must be a man of some experience; still, it is not sufficient to render him liable to penal consequences."(16)

3657. But in the case of public servants, the question that the power exercised was legal is not a conclusive answer to a charge of wrongful confinement. If the power exercised was legal, it may justify a certain degree of harshness and impropriety, but there is a limit beyond which even the exercise of such power becomes penal. Such a case may arise not only when a legal power is exercised maliciously for an illegal purpose, but also where its execise is attended with such high-handedness, tyranny or oppression as cannot be set down to mere misconception of duty or a *bona fide* mistake. For instance, a police-officer, making an investigation into a case under the provisions of Chapter XIV is empowered to summon witnesses likely to be acquainted with the facts of a case.(17) But that does not justify their compelling a person to go with them, practically in confinement, and where they do so, they have to thank themselves if they are convicted for wrongful confinement.(18) The same fate should befall officers of police, who are wont to restrain their witnesses in a case challaned by them from being at liberty to move about or hold communication with persons disapproved of by them. Such a practice is all too common in the mofussil, and it is sometimes defended on the ground that their witnesses were otherwise likely to be tampered with by persons interested in the liberation of the accused. This may, or may not be true but law does not sanction the doing of an evil so that good may come. It does not suffer the doing of a positive wrong to avert a contingent possibility of perjury.

3658. So the police have no power to re-arrest a person for the same offence after he is discharged by a Magistrate, and a person re-arresting a person so discharged would be rightly convicted of wrongful confinement.(19) In such a case the fact that the accused did not *know* that his act was illegal is immaterial. For it is at least a mistake of law which is not a justification to a criminal charge. The accused, a police-officer of the British force, arrested the complainant, a British subject, who committed an offence in a Native State; and then returned to his British domicile. The Native State applied for his extradition, and the complainant thereupon petitioned the Magistrate of his district who intimated to him through the accused his exemption from arrest without his warrant or that issued by the Political Agent. Twelve days after the communication of this order by the accused to the complainant, a police-officer from the Native State came to the accused with a warrant of the State for execution, upon which the accused directed the complainant's arrest. The latter informed him of the

(16) *Budrool Hossein*, 24 W. R. 51.
(17) S. 160, Cr. P. C.
(18) *Lakshmi Gadu* (1886) 1 Weir 121.
(19) *Ramdass Sadhoo* v. *Anund Chunder Roy*, 19 W. R. 27.

order passed by the District Magistrate, but he was nevertheless detained in custody till the matter was reported to the First Class Magistrate, who ordered his discharge. The complainant thereupon prosecuted the accused for wrongful restraint and confinement, and it was held that the accused was guilty of wrongful confinement, to which the accused could not set up the plea of a mistaken view of uncertain law as a defence. Nor could he defend his illegal act on the strength of many years' practice. The fact that he conformed to practice showed that he could not be charged with official perversity, while the fact that he promptly placed the whole matter before a Magistrate showed that he had no intention to exercise his authority harshly or unreasonably. But these were held to be reasons which justified the Court in refusing to sanction the accused's prosecution in the exercise of its judicial discretion, but they did not make the accused any the less guilty under section 342.(20) But there is naturally a great gulf between such venial follies of a fool and the deliberately malicious act of a person in authority. The complainant's pigs were found trespassing, whereupon the accused, who were village-officers, directed their capture. The complainant resisted it, and thereupon the village-officers directed his arrest. He prosecuted them for wrongful confinement, and the Court upheld the conviction for an act which it adjudged malicious.(21)

3659. But, of course, malice is not an essential ingredient of this offence. Here an illegal confinement without any *bona fide* belief in the existence of a legal right to detain is sufficient. So where a surgeon was called to attend a woman in the early stages of labour, but who was not likely to need his services for some hours, but who nevertheless locked the door to prevent his leaving the house until the child was born, and whereupon she was held indictable for false imprisonment.(22)

3660. Lawful Arrest May Become Unlawful.—Again, the fact that an arrest was at one time legal does not exempt the accused from all responsibility under this section, for the question in such cases is not whether an arrest was at any time legal, but whether it was at any time illegal. For instance, police-officers are empowered to arrest and detain persons in custody for a period of twenty-four hours. Any detention beyond that period would, therefore, be necessarily illegal.(23) So jailors and others entitled to take persons in custody are empowered to receive and retain persons in confinement only for the period and subject to the conditions specified in their warrant of authority. They cannot, therefore, lawfully confine a person a minute longer than is strictly justified by their authority.(24) So also Magistrates maliciously or perversely refusing persons bail in bailable cases run the risk of being prosecuted under this section (§§ 611-617).

3661. Respondeat Superior.—This is, again, an offence in which the principal is liable for his act done through the agency of another.

(20) *Mukund Babu Vethe*, 19 B. 72.
(21) 5 M. H. C. R. (App). 24.
(22) *Linsberg*, (1905) 69; J. P. 107.
(23) *Behary Singh*, 7 W. R. 3 (6).
(24) *Mee* v. *Cruickshank*, 20 Cox 210.

So, if a police-officer, without arresting a person himself, directs a private person to take charge of him, the police-officer is responsible in the same way as if he had himself made the arrest, the person arrested by his order being in law in his custody.[25] But this rule would only apply, where the other person effecting the arrest has no will of his own. If he conspired with the other to effect the arrest, then it cannot be said that he was merely an agent carrying out the behests of another. For example, suppose a number of police-officers of varying grades were to conspire to confine a person, every one will be liable for the act in the same way as if he had been singly responsible for it. But this liability is peculiar and arises out of the duty of the police to rescue all persons wrongfully confined, so that police officers who fail in this duty are guilty of an illegal omission, and are consequently responsible to the same extent as if they had been all along privy to the commission of the crime. But in the case of persons not subject to such liability, the same question may arise if instead of being guilty of a mere omission they take some active share in the confinement of a person for a purpose common to them all.

3662. In such cases two questions arise: Was the co-operation of the other as an agent or as a confederate, and what part did he take in the confinement? If suppose A gives a person B into the custody of a police constable C, alleging that B had committed housebreaking, and the police-officer thereupon arrests B. A's husband D then arrived and C's superior officer, an Inspector disclaimed all responsibility for B's arrest unless D sign the charge-sheet,[1] which D did. B was subsequently discharged by the Magistrate, and he, thereupon, sued D for false imprisonment, but to which he objected on the ground that the case was one of malicious prosecution, and as such beyond the jurisdiction of the Court in which the suit was filed,[2] which objection was sustained and the plaintiff non-suited. The plaintiff appealed and the only question argued was whether in the circumstances before set out the plaintiff's suit was one for false imprisonment or a malicious prosecution and Willes, J., held (with the concurrence of Keating and Montague Smith, J.,) that so long as the plaintiff remained in the custody of a ministerial officer of the law, whose duty it was to detain him until he could be brought before a judicial officer, there was no malicious prosecution: "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a Magistrate, one makes a charge against another, whereupon the Magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action

(25) *Behary Singh*, 7 W. R. 3 (5). The rest of the judgment, in this case as to the power of the police-officers to arrest is now superseded by the amended provisions of s. 54 of the Code of Ciriminal Procedure, corresponding to s. 100 of the old Criminal Procedure under which the case was decided.

(1) But the mere signing of a charge-sheet does not make the signatory liable for the prosecution, nor is it evidence to go to jury that he authorised the continued detention of the person charged in custody.; *Austin* v. *Dowling*, 5 C. P. 534; *Sewell* v. *National Telephone Co.*, (1907) 1 K. B. 557.

(2) 9 & 10 Vict., c. 95, s. 58, proviso exempts a suit for malicious prosecution from the jurisdiction of the County Court.

for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connection between them."(3)

So far then as the matter does not reach a judicial officer the accused who has invoked the aid of a minister of law is himself liable for the arrest effected by the other on his statement on the principle of *respondeat superior*. But if the police arrest a person complained against, after inquiry, it is evident that the arrest being then made in the exercise of their own discretion they are liable for the confinement, and the person making a false accusation would only be liable for an offence described under section 182 or 211, but not this section. So where a valid committal order was issued upon the plaintiff's request and he merely told the proper official to do his duty, he was held to be under no liability to the defendant, if the latter was arrested for the whole sum, whereas he had in fact paid a portion without the knowledge of the plaintiff. In such a case it was his duty to satisfy the official that his committal should be discharged.(4)

3663. The responsibility of the master for the offence committed by his servant depends upon the nature of his employment and the order received by him. If the servant or subordinate wrongfully confines a person to extort money for his superior, the latter cannot be held criminally liable, unless it can be shown that he had ordered the maltreatment.(5) But in an English case, a prisoner, who had been on bail, was acquitted of a charge of felony and ordered to be discharged. He was then taken by the warders who were in charge of the prisoner to the cells below the Court and detained there by them for a short time until they had ascertained from him certain particulars. The governor of the jail was not present at his trial, nor was the detention effected by his orders. But in an action against him for false imprisonment he was held liable for the illegal acts of the warders in so detaining the acquitted prisoner.(6) But in such a case the governor could not, of course, be held criminally liable though the warders would clearly be liable for wrongful confinement. The accused, a watchman of an emigration agent prevented a labourer from leaving a depot where he was lodged and fed and to whom the emigration agent had made an advance of money. It was held that he was rightly convicted of this offence.(7) The first accused brought into Bombay his mistress from Kolhapur. He placed her in a brothel house in charge of the second accused the entrance to which was guarded and

(3) *Austin* v. *Dowling*, L. R. 5 C. P. 534 (539, 540); *Carratt* v. *Morley*, (1841) 1 Q. B. 18; *Saunders* v. *Swansea Finance Co.*, (1905) 21 T. L. R. 317.

(4) *Saunders* v. *Swansea Finance Co.*, (1905) 21 T. L. R. 317.

(5) *Luchman Singh*, 31 C. 170.

(6) *Mee* v. *Cruickshank*, (1902) 20 Cox. 210.

(7) *Sheikh Ahmed*, 21 M. L. J. 439, 10 I. C. 107.

her movements were watched, though she was permitted to go out at times under surveillance. It was held that both the accused were rightly convicted of wrongful confinement and they were each sentenced to a year's rigorous imprisonment.(8)

341. Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Punishment for wrongful restraint.

Any Mag. Cognizable. Summons. Bailable. Comp. Summary.

[*Person*—s. 11. *Wrongful restraint*—s. 339.]

Synopsis.

(1) *Analogous Law* (3664).
(2) *Procedure and Practice* (3665-3666).
(3) *Proof* (3667).
(4) *Form of Charge* (3668).
(5) *Wrongful Restraint* (3669).

3664. Analogous Law.—This section prescribes punishment for an offence defined in section 339. Persons wrongfully confined may be searched for under a warrant issued by a Presidency Magistrate, Magistrate of the first class, or a Sub-divisional Magistrate.(9) The High Court at Fort William, Madras and Bombay are further empowered to issue directions of the nature of a *habeas corpus* for such persons.(10) On production of the person wrongfully confined or restrained, the Court ordering the search may also order his release or discharge from custody.

This section refers to the simplest form of the offence, that is to say, when it is *merely* a wrongful restraint and nothing more. The offence may be aggravated by the presence of other circumstances, in which case it may be otherwise punishable, *e.g.*, under section 357 or 364 *et seq.*

3665. Procedure and Practice.—This offence is cognizable but summons should ordinarily issue in the first instance. It is both bailable as well as compoundable, and is triable by any Magistrate, and may be tried summarily.

A question may arise and has arisen under this and the next section, whether on conviction of the accused under this section, it is competent to the Magistrate to cause the removal of the obstruction which constituted the wrongful restraint or the wrongful confinement. The question depends upon the construction of section 517 of the Procedure Code, under which the Calcutta Full Bench has held, that ordinarily no such jurisdiction vests in the Magistrate, unless the case can be brought under the special provisions of section 522 of the Procedure Code which empowers the Court to restore another to the possession of the immoveable property of which he has been dispossessed by *use of criminal*

(8) *Bandu Ebrahim*, 42 B. 181.
(9) S. 100, Cr. P. C.
(10) S. 491, Cr. P. C.

force. The net result of this ruling then is this—that the Magistrate has the jurisdiction to order removal of the obstruction only in the case of wrongful restraint or confinement which is attended by use of criminal force, but not in any other case.(11)

3666. The punishment provided by this section is a light one, and the passing of a light sentence is commended by the draftsmen of the Code who wrote: "The offence of wrongful restraint, when it does not amount to wrongful confinement, and when it is not accompanied with violence, or with the causing of bodily hurt, is seldom a serious offence, and we propose, therefore, to visit it with a light punishment.(12) Wrongful restraint accompained with violence would be punishable under section 357.

3667. Proof.—The points requiring proof are:—

(1) That the accused obstructed a person.

(2) That such obstruction was caused voluntarily.

(3) That it prevented the person from proceeding in a direction in which he had a right to proceed.

3668. Charge.—The charge, if necessary, should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the ——day of——at——you wrongfully restrained one——(*name the person restrained*), and thereby committed an offence punishable under section 341 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3669. Wrongful Restraint.—The elements necessary to constitute an offence for which this section prescribes a punishment have been set out under section 339 which defines it (§§ 3634-3646). This section is the only one prescribing the punishment for that offence which may be of any duration. In the case of wrongful confinement, however, the Code has prescribed a graduated penalty commensurate with the duration of the confinement. But no such scale exists for this offence, the reason probably being that this offence, if long continued, would merge into the other offence of which it is invariably the commencement. It is not, however, necessary that a wrongful restraint should necessarily be of a short duration. For a person may throw up a wall across another's way, and thereby cause him permanent inconvenience, which would amount to a wrongful restraint so long as the wall stands (§ 3638). In such a case the only penalty to which the accused is subject is that here provided, though the offence may continue to be repeated, and against which, according to the view taken by the Full Bench of the Calcutta High Court, the Magistrates are powerless to

(11) *Mohini Mohun Chowdhury* v. *Harendra Chandra Chowdhury*, 31 C. 691, overruling *contra* in *Debendra Chandra* v. *Mohini Mohan*, 5 C. W. N. 432.

(12) Note M, Reprint, p. 154.

contend, unless the offence is attended with the use of criminal force, in which case the Magistrate may cause the removal of the obstruction.[13] But in that case the Magistrate has jurisdiction, not because it is a case of wrongful restraint, but because it is a case in which force has been used, and a breach of peace is presumably apprehended.

For a further commentary on this section, *see* s. 339 (§§ 3634-3646) and s. 340 (§§ 3651-3663).

Punishment for wrongful confinement.

342. Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Summons. Bailable. Com

[*Person*—s. 11. *Wrongfully confines*—s. 340.]

Synopsis.

(1) *Analogous Law* (3670-3671).
(2) *Procedure and Practice* (3672-3673).
(3) *Proof* (3674).
(4) *Form of Charge* (3675-3676).
(5) *Principle* (3677).
(6) *Wrongful Confinement* (3678-3680).
(7) *Legal Confinement* (3681-3683).
(8) *Contempt* (3683).

3670. Analogous Law.—This section which prescribes a punishment for the simple form of wrongful confinement defined under s. 340 lies at the threshold of a number of offences of which it is but an element. Of wrongful confinement as such, there are at least six other varieties. They are all really the same offence committed under various circumstances of aggravation. For instance, the next two sections deal with the offence when the confinement is prolonged to 3 and 10 or more days respectively, the penalty in that case varying from 2 to 3 years respectively. The aggravation of the offence on account of its prolongation is a circumstance which naturally lent itself to the draftsmen who wrote: "One aggravating circumstance is the duration of the confinement. Confinement for a quarter of an hour may sometimes be a mere frolic, which would deserve only a nominal punishment, which, indeed, might be so harmless as not to amount to an offence.[14] But wrongful confinement during many days will always be a most serious offence. We have attempted to frame the law on this subject in such a manner as to give the offender a strong motive for abridging the detention of his prisoner."[15] This view was indorsed by the Law Commissioners who said: "One cannot conceive of a wrongful confinement continued for ten days or more without deliberation and reflection and a special regard to the penal consequences, and when a man sees that by persisting in his offence, he is every day becoming liable to a certain additional punishment, the motive to set the prisoner free will grow stronger daily."[16]

(13) *Mohini Mohan* v. *Harendra Chandra*, 31 C. 691, F. B.
(14) S. 95.
(15) Note M, Reprint, pp. 154, 155.
(16) First Rep., s. 393.

3671. The other circumstances of aggravation obtain their importance from the contempt of authority implied in confining one for whom a writ of liberation has been issued, or from the secrecy of confinement, which makes the work of rescue more difficult, which further betokens a deep laid plot and a greater malignity. The remaining two cases of aggravation present in sections 347 and 348 are the very cases calling for the enhanced penalties provided in sections 330 and 331.

These cases exhaust all the cases of wrongful confinement, but they do not exhaust the offences of which wrongful confinement is a necessary ingredient. Such is the offence of kidnapping,[17] which is defined in section 359 and allied to which are the other offences of obstruction, slavery and forced labour.

So again, without amounting to those offences, the circumstances of further aggravation mentioned in section 345 or 346 may further heighten the offence, in which case the charge should specify those facts, and the conviction should be for two or more offences as disclosed by evidence.

3672. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is both bailable as well as compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class.

3673. In cases of wrongful confinement, it sometimes happens that the confinement is not continuous, the accused being confined intermittently, in which case each act of confinement would constitute one offence distinct from another confinement, though it may have been in pursuance of the same illegal policy. The question really depends upon the meaning of the phrase "the same transaction" as used in section 235 of the Procedure Code. But though that section may sanction the joinder of a number of charges, it does not make such joinder compulsory, nor is it even expedient "if either the accused are likely to be bewildered in their defence by having to meet many disconnected charges, or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence, directed to many matters, and tending, by its mere accumulation to induce an undue suspicion against the accused."[18]

3674. Proof.—The points requiring proof are:—

(1) That the accused obstructed a person.

(2) That it was caused voluntarily.

(3) That the effect of the obstruction was to restrain the person from proceeding beyond a certain limit.

(4) That such restraint was wrongful.

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(17) 1 East P. C. 430; *Lesley*, 29 L. J. M. C. 97.

(18) *Per* Birwood, J., in *Fakirapa*, 15 B. 491.

3675. Charge.—The charge under this and sections 343 and 344, should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you wrongfully confined one———[(*name the person so confined*) (*and add in a case of section* 343 *or* 344) for——days] and thereby committed an offence punishable under section 342 (*or* s. 343 *or* s. 344) of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried by the said Court on the said charge.

3676. If the confinement was in secret, making the offender liable to the added penalty as provided in s. 346, then the fact should be mentioned in the charge in which the charge should be a charge under two heads, the second head of which should run thus:—

"And since you confined the said——for the said period of——days in such manner as to indicate an intention that the confinement of the said person may not be known to any person interested in the persan so confined, to wit——or to any public servant, to wit——[*or* that the place of such confinement may not be known to (*or* discovered by) any such person (*or* public servant)] and thereby you are liable to the additional sentence prescribed in section 346 of the Indian Penal Code, etc.

3677. Principle.—Law esteems the person of every man sacred so that it punishes any interference with it, whether by way of assault, restraint or confinement. As assault may be justifiable, or it may not, so may be a restraint or a confinement, *e.g.*, in the case of a dangerous lunatic. But in each case it punishes the act unless its justification is made good by the defence. In the case of assault and hurt the mental element of criminality is supplied by the word "voluntarily"; in the case of restraint and confinement it is supplied by the word "wrongfully." But there is a difference in approaching the two questions: For while the word "voluntarily" refers to the offender's volition and intentionality independent of the effect, the word "wrongfully" looks at the effect rather than to the intention. In this respect it reverses the order in which the Code judges of the criminality of most offences. But the effect in each case is the same, though the mode of proof necessarily varies (§§ 64-67).

3678. Wrongful Confinement.—Wrongful confinement is a form of wrongful restraint in which a person is kept within limits, out of which he wishes to go, and has a right to go.[19] Every confinement of a person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.[20] But merely preventing a man from proceeding along a particular way, giving him freedom to go by any other way

(19) Note M, Reprint, p. 154.

(20) 2 C. Inst. 482, 589; Cro. Car., 209.

if he chooses is not a confinement[21] though it may amount to a wrongful restraint.[22]

3679. The offence of "wrongful confinement is complete," as soon as the confinement is complete, and it is wrongful. The intention motive and purpose of the confinement is then immaterial though they will necessarily mitigate or aggravate the crime (§ 3644). So it was held not to be a false imprisonment where a person who had an idiot brother bed-ridden in his house, kept him in a dark room without sufficient warmth or clothing.[23] A confinement at one time legal may become wrongful by a subsequent act which departs from the authorized manner of confinement, or exceeds the limit prescribed therefor. So a jailor detaining a prisoner after the expiration of his sentence would be guilty of wrongful confinement[24] (§ 489). But is a jailor equally guilty for executing an illegal warrant supposing it to have been issued by a Court without jurisdiction, or under circumstances not justifying it. Such a case arose in England, where under the Debtor's Act[25] a judgment-debtor may be imprisoned for a period not exceeding a year, but a warrant for the arrest of the plaintiff was drawn up in which the period of his detention was not specified, and as a result the plaintiff was detained in custody for four days more than the year for which his detention was justifiable under the Statute, and after which he was discharged on his application to a Judge. The plaintiff sued the governor of the jail for wrongful confinement for the period of four days claiming £100 damages, but he was non-suited, Kelly, C.B., and Pollock B., both holding that "whether a time for the imprisonment were limited or not, the officer is not bound to enquire what Statute is violated."[1]

So in a similar case Stephen, J., said: "The warrant protects the governor. No more need be said."[2] Where therefore the warrant is of a Court or officer having *prima facie* jurisdiction, the jailor is protected if he acts within its terms, whatever may be its illegality. But the case is different where the warrant is on its face issued by a person who has no jurisdiction to issue a warrant,[3] or where a warrant on the face of it mentions the period of detention, in which case any incarceration beyond that period is necessarily illegal and for which the jailor will be civilly, and may even be criminally, answerable. So where a warrant is issued under a Statute and which is mentioned therein, the jailor is deemed to have notice of the period of legal detention thereby permitted, and any detention beyond is actionable. So where the plaintiff was committed for contempt in not answering to a bill in chancery, and the Statute relating to contempt provided that, unless the person so committed is brought to the bar of the Court within thrity days from the time of his being in custody, the jailor shall discharge him out of custody, and the jailor failed to so discharge him he was held liable in an action for wrongful confinement.[4]

(21) *Bird* v. *Jones*, 7 Q. B. 742.
(22) S. 339.
(23) *Smith*, 2 C. & P. 449.
(24) *Migotti* v. *Colville*, 4 C. P. D. 233; *Moone* v. *Rose*, L. R. 4 Q. B. 486.
(25) 32 & 33 Vict., c. 62, s. 4.
(1) *Greaves* v. *Keene*, L. R. 4 Ex. D. 73 (75); to the same effect *Foulkes*, 15 M. & W. 612; *Olliet* v. *Bessey T. Jones*, Rep. 214; *Bull* v. *Newman*, Gow. 97.
(2) *Henderson* v. *Preston*, 21 Q. B. D. 52 (365).
(3) *Ib.*, *per* Lord Esher, M. R., p. 366.
(4) *Moone* v. *Rose*, L. R. 4 Q. B. 486.

3680. The fact that a person was already in confinement does not preclude the jailor from being held liable for wrongful confinement. Such would be the case where he illegally puts a prisoner into a solitary cell, or confines him in barracks in which he ought not to be (§§ 3634-3638).

All these are cases of the abuse of lawful authority. And when it is so, the offence of wrongful confinement is committed, though it may be due to the ignorance of the accused or to his perversity or malice. If it is due to the latter causes, the offence would naturally be regarded as far more serious than when it is merely a technical one due to the ignorance of law or to a blind adherence to practice. In such cases the case may conceivably fall within the terms of section 79. The accused, who was the decreeholder got the complainant arrested in execution of his decree on a warrant obtained from Court. It appeared that the judgment-debtor while returning from Court had stopped in the way to get a petition written for him by a petition writer when he was arrested. It was held that that fact did not limit his immunity from arrest provided by s. 135 (2) of the Civil Procedure Code; but that while both the bailiff and the decree-holder were guilty of this offence; but that a nominal fine of Rs. 20 was all that was called for[5] (§§ 3644-3646).

3681. Legal Confinement.—A charge under this and allied sections may be rebutted by shewing that the confinement was authorized by a competent authority, which would then be a sufficient answer to the charge. Such confinement may be authorized under civil process under a warrant or order of a Court, or under the warrant of a criminal Court having jurisdiction in the matter, it being then immaterial whether the warrant issued was legal or illegal so long as it was not on its face illegal.[6] And where a person is confined on conviction, the jailor is bound to keep him in confinement until he hears officially that the order which justified his custody has been set aside.[7] Where the Court is a Court of limited jurisdiction, the jurisdiction of the bailiff acting under its authority is necessarily confined within that jurisdiction, and any arrest outside may expose the arrester to the perils of this section.

3682. There are cases in which a person would be justified in arresting without a warrant. Such cases are in the case of police-officers specified in sections 54, 55 and 57 of the Procedure Code. And police-officers are empowered to pursue persons whom they are empowered to arrest without warrant to any place in British India.[8] So "any private person may arrest any person who, *in his view*, commits a non-bailable and cognizable offence, or who has been proclaimed as an offender. But he should, without unnecessary delay, make over the person so arrested to a police officer, or, in the absence of a police-officer, take such person to the nearest police station.[9] Persons arrested by the police without warrant shall not be detained in custody for

(5) *Ram Lal*, (1916) P. L. R. 121, 36 I. C. 493.
(6) *Shergold* v. *Holloway*, 2 Str. 1002.
(7) *Greaves* v. *Keene*, 4 Ex. D. 73; *Henderson* v. *Preston*, 21 Q. B. D. 362.
(8) S. 58, Cr. P. C.
(9) S. 59, Cr. P. C.

a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167 of the Procedure Code, exceed twenty-four hours, exclusive of the time necessary from the place of arrest to the Magistrate's Court.(10) Magistrates are also empowered to arrest or order any person to arrest a person found committing any offence in his presence.(11) Moreover, any Magistrate may at any time arrest, or direct the arrest, in his presence, within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.(12) These are only the general powers of arrest as conferred by the Code of Criminal Procedure. They are not exhaustive of the powers of arrest which have been conferred by special and local laws on officers and persons therein defined, and in which case the power of arrest being an abridgment of the natural liberty of man must be exercised strictly subject to the terms and conditions of the enactments conferring the power.(13) In all such cases the detention made is legal and cannot be complained of under this section as wrongful.(14) No writ of *habeas corpus* can issue for the liberation or production of the person so confined.(15)

(3) Contempt.

3683. Again, certain Courts possess the power to order arrest for contempt of Court. The law relating to such power of arrest has been already the subject of extended notice and to which reference is directed for more particular information (§§ 116-118, 644, 2408-2418).

For a general discussion of the principle of the subject here only briefly set out, reference should be made to s. 340.

Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Summons. Bailable. Not comp.

Wrongful confinement for three or more days.

343. Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Person*—s. 11. *Wrongfully confines*—s. 340.]

(10) S. 61, Cr. P. C.
(11) S. 64, Cr. P. C.
(12) S. 65, Cr. P. C.
(13) Such powers are conferred by the following Acts: Abkari Act (Mad. Act I of 1886), s. 34; Arms Act (XI of 1878), s. 12; Cantonment Act (XIII of 1889), s. 15; Criminal Tribes Act (XXVII of 1871), s. 20; Cruelty to Animals Act (Beng. Act III of 1869), s. 1; Emigration Act (XXI of 1883), s. 82, cl. (2); Excise Act (XXII of 1881), s. 207; Beng. Excise Act (Beng. Act VII of 1878), ss. 40, 41; Explosives Act (IV of 1884), s. 13; Fisheries Act (IV of 1897), s. 7; Forests Act (VII of 1878), s. 63, *ib.*; Upper Burma Forest Reg. (V of 1898), s. 63; Gambling Act (III of 1867), s. 11; *ib.* (Beng. Act II of 1867), s. 11; *ib.* (Bombay Act IV of 1887), s. 12-A; *ib.* (Burma Act XVI of 1884), s. 7; Municipalities Act (N. W. P. Act XV of 1873), s. 35; Burmah Act (III of 1898), s. 194; Police Act (V of 1861), s. 34; Railways Act (IX of 1890), ss. 131, 132; Reformatories Act (VIII of 1897), s. 29; Salt Act (Beng. Act VIII of 1864), s. 24; *ib.* (Mad. Act IV of 1889), s. 49; *ib.* (Bom. Act II of 1890), s. 39; besides these are various other Acts and Regulations, such as Beng. Reg. III of 1818, Mad. Reg. II of 1819, Bom. Reg. XXV of 1827, etc., etc.
(14) *Ameer Khan* (The Great Wahabi Case), 6 B. L. R., 392, 456, 459.
(15) *Ib., per* Norman, J., the point is now made clear by the amendment of s. 491, by addition of clause (3).

Synopsis.

(1) *Analogous Law* (3684).
(2) *Procedure and Practice* (3685).
(3) *Proof* (3686).
(4) *Charge* (3687).
(5) *Wrongful Confinement "for three days"* (3688-3689).

3684. Analogous Law.—This section adds an aggravating circumstance to an offence punishable under the last section, that circumstance being the longer duration of confinement, entailing a proportionately higher penalty (§ 3670).

3685. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Presidency Magistrate, or a Magistrate of the first or second class.

3686. Proof.—The points requiring proof are those mentioned under the last section (§ 3674) in addition to which prove—

(5) That such confinement lasted three days.

3687. Charge.—*See* the form in § 3675.

3688. Wrongful Confinement "for three days."—The only point calling for notice under this section is the phrase "for three days," which aggravates the offence otherwise punishable under the last section. This term evidently means that in order to expose the accused to the enhanced penalties of this section, the durance vile must not be *less* than for three days, but must be at least of three full days or more up to within a minute of ten days, after which the terms of the next section come into operation. The position then is this: Under section 342 the penalty is the same whatever the period of confinement be three hours or three days, provided that the third day is not completed. If it is, the accused makes himself liable under this section, and continues to be so liable if the tenth day is not completed in confinement, after which the accused renders himself liable to the still higher penalty of the next section.

3689. The question what should be the starting point for this calculation is nowhere foreshadowed in the Code. But it is not difficult to see what was intended. The confinement is a highly illegal act, and the accused is not entitled to a moment's deduction as a matter of grace. The days will, therefore, count as from the moment of the illegal confinement, and such a day change every twenty-four hours, irrespective of the diurnal motion of the earth.

For a commentary on the general subject of wrongful confinement, *see* s. 340 (3651-3663) and s. 341 (§ 3669).

Wrongful confinement for ten or more days.

344. Whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable Summons. Bailable. Not comp.

[*Person*—s. 11. *Wrongfully confines*—s. 340.]

Synopsis.

(1) *Analogous Law* (3690).
(2) *Procedure and Practice* (3691).
(3) *Proof* (3692).
(4) *Confinement for Ten Days or More* (3693).
(5) *Other Aggravations* (3694).

3690. Analogous Law.—This section refers to the last degree of aggravation merely from the point of duration of the confinement. It provides the maximum penalty of three years in addition to an unlimited fine, whatever may be the length of confinement in excess of ten days. But presumably such confinement cannot be without a purpose. And if the purpose is illegal then the offence would be very different and subject to a much enhanced punishment according to the nature of the offence committed. And if in such a case wrongful confinement was necessary to commit the higher offence it may be that the offence will merge into that offence for which alone the offender may then be punishable.

Again, if the confinement was, moreover, in secret, the accused may be liable to the additional penalty provided in section 346, in which case the fact should be mentioned in the charge (§ 3705).

3691. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class. The sentence of imprisonment, it will be noted, is under this section compulsory, though the term may even be momentary, but it cannot be dispensed with.(16)

The other procedure applicable to this offence will be found set out under s. 342 (§§ 3672, 3673).

3692. Proof.—The points requiring proof are the same as for an offence under section 342, in addition to which prove—

(5) That such confinement lasted for ten days or more.

3693. Confinement for ten days or More.—This offence goes a step further than the last, inasmuch as it provides a still higher penalty for an illegal confinement lasting for ten days or more. In order to establish this offence all the points required to be proved under section 340 would have to be necessarily proved, in addition to which must be proved an incarceration for ten days or more. The commencement of the time of the illegal confinement marks the commencement of a day within the meaning of this section (§§ 3688-3689). Where a confinement was initially legal and only became illegal subsequently, the day will commence to count as from the moment when the person wrongfully confined became entitled to liberation (§§ 366-368).

(16) *Bahiraji*, 1 B. H. C. R. 39.

3694. Other Aggravations.—If the confinement was clandestine the offender would be liable to the additional penalty provided in s. 346. If it was, moreover, with the knowledge specified in section 345 he will be again liable to another extension as therein provided. These two aggravating circumstances may co-exist and occur in any case of illegal confinement of whatever duration and under whichever section punishable. In such a case, the Court should further see if the offence does not by reason of the intention or motive disclosed fall under the higher penalties provided for the offences of which kidnapping and abduction are two elements. In all such cases the offence should be, of course, dealt with under its appropriate section.

345. Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

Session. or Mag. of 1st or 2nd class. Cognizable. Summons. Bailable. Not comp.

Wrongful confinement of a person for whose liberation writ has been issued.

[*Person*—s. 11. *Wrongfully confines*—s. 340.]

Synopsis.

(1) *Analogous Law* (3695).
(2) *Procedure and Practice* (3696).
(3) *Proof* (3697).
(4) *Form of Charge* (3698).
(5) *Confinement in Contempt of Writ of Liberation* (3699-3700).

3695. Analogous Law.—This section does not provide for an independent offence: but only provides for an enhanced penalty in case of a conviction of an offence under Chapter XVI, and in which the facts stated in the section further occur. The next section has also the same purpose in view.

3696. Procedure and Practice.—As the writ for liberation for the person wrongfully confined is postulated in an offence committed under this section, the offence is non-cognizable, the only power which the police can exercise being to apply to the Magistrate or Judge for a summons for the appearance of such person, who being guilty of contempt, is regarded as a fit person for that Court's punishment. Ordinarily, a summons should issue in such a case. It is bailable, but is non-compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class.

3697. Proof.—The points requiring proof are:—

(1) That accused kept a certain person in confinement.

(2) That such confinement was wrongful.

(3) That a writ for the liberation of such person had been duly issued.

(4) That accused knew of it, when he kept the person wrongfully confined.

3698. Charge.—In addition to the principal charge for an offence under this chapter, as may be proved, a charge under this section should state:—

"And that you on or about the——day of——at——wrongfully confined the same A B, knowing at the time of such wrongful confinement, that a writ for the liberation of the said A B had been duly issued, and thereby you have rendered yourself to the additional punishment as provided in section 345 of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session, or High Court)," etc.

3699. Confinement in Contempt of Writ of Liberation.—As elsewhere remarked (§ 3695) this section only provides an additional penalty for an offence, which is in the nature of a contempt, for continuing to keep in confinement a person, after knowing of a writ of liberation duly issued for him. The implication of law here is that as soon, at any rate, as the accused hears of the issue of an order for the release of his captive, he should set him free. For he then becomes morally as well as legally bound to obey the laws of his land. And if therefore, he continues to hold him captive in defiance of the writ, he does so in defiance of the law which has sanctioned his enlargement. No cases have yet been decided under this section, but it raises a number of knotty points upon which the case-law will have to address itself, should such an opportunity ever arise. In the first place, the section requires that in order to make the accused liable to the enhanced penalty here prescribed, he must know of the writ of liberation. Such knowledge must come to him through the medium of his senses. If he merely suspects or believes that such a writ is likely to be issued or must have been issued, he is not bound to act upon his suspicion or belief on pain of rendering himself obnoxious to the enhanced penalties of this section.

Knowledge is a much stronger word that belief, as the latter is stronger than "suspect."[17] It implies that degree of conviction which is, or at least amounts to, visual perception or credible information. A mere hearsay gossip is not enough. The knowledge, again, must be of the writ for the liberation of the accused's captive. It pre-supposes the actual issue of the writ, knowledge of which must then be posterior to the time of its issue. That writ must, again, be for liberation, and it must have been *duly* issued. Such a writ of liberation may be issued by the High Courts of Calcutta, Bombay and Madras under the provisions of section 491 of the Procedure Code. In that case the writ must contain a direction for setting the person at liberty as provided in clause (*b*) of that section. A writ for any other purpose would not amount to a writ for liberation. In England the superior Courts are empowered to issue a writ of liberation called the Mainprize, but as Norman, J., pointed out,

(17) *Rango Tinaji*, 6 B. 402 (403).

it is a jurisdiction which was never possessed by the High Courts of this country.(18) And the Code of Criminal Procedure empowers no Court to issue such a writ. The power of discovery of persons wrongfully confined conferred on the Presidency Magistrate, Sub-divisional Magistrates, and Magistrates of the first class is a limited power of search, and not of liberation.

The section has thus but a limited operation.

Duly Issued.

3700. Again, the writ of liberation must have been *duly* issued and subject to and in conformity with the law, which of course, implies that it must be a legal writ issued, this will be presumed in the case of writs issued by the superior Courts, which are the only Courts empowered to issue them.(19)

Wrongful confinement in secret.

Session Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Summons. Bailable. Not comp.

346. Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement.

[*Person*—s. 11. *Wrongfully confines*—s. 340. *Public servant*—s. 21.]

Synopsis.

(1) *Analogous Law* (3701).
(2) *Procedure and Practice* (3702).
(3) *Proof* (3703).
(4) *Form of Charge* (3704).
(5) *Secret Confinement* (3705).

3701. Analogous Law.—This is another subsidiary section which is likely to be more widely useful than the last. But in each case the object is the same—to enhance the punishment for an offence committed under Chapter XVI by reason of the aggravation here described. The section will thus furnish as an additional charge to the one for which the accused is being already tried.

3702. Procedure and Practice.—This section is cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, a Presidency Magistrate or a Magistrate of the first or second class. For the rest of the procedure applicable to the section, reference should be made to sections 341, 344.

(18) *Ameer Khan* 6 B. L. R. 392. (19) S. 491, Cr. P. C.

3703. Proof.—The points requiring proof are those for an offence under section 341 in addition to which prove:—

(5) That such confinement was secret.

(6) That the secrecy was against—

(*a*) any person interested in the captive, or

(*b*) a public servant, or

(*c*) discovery of the place of confinement.

3704. Charge.—The charge under this section may be independent[20] or additional to the wrongful confinement for which the offender would be liable according to the duration and purpose of the confinement. It should run thus:—

"And whereas you confined the said A B in such manner as to indicate an intention that the confinement of the said A B may not be known to any person, to wit——interested in the person so confined, [(*or* to any public servant, to wit——) *or* that the place of such confinement may not be known to (*or* discovered by) any such person (*or* public servant)], and thereby you are liable to the additional punishment provided in section 346 of the Indian Penal Code and within my cognizance," etc.

3705. Secret Confinement.—Secrecy is the badge of many crimes. It is never a badge of honesty. A person incarcerating another is guilty of the offence which may be great or small, but when he takes care to conceal his captive so as to place him beyond the reach of those interested in his liberation, he is obviously guilty of a greater crime, because by hiding his victim he naturally aspires to make himself the master of the situation. This is the natural tactic practised of set purpose by the brigands on the Bulgarian frontier where men and women are kidnapped and held up to heavy ransom. A similar offence is not unlikely in this country where child-stealing is not unknown. Of course, the offence gains its enormity not merely by reason of the secrecy, which may as much be for additional security, as by the intention of making the work of rescue difficult, by concealing the person in secret, so as to put the person beyond the reach of law or legal force. This fact must be established by evidence, otherwise this section cannot apply.[21] It is not, however, necessary that the person interested in the person confined, or the public servant should have previously taken any steps to discover him, nor is it necessary that such an attempt, if any, made, should have come to the knowledge of the accused. The offence lies in the intention and not in the success of secrecy.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Summons. Bailable. Not comp.

Wrongful confinement to extort property or constrain to illegal act.

347. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security, or of constraining the person con-

(20) *Semble* in *Sreenath Banerjee*, 9 C. 221.

(21) *Sreenath Benerjee*, 9 C. 221.

fined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[*Person*—s. 11. *Valuable security*—s. 30. *Offence*—s. 40. *Wrongfully confines*—s. 340.]

Synopsis.

(1) *Analogous Law* (3706).
(2) *Procedure and Practice* (3707).
(3) *Proof* (3708).
(4) *Form of Charge* (3709).
(5) *Confinement for Extortion* (3710-3712).

3706. Analogous Law.—The language of this and the next section should be compared with that used in describing the causing of hurt for a similar purpose in sections 329 and 330. In this case the confinement may be superadded to the hurt or grievous hurt caused, and it may be, moreover, with knowledge of the writ for the liberation of the person confined, or in secret so as to be further punishable under sections 345 or 346. The confinement may be of the person from whom the property or information is directly received, or it may be of another interested in the person from whom some benefit is expected.

3707. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. The Magistrate may, however, issue a search-warrant at the same time for the person so confined.[22] It is bailable but not compoundable, and is triable by the Court of Session or a Magistrate, Presidency, first or second class.

3708. Proof.—The points requiring proof are:—

(1) That the accused confined a certain person.

(2) That such confinement was wrongful.

(3) That such confinement was for the purpose of—

(*a*) extorting property, or

(*b*) valuable security, or

(*c*) constraining the doing of any thing illegal, or

(*d*) giving information which might facilitate the commission of an offence.

(4) That the person confined was one from whom any of the objects mentioned in (3) were to be secured; or that he was "interested" in another from whom they were to be secured.

3709. Charge.—The charge under this section should run thus:—

(22) S. 100, Cr. P. C.

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you wrongfully confined one A B (*the person confined or another interested in him*) for the purpose of extorting from the said A B [(*or* from a certain person——C D interested in the said A B (a certain property), to wit——[(*or* a valuable security to wit——, *or* for the purpose of constraining the said A B *or* C D to do anything illegal, to wit——*or* to give any information, to wit——(*specify it*)] and thereby committed an offence punishable under section 347 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

3710. Confinement for Extortion.—The aggravating circumstances here presented are exactly the same as enhance the penalty of the offence of hurt, punishable under section 329 or section 330. In all these objects the offence whether of hurt or wrongful confinement is caused for the purpose of coercing the sufferer or the captive or another in whom he is interested for the purpose of extorting property or a valuable security, or for doing anything illegal or obtaining any information which may facilitate the commission of an offence. If the information required is to facilitate the investigation respecting an offence already committed, then the offence committed falls under the next section, though in this respect the two offences are identical for they are subject to the same punishment.

3711. Where the person confined is one from whom the property or other benefit is to be received the question is comparatively a simple one. For then all that has to be proved is that the confinement was a wrongful one, and that the purpose of it was as stated in the section and this may be proved as much by the evidence of the person confined as of those interested in him and to whom the offender may have approached for assistance for the purpose. A gang of robbers entering a house and tying up its inmates with the object of obtaining from them the key of the safe in which the family valuables are kept, or for the purpose of obtaining from them information about the place where they are buried, or to prevent them from crying to give alarm, would be guilty of this offence, though being robbers, they would be thereupon liable to be punished also for robbery. The accused, a Sub-Inspector of Police arrested one Jagat on a charge of being concerned in the theft of a cart and detained him at the thana, threatening to prosecute him unless he was squared. A sum of Rs. 200 was then paid for him by one Panchu who lent him money for the purpose: Jagat was then released, and he then prosecuted the accused for wrongful confinement and extortion, and he was convicted. He appealed on the ground that all the witnesses who took any part in the transaction were accomplices and unworthy of credit. It was argued that the money so paid was "illegal gratification," so that those who paid it were equally guilty with the

accused who received it.[23] But Prinsep, J., conceded that though it was one way of looking at the payment, the fact was equally clear that the payment was not made voluntarily and that it was not given in consideration of the accused not proceeding against Jagat for the purpose of bringing him to legal punishment. It was paid to obtain his release from the police custody in which he was detained on no reasonable or sufficient ground, and the money was extorted, because the Sub-Inspector refused to release him, as he was bound to do, unless he were paid the money. In this view the persons paying the money were not regarded as accomplices, and the conviction was upheld.[24] This was a conviction under sections 342 and 384.

3712. These two sections undoubtedly possess all the elements required to constitute an offence under this section, and the conviction of the accused might have been, in view of the finding, more appropriately under this section. This was assumed in a case in which the accused, a head-constable of police, had agreed to drop a prosecution against one Kripa Sahu, who had been brought under arrest by two chowkidars for illicit possession or manufacture of country liquor on payment of Rs. 30. As he wanted money he was sent in charge of the two chowkidars to procure it. They first went to one village, where Kripa Sahu was unable to raise the money. He then went with them to another village where the two chowkidars ducked Kripa in a pond and assaulted him. Next day his dead body was found suspended from a tree within the precincts of a temple. Death was reported to be due to beating. The two chowkidars were tried with the accused, the latter being charged under sections 202, 213 and this section. He was convicted under section 213 and acquitted of the other two charges. But on appeal the Sessions Judge held that the conviction of the accused under section 213 was unsustainable, but, he nevertheless, directed a re-trial both under that and this section. The accused moved the High Court and with reference to this section it was held that the petitioner's criminal responsibility for the wrongful confinement by the two chowkidars at places distant from the accused's outpost was too remote to form the basis of any charge, and as a result the order of the Sessions Judge for a retrial was quashed.[25] It is submitted that so far as this section is concerned the view of Pratt and Handley, JJ, may be incontrovertible, but one fails to see why the accused escaped a re-trial for extortion. And even if this section were pushed to its extreme length, the fact that the deceased had been put in charge of the chowkidars for the purpose of extorting money, was enough to constitute wrongful confinement within the meaning of this section, apart from his subsequent maltreatment which accounted for his death.

For a further commentary on this section, *see* s. 330 (§§ 3554-3560).

(23) *See* s. 161.

(24) *Akhoy Kumar* v. *Jagat Chunder*, 27 C. 925; to the same effect on the credibility of accomplices in *Deo Nandan Pershad*, 33 C. 649.

(25) *Luchman Singh*, 31 C. 710.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Summons. Bailable. Not comp.

Wrongful confinement to extort confession or compel restoration of property.

348. Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

[*Person*—s. 11. *Valuable security*—s. 30. *Offence*—s. 40. *Wrongfully confines*—s. 340.]

Synopsis.

(1) *Analogous Law* (3713).
(2) *Procedure and Practice* (3714).
(3) *Proof* (3715).
(4) *Form of Charge* (3716).
(5) *Confinement to Extort Confession* (3717-3719).

3713. Analogous Law.—This section possesses all the elements in common which section 330, the only difference between the two sections being that the means of coercion used in the one case is hurt, while it is wrongful confinement under the present section. In other respects the two offences are the same.

3714. Procedure and Practice.—This offence is cognizable but summons for the appearance of the accused should ordinarily issue in the first instance; the Court being at the same time entitled to issue a search-warrant for the person confined.(1) It is bailable, but not compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class.

3715. Proof.—The points requiring proof are:—

(1) That the accused confined a person.

(2) That such confinement was wrongful.

(3) That such confinement was for the purpose of—

(*a*) extorting a confession, or

(*b*) information, which may lead to the detection of an offence or misconduct; or

(*c*) restoration of property or valuable security; or

(*d*) to satisfy any claim or demand.

(1) S. 100, Cr. P. C.

3716. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you wrongfully confined one A B for the purpose of extorting from the said A B (*or* from one C D in whom the said A B was interested) any confession (*or* any information which may lead to the detection of an offence or misconduct, *or* for the purpose of constraining the person confined to restore *or* to cause the restoration of any property or valuable security, *or* to satisfy any claim or demand, *or* to give information which may lead to the restoration of any property or valuable security) and thereby committed an offence punishable under section 348 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

3717. Confinement to Extort Confession.—This is another section against the provision of which the police are likely to offend most, for they are primarily charged with the duty of investigation, and are therefore apt to torture persons whom they suspect of being concerned in the commission of crimes, or being in possession of any information likely to lead to its detection. The method of torture may vary, but its object is in each case the same: securing a confession of a crime or evidence concerning it, the restoration of property which may lead up to its discovery or any matter akin thereto. If for that purpose the accused causes hurt he would be liable under section 330, if grievous hurt, under section 331, if wrongful confinement, then under this section. It may be that the accused causes both hurt as well as wrongful confinement, in which case he may be rightly charged for both the offences,(2) and it may, moreover, be, that a number of persons are concerned in the commission of the offence, in which case they may be all tried together. But though this may then be the legal course it does not thence necessarily follow, that it is equally in the interest of the accused. As was observed by Birdwood, J., in such a case, the propriety of combining the charges might well be questioned, if either the accused is likely to be bewildered in his defence by having to meet many disconnected charges, or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence directed to many different matters, and tending, by its accumulation, to an undue suspicion against the accused.(2)

3718. Where more persons than one are tried on a variety of such charges, it becomes necessary to disentangle all the facts common to them and those in which only some of them took part. It may be that some of them are wholly innocent, while others are only liable to a certain extent, and no further. In the case of the accused being all police-officers such a difficulty does not present itself. For they

(2) *Fakirappa*, 15 B. 491.

are all equally liable for the offence, whether they actually took part in its commission, or took no means to prevent it (§§ 1023-1027).

3719. But as regards persons who are not under a similar legal duty to protect persons, the same rule cannot apply. For instance, a person may rightly charge another with theft, whereupon the police may take him into custody, and, whether with the connivance or collusion of the complainant, if the police torture the thief, the police alone is responsible for the consequence unless the act of the complainant amounts to abetment in which case they are both liable.(3)

For the rest of the commentary under this section, *see* as follows:—

"Person Interested," § 3518; *"Misconduct,"* § 3553; *"General Scope,"* §§ 3551-3554.

Of Criminal Force and Assault.

349. A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

Force.

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part or on the part of any other person.

Thirdly.—By inducing any animal to move, to change its motion or to cease to move.

[*Animal*—s. 47.]

Synopsis.

Analogous Law (3720-3722).

3720. Analogous Law.—The interposition of the two definitions of "force" and "criminal force" becomes necessary for the purpose of defining criminal assault defined in section 351, and made punishable by section 352. These sections commencing with this and ending with section 358 interrupt the natural sequence of sections which have for their basis the offence of wrongful confinement.

3721. The term "assault" looks the easiest term to understand. But it is probably as difficult to define. This the authors confessed, for

(3) *Shumbhoonath Panday*, 1 W. R. 26.

they wrote: "We have found great difficulty in giving a definition of assault, and are by no means satisfied with that which we now offer."(4) The same difficulty has confronted the text-writers who have to confess that "there are few things in the law harder to define than assault."(5) Bishop defines it as an attempt at a battery,(6) and to a great extent this is correct, but it does not square with existing legal notions. The same definition occurs in English law where the term is thus defined. "An assault is an attempt to commit a forcible crime against the person of another; such as an attempt to commit a battery, murder, robbery, rape, etc."(7) But whatever may be the accurate definition of the concept, its meaning is tolerably clear (§§ 3724, 3725). The term "force" here defined occurs in the English phrase "*vi et armis*." As such, it means an exertion of energy producing a change in the outer world. This is practically all that is meant by the first paragraph, the subsequent paragraphs being those which refer to the interposition of other substances or bodies between the subject and the object.

3722. Shortly then, force is the exercise of one's energy upon another human being;(8) and it may be exercised directly or indirectly. So if A raises his stick to strike B and the latter moves away, A uses force within the meaning of this section.(9) So, again, if a person shouts and cries, and an animal moves in consequence, it would amount to the use of force.(10) In order to constitute force there must be at least the causing of motion, change of motion or cessation of motion in another. The reason of this requirement will be presently evident (§ 3728).

Criminal force.

350. Whoever intentionally uses force to any person, without that person's consent in order to the committing of any offence or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Illustrations.

(*a*) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part, A has therefore intentionally used force to Z; and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(*b*) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the

(4) Note M, Reprint, p. 155.
(5) 1 Bishop Cr. L. 48.
(6) *Ib.*
(7) 2 Roll Abr. p. 554, pl. 45.
(8) *Sadasib*, 18 C. W. N. 1150, 26 I. C. 168.
(9) *Jai Ram*, 12 A. L. J. 154, 23 I. C. 183, 15 Cr. L. J. 231.
(10) *Kondiah*, 17 M. L. W. 746, 72 I. C. 616, (1923) A. I. R. (M.) 608.

animals to change their motion. A has therefore used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.

(*c*) Z is riding in a palanquin. A, intending to rob Z, seizes the pole, and stops the palanquin. Here, A has caused cessation of motion to Z, and he has done this by his own bodily power. A has therefore used force to Z; and as A has acted thus intentionally, without Z's consent, for the commission of an offence, A has used criminal force to Z.

(*d*) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, he has used criminal force to Z.

(*e*) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water and dash up the water against Z's clothes or something carried by Z. Here, if throwing of the stone produce the effect of causing any substance to come into contact with Z, or Z's clothes, A has used forced to Z; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z, he has used criminal force to Z.

(*f*) A intentionally pulls up a woman's veil. Here A intentionally uses force to her, and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(*g*) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling. A has therefore intentionally used force to Z; and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force.

(*h*) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z.

[*Offence*—s. 40. *Injury*—s. 44. *Consent*—s. 90. *Force*—s. 349.]

Synopsis.

(1) *Analogous Law* (3723).
(2) *Analysis of Criminal Force* (3724-3725).
(3) *Quantum of Force* (3726-3727).
(4) *Change of Motion*, (3728-3729).

3723. Analogous Law.—The last section defined force which by itself is not an offence, for the use of force may take place under circumstances the most benevolent, as where a person pulls another out of a well to save him from being drowned. Force becomes criminal only when it is used (*i*) without consent and in order to the committing of any offence; (*ii*) when it is used to cause injury, fear or annoyance to another to whom the force is used. It then becomes criminal, and as such, it is punishable under section 352 and subsequent sections according to the presence of other aggravating circumstances. It has been said in the Punjab that this definition is so wide as to include force of almonst every description of which a person is the ultimate object, "force" as defined being restricted to force used to a person.(11) But both the definitions are so restricted, for if the Code is not concerned

(11) *Rasul* (1889) P. R. No. 4.

with mechanical force or human force as applied to other objects other than human, no less is it criminal under this definition which is only concerned with force used "*to any person.*" The use of force in its ordinary sense as applied to any object other than human, such as buildings and property, would probably be called "violence."

3724. Analysis of Criminal Force.—The term "criminal force" must in the first place be used without the consent of the person against whom it is used. This is not a special requirement for, except in cases of heinous crime, such as murder, abortion or the like, consent of the sufferer is a sufficient vindication of an act otherwise penal. To that extent law respects liberty of action even to one's own detriment. Criminal force must then be a nonconsentient force applied to another for one of the four purposes specified, namely (*i*) the commission of an offence with intention or knowledge of the likelihood of causing (*ii*) injury, (*iii*) fear, or (*iv*) annoyance to another. The section is somewhat inaccurately drawn and would not bear too close a scrutiny. For it rests content with defining the offence to lie in intention, irrespective of the effect; but this must be understood; the object being to punish an act both intended to cause and actually causing such injury, fear or annoyance.

3725. The section then contemplates two distinct classes of cases: *firstly*, those in which the force is used in committing an offence in which case the use of force indicates necessarily an intention to commit that offence. In such case, where it is necessary for that purpose, the offence as such may cease to be punishable. But in such a case there must be evidence of the intention to commit another crime and for which the accused would be punishable, either for a completed offence or for an attempt, as the case may be. In such cases the use of force, however small and momentary, would suffice to convert a mere preparation into an attempt. Where, however, the ulterior object of the offender is not to commit an offence, the use of force may still be punishable, but in that case it must cause and be intended to cause "injury, fear or annoyance to another." These requirements postulate both an intention and an effect; the one without the other is insufficient. If, for instance, one pushes another in good part and another resents it, there is no offence, for no offence was intended. And again contrariwise if one intends to push another with an evil mind, but the other takes it in good part, there is no offence whatever the injury, fear or annoyance the act may be calculated to cause in the mind of a bystander.

3726. Quantum of Force.—Neither the last nor this section defines the quantum of force which should be sufficient to keep the offence within the limits of this section. The use of force as defined in the last section may be sufficient to cause death, and it may be used for that purpose, in which case the offence will, rightly enough, be using criminal force—but it will also be much more, and may even be murder itself. The measure of criminal force here then must necessarily be such as is sufficient to cause hurt as that term is defined in section 319. But comparing that definition with this neither gains in perspicacity. For if one pushes another, it may not only cause a change of motion, but also bodily pain. In that case the offence may be both the causing of hurt as well as criminal force, unless the latter term be restricted

Hurt Compared.

to the use of only such force as causes motion without pain. But this is a construction which is not acceptable to the Courts, though they have enlarged it to often unjustifiable limits. For instance, the deceased in a case who had an enlarged spleen, was struck by the accused in the course of a quarrel, and died owing to his bodily infirmity. It was held that in the absence of knowledge on the part of the accused of the diseased condition of the deceased, the offence was not culpable homicide, but using criminal force under section 352 of the Code:[12] but why not hurt?

3727. The difference between the two offences is undoubtedly artificial, but if the illustrations appended to this as well as the next section are any indication of the intention of the Legislature, there can be no doubt that the two offences must be held to be mutually exclusive, and, therefore, whenever there is the causing of bodily pain, it is necessarily a case of hurt and therefore as necessarily it cannot be a case of criminal force or assault. This was certainly what was intended, for the draftsmen wrote: "A large proportion of the acts which we have designated as assaults will be offences falling under the heads of hurt and restraint. Thus, a stab with a knife is an offence falling under the head of hurt, and it is also an assault. The seizing a man by the collar, and thus preventing him from proceeding on his way, is unlawful restraint, and is also an assault. But there will be many assaults which it is absolutely necessary to punish, yet which cause neither bodily hurt nor unlawful restraint. A man who impertinently puts his arm round a lady's waist, who aims a severe stroke at a person with a horsewhip,who maliciously throws a stone at a person, squirts dirty water over a person, or sets a dog at a person, may cause no hurt, and no restraint. Yet it is evident that such acts ought to be prevented."[13] A person may intend to cause hurt, but having regard to the effect the actual offence for which he is responsible may amount to no more than the use of criminal force. Such will be the effect of a missile hurled at another but which misses its aim. So if a person throws a stone or a bottle at another, or into another's house, he will be guilty of using criminal force irrespective of the consequence.[14]

3728. Change of Motion.—These observations show that the offence of criminal force must only affect motion: it must not cause hurt. And the causing change, or cessation of motion need not involve any bodily movement, for it is sufficient if it affects merely one's sensual feeling by coming in contact with a physical object in consequence of the force. The feeling affected must, however, be sensual, that is the feeling of touch as distinguished from the intellectual feelings unconnected with bodily sensation. The illustrations appended to the last section will suffice to make this further clear. The motion here contemplated need not be directly caused: all that is necessary is that (*i*) it must be caused to human being, and (*ii*) it must be in consequence of the act of another. So if one raises his stick to hit another, and the latter moves how littlesoever to save himself, it is the use of criminal force by one to another within the meaning of this section.[15] But the case would be different if before the stick is raised the other runs away out of sheer fright.[16]

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(12) *Jai Dayal*, (1876) P. R. 21.

(13) Note M, Reprint, p. 155.

(14) And not merely assault as was held in (1906) *Po Taw*, 3 L. B. R. 194; nor rash or negligent act, *Nga San*, (1902) 1 L. B. R. 259.

(15) *Jai Ram*, 12 A. L. J. 154, 23 I. C. 183.

(16) *Mohammad Ishaq Khan*, 1 A. L. J. 602, 1 Cr. L. J. 1057.

3729. The use of "criminal force" may be *preceded* by an assault which is, however, defined in the next section. Ordinarily, in their natural and chronological sequence, the first act to be performed in the physical exertion of energy is an assault, then comes criminal force, of which the former is the forerunner. There may, however, be criminal force without assault and *vice versa* (§§ 3724, 3725).

Assault.

351. Whoever makes any gesture, or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

Illustrations.

(*a*) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(*b*) A begins to unloose the muzzle of a ferocious dog, intending, or knowing it to be likely, that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(*c*) A takes up a stick, saying to Z: "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

Synopsis.

(1) *Analogous Law* (3730-3732).
(2) *Conditional Threat excluded* (3733-3736).
(3) *Explanation* (3737).

3730. Analogous Law.—The term "assault" is defined in this section. It is defined to consist in those overt acts of preparation indicating an intention to use criminal force, and which of themselves are intended or known to warn the other of its approach. The explanation excludes mere words of braggadocio which are intended to frighten another by threats of terrible pains and penalties, but which both the speaker as well as the listener know are not intended to be put in execution. As Tindal, C. J., said: "It is not every threat, where there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. If, therefore, a party be advancing in a threatening attitude, *e.g.*, with his fist clenched, to strike another, so that his blow would almost immediately have reached such person, and he then stopped, it is an assault at law, if his intent were to strike such person, though he was not near enough at the time to have struck him."(17)

(17) *Stephens* v. *Myers*, 4 C. & P. 349.

3731. An assault is then nothing more than a threat of violence exhibiting an intention to use criminal force, and the present ability and intention to carry the threat into execution.

3732. The difference between an assault and criminal force is, therefore, as marked here as the difference between criminal force and hurt. As such, there is nothing in English Law to correspond with them. For there the offence is battery as soon as there is anything more than an attempt to do a corporal hurt to another, how smallsoever may be the injury caused. So even touching another in anger or spitting in his face, or violently jostling him out of the way is a battery [18] though these are all cases of the use of criminal force as defined in the last section. In England, it is said that Law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it, every man's person being sacred, and no other having a right to meddle with it in any of the slighest manner.[19] But the Code makes nice distinctions between what are mere acts of preparation, and what is criminal force without being hurt, and what is hurt, though it is also necessarily criminal force.

As has been remarked before, an assault may precede the use of criminal force—in many cases it does, but it is not necessary that it should invariably precede it. For instance, it is easy enough to conceive of a case in which a person pinches another from behind though he made no preliminary gesture or preparation for it whatever. The last requisite of an assault is words, gesture or any preparation indicative of the use of criminal force and which it is intended that the other person should see or hear. The intention is to frighten him by the menacing words and attitude without resorting to force. If force becomes necessary the offence ceases to be an assault, but is then the use of criminal force. In this sense there is a wide dissonance between the popular and legal use of the term. For in popular parlance there can be no assault unless there is a use of criminal force, but in its legal conception the act must fall short of the use of force. It may then be said that popular assault begins where the legal assault ends.

3733. Conditional Threat Excluded.—Again, from the fact that the words, gesture or the preparation are intended or known to be likely to cause another to apprehend that the person uttering the words or making the gesture or the preparation *is about to use criminal force*, it follows that if the words or attitude was to use criminal force not immediately but in a certain contingency dependent upon the volition of the other, there can be no assault though it is the threat of an assault, which is not by itself an offence. This may be illustrated by an example. A abuses B; the latter warns A that if he persisted in abusing him he should strike him. Here B's attitude may be menacing and he may be prepared and ready to strike A, but his words and gesture do not amount to an assault within the contemplation of this section inasmuch as he has no reason to apprehend that the other is about to use criminal force if he keeps his own mouth shut.

(18) 1 Hawk. P. C. C. 62 s. 2; Bac. *Abridg.*, title "*Assault* and *Battery*" (*B*).

(19) 4 Black 120.

So in the case of the accused, who was registered as a bad character by the police, a Sub-Inspector paid him a domiciliary visit in order to ascertain if he was at home. He called to the accused who came out, whereupon the former wished to take an impression of his thumb. The accused objected to it, but on the other extending his hand, the accused went into his house and brought out a lathi, saying that he would not allow the impression to be taken and that he would break the head of anyone who asked for it. He was convicted under section 353, but it was held that the threat being conditional did not amount to an assault within the meaning of this section and that therefore the accused could not be convicted under section 353.(20) This view is entirely in harmony with English Law, where it was held that if A were to lay his hand upon his sword and say: "If it were not the assize time. I would not take such language from you," it was held not to be an assault on the ground that he did not design to do the other party any corporal hurt at that time, and that a man's intention must operate with his act in constituting an assault.(21)

3734. This case was followed in Bombay in a case in which the defendant had run up to the plaintiff in a violent rage, and making a copious use of bad language three times threatened that if the plaintiff was any more impertinent he (the defendant) would strike him. The defendant's version of the affair was that he had told the plaintiff that if he were not such a miserable little snob or brute he would knock his head off his shoulders, upon which the Court remarked: "The only question is, whether the 'if,' either on the plaintiff's version of it, or on the defendant's, makes any real difference in the case, and tends to show that the plaintiff could have reasonably apprehended that the defendant was then and there about to use criminal force. How was the plaintiff to know what violently incensed man might or might not regard as impertinence?—a look, a gesture, a word, even silence, might be construed as such. The condition of the threat would be held fulfilled and the momentarily suspended violence would become actual criminal force on these grounds, and because we think that in interpreting Law it is better to go on grounds of plain good sense than on any subtleties or refinements, we have come to the conclusion that the circumstances of this case are such as to show that the plaintiff, at the time of the acts complained of, had reasonable ground to apprehend that the defendant was about to use criminal force to him, and that, therefore, the acts complained of amount in law to an assault."(22)

3735. The question whether a certain act amounts to an assault then depends upon the reasonable apprehension which a person entertains about the criminal force being imminent. The actual words used are useful only so far as they enable this question to be decided. The complainant a police constable was patrolling a town at night when he met the four accused leaving the town. The constable advised them not to travel at night as there was danger of being robbed if they went at dead of night. The accused insisted and one of them Dasari

(20) *Birbal Khalifa*, 30 C. 97.
(21) *Tuberville* v. *Savage*, 1 Madd. 3.
(22) *Cama* v. *Morgan*, 1 B. H. C. R. 205 (208).

said that he knew his way about whereupon the constable retorted "Dasaris are all thieves" thereupon one of the accused bit the constable on the face, and the rest surrounded him "in a threatening attitude." The High Court held this insufficient to constitute assault within the meaning of this section, as probably there was nothing to shew that the gesture was the prelude to an assault.(23) This case is not unlike one in which the police sergeant asked a passenger travelling in a train to vacate his seat saying he was authorized to evict him by force, and in reply to the passenger's question whether he was prepared to use force, answered, "Yes" and then took up the passenger's bag standing all the time close to him with a cane in hand. The Court held that it did not amount to assault as defined in this section inasmuch as it was merely a verbal threat to use force if the passenger did not vacate his seat.(24)

3736. And for this purpose, regard must be had not only to the actual words used but also to the surrounding circumstances. Take for instance, the English case last cited.(25) There too the threat was qualified, but the chances of its being carried into effect were remote because as the defendant said, it *was* the assize time, and the consequence of drawing a sword on another during assize time involved in those days not only the certain infliction of a heavy fine, but also the possible chopping off of the hand by which the sword was drawn.(1)

3737. Explanation.—The scope of the explanation has been already explained. It merely declares what is the present English Law, that though mere words *unaccompanied* by threatening gesture or preparation do not amount to assault, but they may explain the gesture or preparation so as to make them amount to an assault, which but for them, they may not be.

Any Mag. Non-cog. Summons. Bailable. Comp. Summary.

Punishment for assault or criminal force otherwise than on grave provocation.

352. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section—

if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

(23) *Munisami*, 8 M. L. T. 118, 7 I. C. 416.

(24) *Mathradas* v. *Secretary of State*, 5 S. L. R. 140, 13 I. C. 237.

(25) (1675) *Tuberville* v. *Savage*, 1 Madd. 3.

(1) (1675) *Tuberville* v. *Savage*, 1 Madd. 3, explained in *Cama* v. *Morgan*, 1 B. H. C. R. 205 (208).

if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

[*Criminal force*—s. 350. *Assault*—s. 351.]

Synopsis.

(1) *Analogous Law* (3738-3740).
(2) *Procedure and Practice* (3741-3742).
(3) *Proof* (3743).
(4) *Form of Charge* (3744).
(5) *Principle* (3745).
(6) *Assault and Criminal Force* (3746).
(7) *Assault on Provocation* (3747).

3738. Analogous Law.—This section deals with the combined offences of assault and criminal force defined in the last two sections, and when it is committed otherwise than on grave and sudden provocation—the offence when so committed being subject to the reduced penalty of section 358.

3739. The explanation here added qualifies the mitigating proviso in favour of grave and sudden provocation. It is an exact reproduction of the three qualifying provisos to section 300, exception I, and have been so referred to under section 335. They might have been similarly referred to here as well. And following the analogy of section 335, their more appropriate place was in any case under section 358 which deals with the offence of assault committed on grave and sudden provocation.

3740. This section deals with the offence of assault or using criminal force in its simplest form, unaggravated and mitigated by any circumstance. The subsequent sections deal with the same offence as affected by the presence of other circumstances. For instance, section 353 deals with assault which is committed under the same circumstance of aggravation as an offence under sections 332 and 333; sections 354 and 355 deal with assault which reflect on the assailant's honor or morality; sections 356 and 357 when it has some other ulterior illegal object in view—the last section dealing with the offence attenuated by provocation.

3741. Procedure and Practice.—This offence is non-cognizable and summons should ordinarily issue in the first instance. It is both bailable and compoundable, and is triable by any Magistrate, and summarily. Of course, the complaint of an assault committed on a public servant in the execution of his duty may be inquired into under this section, without a sanction of the Court or officer under whom he was then acting. So a Civil Court peon assaulted by persons while effecting

an attachment may file a complaint and the Court would be justified in disposing it of according to Law without requiring him to obtain sanction of the Civil Court.[2] This is an offence in which the usual sentence is fine, but the imprisonment awarded in default must then bear the proportion prescribed in section 65. So a fine of Rs. 50 and in lieu thereof imprisonment for one month is illegal, for the alternative sentence could not, having regard to the provisions of section 65, exceed one-fourth of the maximum provided for the offence, which would be three weeks.[3]

3742. A person once discharged after inquiry into an offence under this section could not, so long as that order remains, be legally re-tried for the offence of hurt which involves recanvassing the same facts, and which on the principle of *res judicata*, or *autrefois acquit* the Court refuse to re-try.[4]

3743. Proof.—The points requiring proof are:—

I. *For assault* (s. 350)—

(1) That the accused made a gesture or preparation to use criminal force.

(2) That it was made in the presence of the complainant.

(3) That he intended or knew that it was likely that such gesture, etc., would cause the complainant to apprehened that such criminal force would be used.

(4) That such gesture or preparation did cause the complainant to apprehend it.

(5) That accused received no grave or sudden provocation from complainant.

II. *For criminal force* (s. 349)—

(1) That the accused used force to the complainant.

(2) That he did so intentionally.

(3) That he used it without complainant's consent.

(4) That he did so in order to commit an offence, or with the intention of causing, or knowledge of the likelihood of its causing injury, fear or annoyance to the complainant.

(5) That he received no grave and sudden provocation from complainant.

3744. Charge.—The charge, if necessary, should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you assaulted (*or* used criminal force) to A B (*the person aggrieved*) and thereby committed

(2) *Arjun Pramanik*, 31 C. 664.
(3) *Jehan Baksh*, 16 W. R. 42.
(4) *Dwarka Nath*, 7 W. R. 15; *Kaptan* v. *Smith*, 16 W. R. 3.

an offence under section 352 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3745. Principle.—The meaning of assault as understood in the Code is at variance both with its popular sense, as the sense in which it is used in English law. In popular parlance the term is used to denote beating, but beating is causing hurt in the Code, and it is not an assault but battery in English law. The authors intended to designate the use of criminal force as assault, but this nomenclature was not approved, so that now the word "assault" has become a term of art, used in a special sense in which it is defined in the last section. What is assault in that sense is not criminal force as that term is defined in section 349. But in fact the two concepts though thus clearly distinguishable are nevertheless in point of their effect identical, for they are both subject to the same penalty, so that hereafter the two offences may be, for convenience sake spoken of as "assault" the difference between them being, of course, kept in view, against any necessity that may arise for discriminating them.

3746. Assault and Criminal Force.—These offences defined in the preceding two sections are both subject to the same penalty here prescribed. The penalty here foreshadowed varies according to the presence or absence of "grave and sudden provocation." In short, the offence differs in its gravity according to the presence or absence of that circumstance. But it is not the only circumstances possible; for as the ensuing sections declare, there are others which are calculated to aggravate the offence, and enhance the penalty to which an offender should be ordinarily subject. This section, however, postulates a case in which neither element occurs. The essential ingredients of the offence of assault have already been set out (§§ 3724, 3725); and so have been those of "criminal force" (§§ 3728, 3729). Both these offences would naturally be committed under a circumstance of some provocation. But though such provocation may not be sufficient to reduce the offence into one under section 358, still it will be a sufficient matter for consideration in awarding punishment. In fact, these are offences, in which the Court should be loth to imply offence unless it was clearly intended. For, if the would be assailant intended what we should call "bluff" it would be wrong to convict him of assault, merely because of the threatening gesture and the uttering words of terrible import. Indeed, such gesticulation and words as "I will kill and bury you on the spot," or "I will chop you up into pieces," or "I will pull out your eyes or slit off your nose," are ordinarily used by the people of this country as meaning no more than words of vulgar abuse. They are never intended to be followed up by action, even though a feint is sometimes made, but both parties know its true meaning. In such cases the motto to follow is *festina lente*.

3747. Assault on Provocation.—Assault is a minor offence and it may be further minimized if it is brought about by provocation. In one case the accused were beating drums at night to celebrate a festival. This noise annoyed the complainant who snatched away one of the drums and threatened the festive gathering who retaliated by an assault

upon the irate intruder breaking his arm. The Court convicted the accused only under this section holding that the complainant had unlawfully disturbed a lawful gathering, who had no intention of causing the grievous hurt, though it was in fact occasioned.(5)

Pres. Mag or Mag. of 1st or 2nd class. Cognizable. Warrant. Bailable. Not comp.

Assault or criminal force to deter a public servant from discharge of his duty.

353. Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done, or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Public servant*—s. 21. *Criminal force*—s. 310. *Assault*—s. 351.]

Synopsis.

(1) *Analogous Law* (3748).
(2) *Procedure and Practice* (3749-3750).
(3) *Proof* (3751).
(4) *Assault on Public Servant* (3752-3754).
(5) *No Offence* (3755).
(6) *Assault on Duty* (3756-3757).

3748. Analogous Law.—In commenting on the scope of sections 332 and 333, reference has been already made to this section, which only differs from them in that the violence here used falls short of hurt, but is sufficient to constitute "assault" or "criminal force" as those terms have been defined in sections 350 and 351; in all other elements the two offences are the same.

3749. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Presidency Magistrate, or a Magistrate of the first or second class.

No sanction is required to initiate a prosecution under this section, whether the prosecutor be a private person, or a public servant.(6) But a prosecution may be instituted for this offence either by the person directly aggrieved or by his official superior in the contempt of whose authority this offence is committed.

3750. Proof.—In addition to the points required to be proved for an offence under section 352, prove the following:—

(1) That the person assaulted, etc., was a public servant.

(2) That when so assaulted he was—

(5) *Ram Pershad*, 39 I. C. (A.) 687. (6) *Arjun Pramanik*, 31 C. 664.

(*a*) acting in execution of his duty as such public servant, or

(*b*) that the assault was intended to prevent or deter that person from discharging his duty as such public servant; or

(*c*) that it was in consequence of anything done, or attempted to be done by such person in the lawful discharge of his duty as such public servant.

3751. Meaning of Words.—"*In consequence of*" includes both the motive which actuated the assault and the immediate cause of the assault.(7)

3752. Assault on Public Servant.—The subject of assault on public servants has been so fully considered in the foregoing discussion that it will be superfluous to cover the same ground over again. The following commentary is, therefore, a mere recapitulation of the points already considered, to which reference should be made for a general view of the subject here presented.

3753. This offence consists of assaulting or using criminal force on a person who is at the time of the offence a public servant in the execution of his duty. As such, he is often exposed to considerable risks in the discharge of his official duties, and law, therefore, throws round him a special protection by prescribing specially deterrent sentences to those who offend against the majesty of law of which he is a minister. As, however, it is not intended to encircle him with a perennial halo of sanctity and inviolability, the Code has throughout in referring to him protected him only when he is in the execution of duty, he being left at other times to have recourse to the ordinary law applicable to all alike. The question when a public servant is in the execution of his duty has been already considered (§§ 927-938). It has been there remarked that this section was never intended to protect a person acting in good faith under the colour of his office, but only one who acts legally and within the scope of his authority. In other words, in order to enable a public servant to avail himself of the special protection here conferred, his act must be shown to be not only excusable but legal.(8) If, therefore, it was not legal, one thing is certain, that any resistance offered to him or assault committed upon him would not be punishable under this section. But would it then be punishable at all? On this question two views are possible: one is that if the act of the public servant was illegal, any resistance offered to his act would be legal and justifiable in law; another is that the fact that the act of the one was illegal does not make resistance offered by the other necessarily legal; whether it is or is not legal must be decided with reference to the law of private defence. And as such law (namely,

(7) *Mehr Din*, 99 I. C. 935, (1927) L. 162.

(8) *Dalip* 18 A. 246; *Raman Singh*, 28 C. 411; *Shyamacharan*, 16 C. W. N. 549, 15 I. C. 1006; *contra* in *Preolal Mukherjee*, 18 C. W. N. 548, 24 I. C. 163. In *Amir Khan*, (1913) P. L. R. 183, 18 I. C. 893, it was said that the subordinate was bound to obey the command of his superior officer (*submitted*—no unlawful commands).

section 99) does not confer on the public any right of resistance to an illegal act done by the public servant acting in good faith under colour of his office, it follows that the only occasion on which resistance to an act of a public servant is legal is when the act is not only illegal but is also not done in good faith under colour of his office.(9)

3754. The other view places the doctrine of self-help immediately before an illegal act,(10) but it must be confessed that this view is not in accord with the Code, and is directly opposed to the provisions of section 99 which confers on the public a more restricted protection against the acts of public servants than it does against the acts of others. The former view taken by the Madras Court is obviously right, and it reduces the question possible in a case of an assault on public servants to these: (*i*) Was the act of the public servant legal; (*ii*) if otherwise, was it done in good faith under colour of his office; if so, there is no right of private defence except in cases referred to in section 99, that is to say, except when the act reasonably causes the apprehension of death, or of grievous hurt. The question whether any act was likely to cause such an apprehension is necessarily one of fact dependent upon the nature of the act and the other circumstances of the case. So is also the question of good faith (§§ 3579, 3580). But, of course, neither question is material if the public servant is assaulted before he had had a chance to enter upon his duties. Such was the case of the Excise Inspector, whom the accused assaulted before he had entered his house or made any search for illicit distillation of liquor.(11) Further even after the public servant is in the execution of his duty, a distinction must be drawn between resistance and attack. This may be rendered necessary to make resistance effective. In that case the view of the Court would appear to be that the accused is protected. But his resistance accompanied by violence raises another question upon which, as already observed, the Courts are not agreed.

3755. No Offence.—Resistance to, and assaults on public servants while performing acts devoid of legality are, of course, not punishable under this section. A police constable who made a search in contravention of the provision of ss. 165 and 166 of the Criminal Procedure Code does not act within the limits of his authority, and an assault on him for resisting such search is not punishable under this section.(12) Arrears of income tax are realizable by law as arrears of land revenue. If therefore a police constable is deputed to realize them he acts illegally and resistance to him cannot be punished under this section.(13) So resistance to the execution of a warrant which did not contain the name of the person to be arrested cannot be punished under this section or s. 225-B.(14)

(9) *Pukot Kosu*, 19 M. 349; *Poomalai* v. *Udayan*, 21 M. 296 *Dorasami Pillai*, 27 M. 52.

(10) *Allah Baksh*, (1904) 5 P. L. R. 390; *Jogendra Nath* v. *Hiralal*, 51 C. 902.

(11) *Prakashchandra Kundu*, 41 C. 836.

(12) *Madho Sonat*, 13 A. L. J. 691, 30 I. C. 141, 20 Cr. L. J. 48; *Tukaram*, 48 I. C. (N.) 688; *Nandlal*, 19 N. L. R. 183, 76 I. C. 655 (resistance to a revenue peon executing a time-expired warrant of attachment issued under the C. P. Land Revenue Act); *Allah Dad*, 75 I. C. (P.) 731.

(13) *Jairam Sahu* (1923) Pat. 111, 72 I. C. 954.

(14) *Jogendra* v. *Hiralal*, 51 C. 902; *Mallampati*, 47 M. L. J. 447.

A vaccinator who is assaulted while attempting to vaccinate a child against the will of the parents, in a locality where vaccination has not been made compulsory, cannot complain of an assault which his own officious act had provoked.(15) The same view was taken of an assault on a bill collector, who being deputed to distrain moveable property, proceeded to seize the doors of a house which are immoveable property.(16) So where a Malguzar in the United Provinces was assaulted by his villagers when he was holding an inquiry as to the damage caused by them to the Government forest, the question arose whether he was a public servant in the execution of his duty at the moment of assault, and as it was found that under the Forest Act his duty was merely to assist a forest officer, he was neither a public servant nor an assault committed upon him punishable under this section.(17)

3756. Assault on Duty.—The cases last cited could be interminably multiplied as there are cases in which the assault is committed upon a person who is not a public servant at all, or being a public servant he is not acting in execution of his duty. It is as easy to multiply instances on the other side of the line, that is to say, those in which a public servant is assaulted in the discharge of his duty which is in every sense legal. These cases present no difficulty. Those that do are those in which a legal duty is irregularly performed in which the question appears to be one of degree. For instance, where the constable arrested a person (A) against whom a warrant of arrest for a cognizable offence was awaiting in the Station House, his arrest though irregular was justified on the ground that the existence of the warrant might be taken as credible information entitling him to arrest A under s. 54 (1) of the Code of Criminal Procedure, so that when B a stranger interfered and beat the constable off with a view to prevent his arresting A he was rightly convicted under this section.(18)

In another case the legality of the accused's conviction under this section depended upon the construction of ss. 94 and 165 of the Criminal Procedure Code. Under s. 94 the police may call for the production of anything necessary or desirable for the purpose of any investigation, he may summon the person in possession to produce it, and if he thinks that he would not so produce it, he may under s. 165 make a search for it. As such, the complainant, a Sub-Inspector of Police, searched the house of one Sirjivan Misser against whom his employer had complained of criminal breach of trust. His object was to search for the money said to be contained in a bag. During the search the accused assaulted the Inspector. He was convicted of this offence, and two objections were taken in revision to his conviction (*i*) that s. 165 did not authorize a general search, and (*ii*) that no search could be made in the house of an accused person, but both these contentions were overruled.(19) Of course, s. 165 of the Criminal Procedure which is an encroachment upon the right of a subject to treat his home as his

(15) *Bozagellaya*, 19 M. L. T. 238, 4 I. C. 1166.
(16) *Chinnaswami* v. *Chairman*, 16 M. L. T. 429, 25 I. C. 837.
(17) *Meharban Singh*, 9 I. C. (A.) 669.
(18) *Gopal Singh*, 36 A. 6.
(19) *Bissa* v. *Misser*, 41 C. 261; *Parasurama*, 9 M. L. T. 168, 8 I. C. 881; *Abdul Ghani*, 76 I. C. (P.) 186.

castle, must be strictly construed. Where, therefore, it requires that an authority to a subordinate to make a search must be in writing, any search by a constable without such authority would be illegal courting an assault which could not be punished under this section.(20) So it is not illegal to resist the execution of a warrant for the attachment of property which does not specify the date on or before which it is to be executed.(21)

3757. Of course, the fact that a person was not donning his official livery is no excuse for an assault on a public servant if his position and vocation was known to his assailant.(22) Nor is it even invariably necessary that, to be punishable under this section, the public servant should then be "in the execution of his duty" so that the assailant should "intend to prevent or deter" him from discharging his duty, since, if the assault was "in consequence of anything done or attempted to be done in the lawful discharge of his duty," it is equally punishable under this section. Such would be the case where the accused committed the assault because his request had not been acceded to.(23)

For a further commentary on this section, *see* s. 332 (§§ 3570-3572).

Pres. Mag or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Not comp.

Assault or criminal force to woman with intent to outrage her modesty.

354. Whoever assaults or uses criminal force to any woman, intending to outrage, or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Women*—s. 10. *Criminal force*—s. 350. *Assault*—s. 351.]

Synopsis.

(1) *Analogous Law* (3758).
(2) *Procedure and Practice* (3759-3760).
(3) *Proof* (3761).
(4) *Form of Charge* (3762).
(5) *Principle* (3763).
(6) *Indecent Assault on Woman* (3764-3770).
(7) *Assault on Prostitutes* (3769).
(8) *What Criminal Intent Material* (3770).
(9) *Quantum of Necessary Evidence* (3771-3772).
(10) *Indecent Assault or Attempted Rape* (3773).

3758. Analogous Law.—There are two sections in the Code protecting women against the sexual lust of men. One is section 376 which punishes the forcible ravishment of women, called rape, while this section punishes lesser acts of indecency such as a solicitation for sexual intercourse, or the like. Now as section 511 deals with attempts, and as there may be an attempt to commit rape implying a certain

(20) *Madha Sonar*, 13 A. L. J. 691, 30 I. C. 141.
(21) *Mohini Mohan*, 1 Pat. L. J. 550; *Judagi Rant*, 2 Pat. L. J. 18, 38 I. C. 744.
(22) *Lava*, 13 N. L. R. 87, 40 I. C. 629.
(23) *Mehr Din*, 99 I. C. 935, (1927) L. 162.

outrage on feminine modesty, the question whether what was done was merely an offence as here described or something more punishable under section 376|511 or 376 must not be lost sight of.

3759. Procedure and Practice.—This offence is non-cognizable, and a warrant should ordinarily issue in the first instance. It is bailable but non-compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class.

3760. If the facts disclose an offence punishable under sections 376—511 not triable by the Magistrate, he should invariably commit to the Court of Session. The statement of the female indecently assaulted to another, though in answer to questions put by the latter, is admissible in evidence against the accused.(24)

3761. Proof.—The points requiring proof are :—

(1) That the person aggrieved was a woman.

(2) That the accused assaulted or used criminal force to her.

(3) That he did so intending to outrage her modesty or knowing that he was likely to do so.

3762. Charge.—The charge should run thus :—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the—day of—at—you assaulted (*or* used criminal force to) A B, a woman intending to outrage (*or* knowing it to be likely that you would thereby outrage) her modesty, and thereby committed an offence punishable under section 354 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3763. Principle.—This section is enacted in the interest of decency and morals. An indecent assault upon a woman being an index of a depraved soul and often causing intense shame and suffering to the sufferer, arouses just indignation both of the person assailed as of the public and by which law esteems the degree of crime.

3764. Indecent Assault on Woman.—This section is intended to punish a special vice and an offence against public morality and decency. It is not, however, punishable on account of its being an offence revolting to the public, because, as such, it is punishable as a public nuisance. In that case its requirements are different, for it must then be committed in a public place or in view of the public, and it has then no reference to a particular woman. Such would be the exposure of one's person which is an act of indecency, and may outrage the feelings of women as well as men, but the injury thereby caused is general and is not aimed at a particular person, which is the object supposed in the present case.

(24) S. 8, ill. (*j*), Indian Evidence Act; *R.* v *Norcott*, (1917) 1 K. B. 347 carries the principle of admissibility a little further.

3765. The offence here punishable is an act which must at least amount to an "assault" on a woman. The term "woman" is, as defined in the Code, wide enough to denote "a female human being of any age."[25] In this sense an infant three days old or an octogenarian would be equally "women," but no one would think of committing the act here reprobated on such a person. Ordinarily, then, the women who are likely to be made victims of this offence are those who are young and who are old enough to feel the sense of modesty and the effect of the acts directed against it. But it does not deprive others of the protection from the license of men, provided their sense of modesty is sufficiently developed.

The accused took a girl six years old into his room, made her lie down, and he lay on her. She screamed and immediately after reported the matter to her mother. He was convicted under s. 352, but the High Court altered his conviction into one for this offence and substituted the sentence of rigorous inprisonment for one year and a fine of Rs. 60. The Magistrate had based his conviction upon the fact that the girl was too young to have any sense of modesty devoloped but the High Court held that the fact that she screamed and ran away proved that she resented her modesty being outraged by the accused.[1] If she had been older, say, 18 or 20, then the offence might have been one of attempted rape.[2] In another case a Captain McCormick had, through his mistress, seduced a young Malay girl aged between 11 and 12 upon whom he committed rape, but the prosecution fell through even for this offence, *inter alia* on the ground that she might have consented to the act.[3] The pulling of a girl's hair and hand suggests to onlookers in Burmah that the man and the woman are on conjugal terms. Where, therefore, one A was in love with B and pulled her hand and hair in the presence of several onlookers, A was held guilty of this offence because his act had insulted the modesty of B.[4]

3766. Such acts may assume a variety of form. It all depends upon the customs and habits of the people no less than upon the age of the woman. So an act which would be an outrage on the modesty of one woman would be thought nothing of by another. A kiss that would be highly resented by a lady might be no affront to the maid.[5] For instance, uplifting the veil of a pardah woman would be justly regarded as a highly indecent act grossly outrageous to her modesty, but it will pass unnoticed in the case of a European. Then there are occasions when an act could be considered as comparatively less outrageous than on other occasions. For instance, the license sanctioned at the festival of *Holi*, and on the occasion of marriages, are not to be taken as examples of the acts tolerated on ordinary occasions. The acts here punished may consist of what is technically an "assault," or they may even amount to the use of criminal force.

(25) S. 10.

(1) *Tatia Mahader*, 14 Bom. L. R. 961, 17 I. C. 794.

(2) *Khadam*, (1910) P. W. R. 42, 8 I. C. 257.

(3) *McCormick*, 6 Bur. L. T. 21, F. B. (but under s. 90 consent of child below 12 is no consent in law—a fact adverted to, and yet the fact of consent was found against the prosecutrix).

(4) *Mi Illa So* v. *Nga Than*, 4 Bur. L. T. 268, 13 I. C. 389.

(5) First Rep., s. 413.

3767. Now as mere words do not amount to an assault, it would seem to follow that a mere making of an indecent proposal unaccompanied by any gesture or preparation, is not sufficient to constitute this offence, though the case would be very different, if coupled with the words the accused pulled the woman by the arm.(6) Acts which are outrageous to morality would be naturally deemed outrageous to the modesty of woman. Such are taking indecent liberties with a female(7) (such as touching her breasts, stripping her naked,(8) or the like, and attempts at sexual intercourse), when they do not amount to something more.

3768. Such an assault must be without the consent of the woman. If she is *sui juris* and consents to the act, there can be, of course, no indecent assault. But a consent obtained by fraud, or given under a misconception of facts, is no consent at all. So where a person had connection with a married woman under pretence of being her husband, he was held guilty of an assault.(9) The same view was taken of a medical man who had himself stripped his patient naked under the pretence that he could not otherwise judge of her illness.(10) So an assault consented to by a female under eighteen years of age would be punishable in this country irrespective of the consent.

Assault on Prostitutes.

3769. The question whether this section is equally applicable to unfortunate women who live by their immorality must be answered in the affirmative. For they can be no more subjected to the unbridled lust of other persons than respectable women. And if a person takes indecent liberties with them, they will be as much punishable as if he had outraged the modesty of a virtuous woman. But in case of such women the question would be whether what was done was not done by leave and license. It is, however, a question of fact which in no way alters the law.

What Criminal Intent material.

3770. Again, it is not every act that is criminal, apart from intention or knowledge. In order to give it that character, the act must be done with the intention or knowledge that it was likely to outrage the modesty of the person with reference to whom the act is done.(11) A person may open a closed *palki* believing that it contains a runaway debtor for whom he is carrying warrant of arrest. It may hold a pardanashin lady of quality—the act may outrage her modesty, but it is not criminal, because the intention was innocent.(12) Other cases of similar mistakes are conceivable. Then again, while it is true that there are certain acts which will be considered as outrageous to the modesty of women of all countries, there are others which are not of the same unequivocal character, and in which there is room for mistake. A European holding out his hand to shake a native pardah lady is doing what

(6) *Sena Shetty*, (1190) 1 Weir, 347.
(7) *Rosinski*, 1 Mood. 19.
(8) *Nuna*, (1912) O. W. R. 16, 15 I. C. 309.
(9) *Williams*, 8 C. &, P. 286; *Saunders*, 8 C. & P. 265; *see* this case, *post*.
(10) *Rosinski*, 1 Mood, C. C. 19.
(11) *Fatima* v. *Capt. McCormick*, 6 Bur. L. T. 21 F. B., 19 I. C. 149; *G* v. *Kantila*, 31 C. W. N. 583, (1927) C. 505.
(12) *Kanai Lal Gowala*, 24 C. 886.

is only right and in accordance with the social etiquette of his country. But it is an act which may conceivably outrage the feeling of modesty of a lady brought up to practices of the harem. So while putting one's hand round a lady's waist is natural on certain occasions and is dictated by usage and social etiquette, it is regarded as a flagrant act of indecency intolerable to a native lady whether emancipated or otherwise. So there are other differences in which ignorance may betray one into acts which may be outrageous to female modesty, but they are not punishable here, whatever social penalties they may bring in their train.

3771. Quantum of Necessary Evidence.—Accusations connected with indecency and sexual immorality are one which are very easy to make in this country, and when made, very difficult to rebut. It is, therefore, necessary to see whether they are supported by independent evidence besides that of the woman herself, or are corroborated by conduct and the surrounding circumstances and natural probabilities.(13) It is, indeed, the practice of low class women, and not infrequently of women who ought to know better, to make shameless accusations against persons from the mere desire to aggravate their transgressions and so to bring down upon them their husbands' revenge. A small trespass or assault committed on grave provocation would be aggrandized into a brutal act of indecency, and it is a common thing to hear of such women complaining of their aggressor having unloosened their *dhoti*. Even where the accusation goes further than that, the Courts have cautioned due reserve in such cases, and unless there is some surrounding corroboration they have refused to rely on the uncorroborated testimony of the female complainant,(14) or of her cavalier husband. So in one case where the charge was of an attempt to commit rape, Melville, J. observed; "We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself, and we think that a conviction of an attempt at rape ought not to be arrived at, unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance."(15) The Court then commented on the absence of any injuries due to resistance and eventually altered the conviction to one under this section.

3772. It has been said before that if a person have sexual connection with another under the pretence that he was her husband, the offence was held to be an indecent assault. But the soundness of this view may be seriously doubted. It is submitted that the offence in such a case would be rape and nothing less (s. 376).

It is probably needless to add that no provocation, howsoever, sudden and grave, can mitigate this offence.

3773. Indecent Assault or Attempted Rape.—An indecent assault upon a woman may fall short of an attempted rape though it may amount to a preparation. In that case it would be punishable under

(13) *Nga Aung Dwe*, (1894) 1 U. B. R. 229.
(14) *Shankar*, 5 B. 403.
(15) *Ib.*

this section. Such was the case of the accused who took off the clothes of a woman whom he threw on to the ground and then sat down beside her.(16) But if he had laid on her it would have been attempted rape punishable under ss. 376-511.(17)

For other cases on this subject, *see* s. 376, Comm.

Assault or criminal force with intent to dishonour person otherwise than on grave provocation.

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Pres. Mag or Mag. of 1st or 2nd class. Non-cog. Summons. Bailable. Comp.

[*Person*—s. 11. *Criminal force*—s. 350 *Assault*—s. 351.]

Synopsis.

(1) *Analogous Law* (3774).
(2) *Procedure and Practice* (3775).
(3) *Proof* (3776).
(4) *Form of Charge* (3777).
(5) *Principle* (3778).
(6) *Assault and Dishonour* (3779-3780).

3774. Analogous Law.—The gist of the offence here punishable lies in dishonouring a person by means of assault or use of criminal force.

Now since the word "person" includes a human being, whether male or female, it may be possible to construe this section, so as to include all that is included in the offence described in the last section. But this is not what was intended to be included, and to include it would be against the rule of interpretation : *Specialia generalibus derogant.*(18) The section must then be confined to acts which are considered as derogatory to one's honour, as threatening to shoe beat one, or kicking, or spitting on one, clipping of one's moustaches or beard or other hirsute adornment or the like.

3375. Procedure and Practice.—This offence is non-cognizable, and summons should, ordinarily, issue in the first instance. It is bailable as well as compoundable, and is triable by a Magistrate, Presidency, first or second class.

3776. Proof.—The points requiring proof under this section are the same as for an offence under section 352 (*see* § 3743), in addition to which, prove :—

(6) That the accused intended thereby to dishonour the person assaulted.

(16) *Nuna*, (1912) P. W. R. 16: 15 I. C. 309.
(17) *Khadam*, (1910) P. W. R. 42; 8 I. C. 257.
(18) "Things special derogate from things general."

3777. Charge.—The charge should run thus :—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

'That on or about the day of—— -at -you assaulted (*or* used criminal force to) A B, intending by such assault (*or* criminal force) to dishonour the said A B, and thereby committed an offence punishable under section 355 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3778. Principle.—An assault when intended to smite one in one's sense of honour, is often provocative of mortal fray. It is, therefore, as much for the maintenance of public peace as in the interest of the person aggrieved that this section has been enacted.

3779. Assault and Dishonour.—This section is intended to meet those cases in which the mode of assault is selected on purpose to dishonour another, not those in which a person feels dishonoured by the assault. As a rule, all assault is dishonourable, but it is not with the general feeling of humiliation which one feels on being assaulted that the section is concerned. So a person may assault another and break his sacred thread or pull out his pigtail or his beard, but unless he did so on purpose to dishonour him and not merely because it offered him a convenient grip, he could not be visited with the higher penalty here provided. Such a case may arise where a person clips those hirsute adornments, for the act so chosen would at once convey the idea of dishonour, and it could not be otherwise accounted for. So if a person throw down another's cap and stamp upon it or use a slipper or shoe as the weapon of offence, he would be punishable under this section, so also would be kicking one, or pulling one's nose or laying a whip across the shoulders.

3780. The question whether an assault intended to offend one's religious susceptibilities is within the comprehension of the term "dishonour," requires consideration. Suppose a person selects on purpose a special weapon of ignominy, such as cow's or swine's bones, with which to assault a Hindu or a Mahomedan, respectively, could it not be said that the intention was to add insult to injury? The object of the section is to prevent those laceration of feelings caused by acts small and inconsiderate in themselves, but which lead to envenomed reprisals and serious breaches of peace. Such being the case, law is not punctillious as to how a person was disgraced so long as he was disgraced and disgrace was intended.

Any Mag. Cognizable. Warrant. Not bail. Not comp.

Assault or criminal force in attempt to commit theft of property carried by a person.

356. Whoever assaults or uses criminal force to any person, in attempting to commit theft of any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Person*—s. 11. *Criminal force*—s. 350. *Assault*—s. 351. *Theft*—s. 373. *Attempt*—s. 511.]

Synopsis.

(1) *Analogous Law* (3781).
(2) *Procedure and Practice* (3782).
(3) *Proof* (3783).
(4) *Form of Charge* (3784).
(5) *Assault to Commit theft* (3785-3787).

3781. Analogous Law.—This section is enacted against pick-pockets who attempt to commit thefts of property carried on one's person, such as the ordinary articles of jewellery, like watch and chain, rings and money purses and other trinkets, which pick-pockets make it their vocation to steal or snatch away in crowded bazars and fairs. The section evidently refers only to a case where the attempt made stops short of actual theft or robbery. In case of actual theft and robbery a very different punishment would be meted out.[19]

3782. Procedure and Practice.—This offence is cognizable, but warrant should, ordinarily, issue in the first instance. It is non-bailable as well as non-compoundable and is triable by any Magistrate.

3783. Proof.—The points requiring proof are:—

(1) The assault or use of criminal force by the accused to some person.

(2) That the person was then wearing or carrying a certain property.

(3) That the assault was committed in attempting to commit theft of such property.

3784. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you assaulted (*or* used criminal force to) A B in attempting to commit theft of certain property to wit——, which the said A B was then wearing (*or* carrying), and thereby committed an offence punishable under section 356 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3785. Assault to Commit Theft.—One great aggravating circumstance adding to the criminality of the offence of assault is an intention and an attempt to commit theft. The section only punishes an attempt which falls short of the offence of theft. Now, as moving or asportation of the property intended to be stolen is sufficient to constitute theft,[20] it follows that if the property is moved, it may be by a hair's breadth, the offence of theft is complete, and the accused would then be liable to punishment as for a completed offence and not merely for the offence here described. But in such a case the question may be whether the act done satisfies the requirement of law as to asportation.

In England, where in order to constitute larceny from the person the removal must be complete, a number of cases has been held to amount merely to attempts, which would probably be decided as complete thefts in

(19) *Mukeen*, (1865) B. U. C. 3. (20) S. 378.

this country. So where the prosecutor was carrying a pocket-book in the inside front-pocket of his coat, and as the accused lifted it about an inch above the top of the pocket, the prosecutor was apprised of it, it was held that though the thief could be convicted of larceny, yet he could not be convicted of stealing from the person, as in order to constitute that offence, the thing taken must be removed completely from the person.(21)

So upon indictment for stealing a watch from the person it appeared that the watch was carried by the prosecutor in his waistcoat pocket, and the chain, which was attached to the watch at one end, was at the other end fastened to a button-hole of the waistcoat with the watch key turned, so as to prevent the chain from slipping through. The prisoner stole the watch out of the prosecutor's pocket, but as he forcibly drew the chain out of the button-hole, the point of the key was caught in another button-hole, and so could not be severed from the prosecutor's person before the thief was caught. It was contended that the act amounted to no more than an attempt only, but on a case reserved the prisoner was held to have completed the theft, for which his conviction was upheld.(22)

3786. These cases are, however, inconsistent with some earlier cases in which a complete severance was held to be essential to constitute larceny.(23) However, should such cases ever arise under the Code, there can be no doubt but that they would be regarded as complete cases of theft and not merely of an attempt here punishable. It should also be noted that the English cases were concerned with theft as compared to the higher felony of stealing from the person, which is there punishable with penal servitude for any term up to fourteen years.(24) But this offence is higher as compared to theft punishable under section 379; and as such it only deals with an *attempt* which would certainly be complete on the facts upon which the English cases were decided.

Indeed, an attempt would be complete as soon as one's person is touched with intent to steal some property therefrom. A tug given at one's pocket would constitute an attempt, though the thief may be seized before he has gone any further. But in such a case a question may arise: Is the thief liable for an attempt when there was no property to steal? Suppose, a person was going with an empty pocket; but the thief believing that it contained valuables inserted his hand therein when he was seized, could he be said to have attempted to commit theft of any property which the person was carrying? It is apprehended not; for the section postulates the existence of something to steal, and there can be no attempt to steal from an empty pocket. But the section only requires that the property should be worn or carried, when the attempt is made, and not before or after it is completed. If therefore, the owner seeing the thief advancing towards him threw away his property, and the thief then picked it up and ran away, he could not be convicted under this section, though he would then be guilty of the much higher crime of robbery.(25)

(21) *Thompson*, R. & M. C. C. 78.
(22) *Simson*, Dears C. C. 421.
(23) *Wilkinson's case*, 1 Hale P. C. 508; *see* s. 378, Comm,
(24) Larceny Act, 1861 (24 & 25 Vict., c. 96, s. 40); re-enacting 7 Will. IV & 1 Vict., c. 87, s. 5.
(25) 1 Hale P. C. 533; *Thompson*, 32 L. J. M. C. 53.

For further commentary on what is an attempt and a completed theft, *see* s. 378.

Assault or criminal force in attempting wrongfully to confine a person.

357. Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Any Mag. Cognizable Warrant. Bailable. Not comp.

[*Person*—s. 11. *Wrongfully confine*—s. 340. *Criminal force*—s. 350. *Assault*—s. 351. *Attempt*—s. 511.]

Synopsis.

(1) *Analogous Law* (3787).
(2) *Procedure and Practice* (3788).
(3) *Proof* (3789).
(4) *Form of Charge* (3790).
(5) *Assault in Attempted Confinement* (3791).

3787. Analogous Law.—The offence of wrongful confinement is defined in section 340. This section punishes an assault in attempting wrongfully to confine a person. As such, it may be superadded to that offence.

3788. Procedure and Practice.—This offence is cognizable but warrant should, ordinarily, issue in the first instance. It is bailable but not compoundable and is triable by any Magistrate.

3789. Proof.—The points requiring proof are:—

(1) That the accused committed an assault or used criminal force to another.

(2) That he did so in attempting wrongfully to confine that person.

3790. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you assaulted (*or* used criminal force to) A B in attempting wrongfully to confine the said A B, and thereby committed an offence punishable under section 357 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3791. Assault in Attempted Confinement.—At the first blush this offence would appear to apply as much to an assault committed in attempting to put a person into confinement as in attempting to prevent his escape therefrom. But the section is really intended to apply only to the former case, that is, to a case when assault is made or criminal force used to disarm opposition offered against getting into confinement, and not to an assault upon a person already confined. The attempt to get one into

wrongful confinement is in itself an offence: to commit assault to effect that purpose is, therefore, necessarily an assault committed under aggravation. As the Law Commissioners pointed out, an attempt attended with an assault is as good in point of criminality as wrongful confinement, and the two offences are, therefore, liable to the same punishment.(1) This section suggests another circumstance of even greater aggravation, namely, assault or the use of criminal force upon a person wrongfully confined. Such a person may be wholly helpless and unable to defend himself. Any assault committed on him should, therefore, deserve to be visited with exemplary punishment. But there appears to be no provision for it.

Pres. Mag. Non-cog. Summons. Bailable. Comp. Summary.

Assault or criminal force on grave provocation.

358. Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Explanation.—The last section is subject to the same explanation as section 352.

[*Person*—s. 11. *Criminal force*—s. 350. *Assault*—s. 351.]

Synopsis.

(1) *Analogous Law* (3792).
(2) *Procedure and Practice* (3793).
(3) *Assault on Provocation* (3794).

3792. Analogous Law.—This is an attenuated form of the offence which is otherwise punishable under section 352. The explanation was added at a later stage. It refers to section 358 as "the last" section which is incorrect. The words more appropriate would be "this section."

The explanation not only qualifies section 352 but other sections relating to hurt, such as sections 300, 334 and 335.

3793. Procedure and Practice.—This offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable as well as compoundable, and is triable by any Magistrate and may be tried summarily.

3794. Assault on Provocation.—A simple assault on grave and sudden provocation is about the most venial offence known to law. It is, indeed, an offence in which the provisions of section 95 should be read side by side.

For rest of the commentary under this section, reference should be made to sections 350, 351 and 352.

(1) First Rep., s. 416.

Of Kidnapping, Abduction, Slavery and Forced Labour.

359. Kidnapping is of two kinds: kidnapping from British India, and kidnapping from lawful guardianship.

Kidnapping.

Synopsis.

Analogous Law (3795-3797).

3795. Analogous Law.—As to this the draftsmen said: "The crime kidnapping consists, according to our definition of it, in conveying a person without his consent or the consent of some person legally authorized to consent on his behalf, or with such consent obtained by deception, out of the protection of the law, or of those whom the law has appointed his guardians.

"This offence may be committed on a child by removing that child out of the keeping of its lawful guardian or guardians. On a grown-up man it can be committed only by conveying him beyond the limits of the Company's territories, or by receiving him on board of a ship for that purpose.

"The carrying of a grown-up person by force from one place within the Company's territories to another, and the enslaving him within the Company's territories, are offences sufficiently provided for under the heads of restraint and confinement. The enticing of a grown up person by false promises to go from one place in the Company's territories to another, and the enslaving him within the Company's territories, may be a subject for a civil action, and, under certain circumstances, for a criminal prosecution; but it does not appear to us to come properly under the head of kidnapping."(2)

3796. Kidnapping is literally child-stealing.(3) It thence came to mean the forcible abduction or stealing of a human being regardless of sex or age. The term has, however, been used here in a special sense as meaning the abduction of a minor male under fourteen years of age and a female under sixteen years of age from lawful guardianship, and in the case of an adult abduction from British India. The term used in English Law to designate an offence of the former description is "child-stealing," the term kidnapping being reserved to designate an offence which consists of stealing and carrying away or secreting any person, whether in the same country,(4) or by sending him away from his own country into some other, or to parts beyond the seas whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity.(5) The offence is punishable at common law, and by the Habeas Corpus Act, 1679,(6) the offence of child-stealing being punishable under the Statute of 1861, where the person kidnapped is taken abroad.(7)

(2) Note M. Reprint, s. 156.
(3) From slang, *kid*, a child, and *nap* for *nab*, to steal.
(4) 1 East P. C. 429.
(5) *Ib.*, p. 430.
(6) 31 Car. II, c. 2, s. 11.
(7) 24 & 25 Vict., c. 100, s. 56.

The terminology adopted in the Code is thus different from what is sanctioned by English Law, though the offences are, in other respects, more or less alike.

3797. Kidnapping is in this section divided into kidnapping from British India and kidnapping from lawful guardianship. But it is apparent that this division is not mutually exhaustive and exclusive. For there may be kidnapping of a minor both from his lawful guardian as well as from British India.

The offence of kidnapping is but an aggravated form of wrongful confinement and is, therefore, an offence in which all the elements of that offence are necessarily, present. It is, however, confinement of such a serious form that the Code treats it as a distinct offence.

360. Whoever conveys any person beyond the limits of British India without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from British India.

Kidnapping from British India.

[*British India*—s. 15. *Consent*—s. 90.]

Synopsis.

(1) *Analogous Law* (3798).
(2) *What is Kidnapping from British India* (3799-3800).
(3) *Meaning of "Conveys"* (3799).

3798. Analogous Law.—After describing the general character of kidnapping in the last section, this section and the next proceed to define the two offences—this section defines kidnapping from British India, and the next kidnapping from lawful guardianship. As for kidnapping from British India the offence is complete as soon as a person "conveys" any person beyond the limits of British India without his consent.

The corresponding provisions of the English law have been referred to under the last section (§ 3796).

3799. What is Kidnapping from British India?—This section defines the offence punishable under section 363. As remarked before, this offence is more general than "kidnapping from lawful guardianship," an offence defined in the next section. The offence of kidnapping from British India may be committed in respect of any person, male or female, major or minor, and irrespective of his nationality. It is not necessary that British India should be his home; nor is it necessary that he should be a British subject. But what is necessary is that the accused should (*i*) "convey" him, (*ii*) beyond the limits of British India, (*iii*) without his consent, or the consent of some one legally authorized to consent on his behalf. The term "conveys"[8] is a little ambiguous.

Meaning of "Conveys."

(8) From Fr. *convoyer*, Lat. *con*, together, *via*, way; lit—to go together; hence to escort, transport.

For it may as much refer to an attempt as to a completed act. If, for instance, a person were to deceitfully induce another to go with him to Hyderabad, would his offence be complete as soon as the former has made a start, or only when he crosses the Hyderabad territory?

In its original literal sense the word "convey" meant simply going together on a journey, but, in popular parlance, it now means carrying a person to his destination. In this view the offence would not be complete till the person actually reaches not only a foreign territory but his destination as well. Any act falling short of it would then be punishable merely as an attempt. That this is really the meaning intended would appear to be strengthened by the collocation of the words "beyond the limits of British India," and the different phraseology of the next section in which a cognate offence is defined. But since the words "beyond the limits of British India" indicate merely a territory outside its geographical limits, it follows that the offence would be complete as soon as its frontier is crossed, no matter whether the parties reach their intended destination or not. Till then apparently he has a *locus penetentia*. He takes the irrevocable step as soon as he places his victim on foreign soil.

3800. The term British India has been defined in section 15, and it has been, of course, used in that sense here. But though the territory is beyond the limits of British India it need not be necessarily foreign jurisdiction. So the conveyance of a person to Demarara or Mauritius would be as much kidnapping as his conveyance to Hayti or the Pacific Islands. But the mere conveying of a person from one place to another is not criminal. The act becomes criminal if he is conveyed without his consent. It is that which gives to the act its essential element of criminality. Now, a person may be so conveyed as much by force as by inducing another to give his consent by fraud and deception.(9) So, of course, consent loses its essential elements if it is given by one through fear, in which case it is submission and not consent. So again, consent given by a person who is not *sui juris* is no consent in law. But in such a case consent may be validly given by his lawful guardian, in which case it will have the same effect as if he had consented to the act himself. But such consent, again, must be an intelligent consent not obtained under fear or misconception of facts. Suppose, for instance, a person were to approach the guardian of a minor and offer his child an agreeable protection in his home in foreign territory, and believing in his good offices, the guardian were to consent to his taking away the minor, upon which the accused were to dispose him of as a slave or for forced labour, which was his orginal intention, he would be guilty of this offence and so punishable under section 363. The case would be the same if the accused were to inveigle a major by blandishments and false allurements to leave his home and then sell him to a party who employs him on forced labour. The consent here spoken of may be given before the conveyance or even afterwards, for the ratification of an act is consent, and has in law the same effect as consent previously given.

(9) S. 90.

361. Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Kidnapping from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Synopsis.

(1) *Analogous Law* (3801).
(2) *What is Kidnapping from Lawful Guardianship* (3802).
(3) *Meaning of Words* (3803).
(4) *Kidnapping of Minor or Insane* (3804-3806).
(5) *Age Below 14 and 16* (3805).
(6) *What is "Taking" any Minor?* (3807-3812).
(7) *Taking and No Taking When Complete* (3808).
(8) *When is the "Taking" Complete* (3809).
(9) *Length of Detention Immaterial* (3810).
(10) *Children Without Guardian Excepted.* (3812).
(11) *Guardian of minor and lunatic* (3813-3819).
(12) *Under Hindu Law* (3813).
(13) *Under Mahomedan Law* (3815-3817).
(14) *Under Other Laws* (3818-3819).
(15) *So far as regards Natural Guardians* (3820).
(16) *Lawful Custodians* (3821-3823).
(17) *Out of the Keeping of the Lawful Guardians* (3822).
(18) *No Guardian: No Offence* (3824).
(19) *General Summary* (3825).
(20) *Good Faith as a Defence* (3826-3828).
(21) *English Law* (3826).
(22) *English Case Contra* (3827-3828).
(23) *Mistaken Belief as to Age When a Defence* (3829-3830).
(24) *Intention Immaterial* (3831).
(25) *Consent Necessary* (3832).
(26) *Abetment of Kidnapping* (3833).

3801. Analogous Law.—This section defines kidnapping of a minor, which is "child-stealing" in English Law and against which statutory provisions exist in that country.

This offence is necessarily only committed in respect of a minor. To kidnap a grown-up person would, therefore, not be this offence, though it would be punishable as wrongful confinement or kidnapping from British India, as the case might be.

3802. What is Kidnapping from Lawful Guardianship?—The corresponding provisions of the English Statute run thus :—

"S. 55. Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of the father and mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without labour."(10)

"S. 56. Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy, or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child, or the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as in this section before mentioned,

"Shall be guilty of felony, and being convicted therefor, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and if a male under the age of sixteen years, with or without whipping:

"Provided that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof."(11)

This section has been manifestly drawn from these two sections from which its language has also been borrowed. But the English Statute is in many respects much wider and more general in its terms than the section. The English cases decided under it must be then cautiously applied as aids to its construction.(12)

3803. Meaning of Words.—"*Takes or entices*": These words are important and imply removal or decoying of the minor. The word "taking" means physical removal or taking away.(13) "*Out of the keeping of the lawful guardian*": "Keeping" means custody, but not necessarily possession. Maintenance, protection, control or care is enough to constitute keeping. The word "lawful" is important and must be distinguished from the term "legal" which means quite a different thing. A guardian may be lawful without being a legal guardian. The legal guardian is the guardian appointed by law, or whose appointment is in consonance with the general law of the land and of the person whose guardian he is. A lawful guardian is a guardian whose custody is merely sanctioned by law. A legal guardian is necessarily a lawful guardian, but not necessarily *vice versa; e.g.*, a schoolmaster or an employer is a *lawful* guardian, a parent of the minor is a *legal* guardian. "*Lawful guardian includes*": The word "includes" merely means that others may be lawful guardians, and not that thereupon the natural guardian ceases to be so.(14) The term must be liberally construed.(15)

(10) 24 & 25 Vict., c. 100, s. 55, taken from 9 Geo. IV, c. 31, s. 20; 10 Geo. IV, c. 34, s. 24 (1).

(11) 24 & 25 Vict., c. 100, s. 56, taken from 9 Geo. IV, c. 31, s. 21; and 10 Geo. IV, c. 34, s. 25 (1).

(12) *Kesar*, (1919) Pat. 33 F. B., 49 I. C. 481.

(13) *Jagannath*, 15 Cr. L. J. 630, 25 I. C. 638.

(14) *Jagannadha*, 24 M. 284.

(15) *Pemantle*, 8 C. 971; *Jetha Nathoo*, 6 Bom. L. R. 785; followed in *Kesar*, (1919) Pat. 33 F. B., 49 I. C. 481, 20 Cr. L. J. 161.

3804. Kidnapping of Minor or Insane.—This section defines the offence of "kidnapping" properly so called (§§ 3796-3799), which is designated child-stealing in English law. In describing other offences in this Chapter the qualifying words adopted in the Code, and constituting one element of criminality are "intentionally," "voluntarily," "with knowledge of the likelihood," "wrongfully" or the like, but no such term qualifies this section, and the reason is that the criminal intention is necessarily implied from the fact of taking away a minor from lawful guardianship. The fact that the person taken is in his nonage is sufficient notice of the illegality of the act, for every one is presumed to know that a minor is incompetent to think for himself, and his consent is therefore, as good as if he had not consented at all. This applies to all minors whether male or female, who are under eighteen years of age which is the age of majority fixed in this country.(16)

But the taking of such persons is not an offence under this section, which fixes a still lower age for the purpose, and which is the special age of minority, below which law presumes a total mental incapacity to consent. In this respect there is a divergence between the civil law and this section and other parts of the Code. Under the former, a minor below eighteen years of age is incompetent to contract, and as that rule obtains in other parts of the Code, a person taking a minor below that age away from his lawful guardian may be guilty of wrongful confinement, irrespective of his consent, and he may be even guilty of abduction under the last section if he conveys him beyond the limits of British India. But, nevertheless, he could not be held guilty under this section. And since section 363 provides a common punishment for the two offences described in the last and present section, it follows that there may be cases in which a person may be liable for abduction irrespective of consent, though the age of the person abducted may not be below the age here prescribed.

Age Below 14 and 16.

3805. However, adverting only to the language of this section, the first essential of this offence is that the person decoyed must, if a male, be below 14 and if a female, below 16 years of age at the moment of the crime. In case of minors verging on that age this must be strictly proved, but when proved it is sufficient, and the accused cannot be heard to say that he did not know her to be under the age of consent, or might suppose from her appearance that she was older,(17) or that there were reasonable grounds for believing her to be so, and that the accused was honestly misled.(18) Nor does the fact that the girl had herself volunteered to go with the prisoner alter his liability, for, if it did, it would be giving effect to her consent which law has declared to be wholly inoperative.

So Maule, J., said: "The law throws a protection about young persons of the sex and within the age specified by the Statute. It has been determined by the Legislature, that at age young females are

(16) S. 3 Act IX of 1875.

(17) *Robins* 1 C. & K. 456; *Olifier*, 10 Cox 402; *Mycock*, 12 Cox 28; *Booth*, 12 Cox 231.

(18) *Prince*, L. R. 2 C. C. R. 154.

not able to protect themselves; or give any binding consent to a matter of this description. It is, therefore, quite immaterial whether the girl abducted consents or not; if her family, that is to say, those who under the Statute may lawfully have the possession and control over her, do not consent to her departure, the offence is committed.[19] Even the fact that the girl had deceived the accused by overstating her age would be no defence, for as Erle, C. J., said: "The Statute was passed for the protection of parents, and for preventing unmarried girls from being taken out of the possession of their parents against their will; and it is clear that no deception or forwardness on the part of the girl in such cases can prevent the person taking her away from being guilty of the offence created by this section."[20]

3806. The prisoner took, out of the possession and against the will of her father, a girl of the age of fourteen, who, however, looked much older than sixteen, and the jury found as a fact that before the prisoner took her away, she had told him she was eighteen and that he *bona fide* believed such statement, and that such belief was reasonable; it was held that the prisoner was guilty, though he reasonably believed the girl to be over sixteen years of age[21] (§§ 379-386).

3807. What is "Taking" any Minor?—But in such a case the question may be legitimately raised whether the girl can be said to have been "taken" by the prisoner within the meaning of this section. So on an indictment against two prisoners, one man and another a woman, it appeared that the girl became first acquainted with the female prisoner, and at her house met the male prisoner with whom she became acquainted and whom she met frequently, and at last she left her father's home, as she said for a walk, but never returned: she was afterwards found cohabiting with the male prisoner, whereupon Wightman, J., told the jury: "This offence is complete under the Statute which creates it without any reference to the object for which the girl may be taken. You must be satisfied that the girl was under sixteen years of age, and that her father was unwilling that she should go away, and it must be assumed to be so if it appears that, had he been asked, he would have refused his consent. You must also be satisfied that the prisoners, or one of them, took the girl out of the possession of her father. For this purpose a taking by force is not necessary; it is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's house. If however, the going away was entirely voluntary on the part of the girl, the prisoner would not be guilty of an offence under this Statute."[22]

So the question in such cases then is whether what was done by the prisoner amounts to "taking" the minor from lawful guardianship. So, referring to this aspect of the case, Bramwell, B., said: "I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet,

(19) *Kipps*, 4 Cox 167.
(20) *Timmins*, Bell C. C. 276.
(21) *Prince*, 44 L. J. M. C. 122.
(22) *Handley*, 1 F. & F. 648.

his not doing so is no infringement of this Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away. It is, however, equally clear that, if the girl, acting under his persuasion, leaves her father's house, although he is not present at the moment, yet, if he avails himself of that leaving which took place at his persuasion that would be a taking her out of her father's possession, because the persuasion would be the motive cause of her leaving. Again, although she may not leave at the appointed time, and although he may not wish that she should have left at that particular time, yet, if finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment, he is also guilty, if his persuasion operated on her mind, so as to induce her to leave."(23)

Taking and No Taking when Complete.

3808. So where the accused was in the habit of visiting a prostitute, and he there met a young married girl below the age of sixteen whom he seduced and then carried her about and kept her concealed from her husband, it was held that the girl having been already with the prostitute the accused took advantage of his opportunity to seduce her, and that he could not therefore be held to have taken or enticed her, and he could not, therefore, be convicted of kidnapping.(24) The fact that the girl was in the habit of going about by herself would be a strong piece of evidence against her "taking" by the prisoner from lawful guardianship if, in fact, she visited him of her own accord, and he cohabited with her.

So in an indictment against the prisoner it appeared that the girl, who was over fifteen but in appearance three years older, and very prepossessing, lived with her widowed mother, and was allowed to leave her home all by herself and that she sometimes went to dances at public houses and that whenever she was out, the door was either left on the latch or the mother let her in. As such, she left her home one evening at nine o'clock at night alleging that she was going to spend the night with her married sister, but, joining company with another girl they went and slept at night with the prisoner and his companion with whom they spent the next day. The mother searched for her, when the two prisoners were indicted, but Cockburn, C. J., directed the jury to discharge the prisoner who had slept with the girl's companion; and as to the first prisoner he told them that if they thought that the mother had by her conduct countenanced the daughter in a lax course of life, by permitting her to go out alone at night and to dance at public houses, this was not a case that came within the intent of the Statute, but was one where what had occurred, though unknown to her, could not be said to have happened against her will.(25)

This case resembles the case of a potter's girl under sixteen years of age whose case was disposed of by the Bombay High Court. She too

(23) *Olifier*, 10 Cox. 402; *Pandyaram*, (1912) M. W. N. 538, 16 I. C. 166; *Lachi Ram*, 73 I. C. (P.) 260, (1923) A. I. R. L. 330.

(24) *Rakhal Nikari*, 2 C. W. N. 81; *Ramchander*, 12 A. L. J. 265.

(25) *Primelt*, 1. F. & F. 50; *Frazer*, 8 Cox 446.

was living with her widowed mother in straitened circumstances and eked out a scanty livelihood by working as labourer in the vegetable market. One day she was going towards the market alone with a labourer's basket, when she was accosted by a woman who took her to a house, promising to find her work. She went; but on reaching her house, the woman gave her promises of jewellery and fine clothes, and, it seems, fed her with drugged sweets. She was driven in the evening to an empty house where the accused cohabited with her for two days. She was then let go. It was held that the girl had been decoyed from the keeping of a legal guardian and all the persons concerned were convicted.(1)

Such was also held to be the case of a married girl under 16 years, who being dissatisfied with her mother-in-law, left her husband's home to go to her maternal uncle. On the way she was seduced by the accused Karan Singh who took her to his brother's house and kept her there, for a time, and then commenced negotiations for her marriage with several people, in the course of which her identity became disclosed, whereupon Karan Singh left the place, leaving the girl with his brother Bhulan, whom the headman of village persuaded to report the matter to the police which he did keeping her for another month with him while the police were making inquiries. The Court convicted Karan Singh under s. 363, holding that though she had left her husband, she had not ceased to be under his guardianship. As for Bhulan, she resided with him pending the police investigation, and there was no evidence that he was a party to the conspiracy.(2)

When is the "Taking" Complete?

3809. In all these cases the prisoners were willing to receive and did receive the girls. They had even encouraged them to come to them. But there was no persuasion, inducement or blandishment to leave their homes. If there had been, then the taking would be complete.(3) For it is not required that the taking should be by force or fraud, actual or constructive,(4) or that there should be physically carrying her in his arms or upon his back.(5) For taking is complete if he was materially instrumental in either counselling her to leave or helping her in leaving. The question is one of fact to be determined with reference to the circumstances of each case. It may sometimes be difficult to determine the precise moment at which the taking is complete. But, speaking generally, the keeping of the guardian would be at an end when the person of the minor had been transferred from the custody of the guardian of some person on his behalf into the custody of a stranger.(6)

The offence of kidnapping is completed the moment the minor is taken out of the custody of a lawful guardian and the offence is not

(1) *Jetha Nathoo*, 6 Bom. L. R. 785; followed in *Karan Singh*, 14 A. L. J. 792.
(2) *Kasar Singh*, 14 A. L. J. 792, 36 I. C. 580.
(3) *Robb*, 4 F. & F. 59; *Meadows*, 1 C. & K. 399.
(4) *Mankletow*, 22 L. J. M. C. 115; *Kipps*, 4 Cox 167; *Booth*, 12 Cox. 231; *Bhungee Abeer*, 2 W. R. 5; *Amgad Bugeah*, 2 W. R. 61; *Koordan Singh*, 3 W. R. 15.
(5) *Kipps*, 4 Cox 167.
(6) *Jeetha Nathoo*, 6 Bom. L. R. 785; *Gurdib Singh*, (1916) P. L. R. 55; 34 I. C. 652.

a continuing one until the minor's return to his guardian; there can, therefore, be no abetment of the offence by conduct which commences only after the minor has once been taken out of the keeping of the guardian and the guardian's keeping of the minor is completely at an end.(7) So where the defendant went in the night to her father's house, and placed a ladder against her window, and held it for her to descend, which she did, and eloped with him, it was held to be "taking of her out of the possession of her father" within the Statute ; although she herself proposed the plan to the prisoner.(8) So it was held to constitute taking, where the prisoner advised the girl to leave her parents' house and meet her at an appointed place, which she did.(9) And the taking becomes clearer if the prisoner induced her to leave her father's house promising to keep her and making other promises, and in consequence of which she leaves her home.(10)

Length of Detention Immaterial.

3810. Time is no element in considering the question of taking, it being immaterial as to for how long the girl was with the prisoner. If she left the lawful custody of her guardian for ever so short a time the offence is complete, but in such a case the question would be whether the time during which she was away from her guardian was sufficient to constitute loss of possession. So in a case where the prisoner had frequently met and cohabited with the girl, on the last occasion keeping her for three days, Erle, C. J., on a case reserved held that the time was sufficient to have deprived the parents of the custody of their child: "The Statute was passed for the protection of parents, and for preventing unmarried girls from being taken out of the possession of their parents against their will; and it is clear that no deception or forwardness on the part of the girl in such cases can prevent the person taking her away from being guilty of the offence created by this section. The difficulty which we have is to say what constitutes a taking out of the possession of the father. The taking away might be consistent with the possession of the father, if the girl went away with the party intending to return in a short time; but when a person takes a girl away from the possession of her father, and keeps her away against his will for a length of time, as in this case, keeping her away from her home for three nights, and cohabiting with her during that time, we think the evidence justified the jury in finding the taking to be a taking out of the possession of the father within the meaning of the Statute....We limit our judgment to the facts of this particular case. It may be that a state of facts might arise upon which the offence would be complete in Law when the girl passed her father's threshold, as where she is taken away with the intention of keeping her away permanently."(11)

The offence then depends not so much on the time during which the girl was away as upon the intention to remove her from the custody

(7) *Abdur Rahman*, 38 A. 664; *Habibullah*, 15 O. C. 36, 18 I. C. 653.
(8) *Robins*, 1 C. & K. 456.
(9) *Mankletow*, 22 L. J. M. C. 115.
(10) *Robb*, 4 F. & F. 59; *Nemai Chakoraj* 27 C. 1041, F. B.; *Chekutty*, 26 M. 454. (455); *Koochri*, 7 S. L. R. 17, 20 I. C. 599.
(11) *Timmins*, Bell C. C. 276.

of her guardian. It may then be that there would be taking if the custody is gone though the girl may still be in the house. It was so held in a case in which the prisoner had induced the girl to get married to him, which she did by going to church, after which she immediately returned to her parents' home and lived there as before, and when it was held that the prisoner was guilty as the girl's marriage to him had put an end to the parents' possession, and that the time she was actually away was wholly immaterial, as her husband had power to take her away whenever he liked, her whole relationship to her father being altered by the marriage.(12)

3811. Enticing(13) is one mode of taking a minor. It is inducing the minor of her own accord to go to the kidnapper. The latter may decoy the former not only by specious promises and false assurances, but by making acceptable presents and otherwise ingratiating himself into the favour of the minor. A child may be enticed away by a promise of toys and sweets, a grown up girl by amorous blandishments and the present of dresses and trinkets. In each case there is the "taking," if the minor abandons the protection of the lawful guardian, who is entitled to it.

Children Without Guardian Excepted.

3812. Of course, if there is no lawful guardian then the case would be different, for the section is intended only to protect the guardian's custody of their wards. It has no application to a street Arab, who may permit himself to be taken away by any one who may choose to do so. Some penalty for this act was proposed by the Sudder Court of the North-Western Provinces who observed that "cases are of common occurrence in this country in which children are left at fairs, or abandoned in times of famine and distress, and provision is required for the punishments of persons appropriating such children with evil intentions. But the Commissioners opposed the suggestion which was not given effect to.(14)

The same rule applies to a lunatic without a lawful curator. These cases may be then regarded as exceptional. But even in their case the accused may bring himself within the penal visitation of section 363 if he offends against the provisions of the last section.

3813. Guardian of Minor and Lunatic.—This raises the next question, who are the lawful guardians of minors and lunatics? Its solution depends upon the personal *status* of the minors and the Law to which they are subject. There are no positive rules of Hindu Law on the subject, and the only reference to the subject available in the sacred texts is to be found in Manu who says: "The property of a student and of an infant, whether by descent or otherwise, let the King hold in his custody, until the owner shall have ended his studentship, or until his infancy

(1) Under Hindu Law.

(12) *Baillie*, 8 Cox 238.

(13) Derivation uncertain—Probably from Lat. *titio*, a firebrand. Hence, to draw on by exciting hope or desire, to attract to allure as a bait; to decoy—which is the word used in English Statute.

(14) First Rep., ss. 424, 425.

shall have ceased in his sixteenth year."[15] This rule is obviously only applicable to the guardianship of the property of male minors. It has no reference to females, and in neither case to personal custody. The custody of property vested in the King must now be understood to mean the Courts of Law to whom the king has delegated this function.[16] But though there is the paucity of direct authority for the guardianship of Hindu minors, the question has been settled by long established custom and usage which, according to Manu, is transcendental Law,[17] by which the father is the natural guardian of his legitimate minor children, both male and female, and against him the mother has no right to their custody even if they be infants in arms. But on their marriage the custody of his daughter ceases in him and becomes at once vested in her husband who is then his wife's natural guardian,[18] and on his death, his relations, if any, within the degree of a *Sapinda*, are the guardians of a minor widow in preference to her father or his relations.[19]

But so long as girls are minors and unmarried, the father is their sole guardian, though, as a matter of course, the actual custody remains as much with the father as the mother. But the custody of the mother is in such case the custody of the father, so that any removal of the children from place to place by the mother ought to be taken to be consistent with the right of the father as guardian, and not as taking out of his keeping. But where the mother removed her girl from the father's house for the express purpose of marrying her without his consent, and thereby deprived him for ever of his guardianship and custody, she was held to have offended against the provisions of this section, and rendered herself obnoxious to the penalties of section 463.[20] After the father, and in the absence of a valid appointment by him, the mother is the natural guardian of her minor children,[21] subject to the same disqualification on the marriage of her daughters. In default of the mother the guardianship of minors devolves on the eldest brother,[22] and in default of an adult brother the paternal relations generally are entitled to hold the office of guardian; failing such relations, the office devolves on the maternal kinsmen according to the degree of propinquity.

3814. As adoption is in Hindu Law the imitation of nature, it follows, that by adoption the adoptive father becomes similarly entitled to the custody of his adopted son, and he then acquires this right even as against the natural father.[23]

(2) Under Mahomedan Law.

3815. Under Mahomedan Law, the rule as to guardianship is different, there being a different set of guardians, for marriage, of property and of person respectively.[24] For instance, the mother, though the

(15) Manu (Sir Wm. Jones' Ed.), ch. VIII, V. 27, p. 153.
(16) *Ram Bunsee Konwaree* v. *Soobh Koonwaree*, 7 W. R. 325.
(17) Manu, ch. I, s. 108, p. 12.
(18) *Dhuronidhur Ghose*, 17 C. 298.
(19) *Khadiram* v. *Coumari*, 16 C. 584; *Tekchand*, (1915) P. R. No. 27.
(20) *Pran Krishna Surma*, 8 C. 969.
(21) *Soobah Doorga Lal* v. *Neelanund*, 7 W. R. 74.
(22) *i.e.*, he must not be himself a minor; *Karura* v. *Maruraj*, 3 L. L. J. 588; 67 I. C. 831.
(23) *Lakshmibhai* v. *Vasudev Takee*, 3 B. I.
(24) *Monijan Bibi* v. *Dist. Judge*, 19 C. W. N. 290, 25 I. C. 229.

natural guardian of the minor's person, is not the guardian of her property, nor for marriage. The father and the grandfather of a minor girl are her natural *wali* or guardians for marriage, in their absence the *Hanafis* entrust that duty to their male descendants, *viz.*, the brother, the paternal uncle, and then their sons, and so on.(25) For other purposes Mahomedan Law divides the natural guardian of minors into those who are either *near* or *remote*. The ordinary natural guardian of minor children, whether male or female and whether married or unmarried, is both under the *Sunni* as well as the *Shiah* school of Law their mother,(1) and according to the *Sunni* school her guardianship of her daughters, whether married or unmarried, continues until their puberty,(2) which is presumed on the expiration of the fifteenth year.(3) But her guardianship for the purpose of this section does not end then but continues up to the time she has completed her sixteenth year.(4) In any case her right to custody remains even where she has been divorced by her husband and it does not relieve the father from the obligation of maintaining them.(5) On attaining puberty the custody of daughters devolves upon their other female relations capable of their management. According to Mahomedan Law the care of minor girls should never be entrusted to male members of the family unless they are within the prohibited degree of relationship for marriage, such as the father, paternal grandfather, paternal great grandfather and others in the same ascending scale, after whom come the full brother, then the half brother by the father, then the full paternal uncle, then the half-paternal uncles in the same order, who are the natural guardians of the boys in their order of propinquity to him.

3816. It will be observed that the husband has no place in the table of guardians, and he is therefore never to be guardian of his wife till she has attained puberty and is fit to receive the embraces of her husband.(6) Till then he is not even obliged to maintain her,(7) but on attaining puberty he acquires a right over her person as she on her part acquires a right to receive her dower and maintenance.(8)

3817. As regards the custody of illegitimate children, both the Hindu as well as Mahomedan Law assign it to the mother, and this for an obvious reason.(9) Failing the mother, there is no one competent to have their custody, but the Court is empowered to appoint a guardian and determine what custody would be for their interest.

(3) Under Other Law.

3818. In the case of children of other nationalities the father has the preferential right to the custody of his minor children of both sexes(10) and it has been held in

(25) Amir Ali, 1 Mah. Law, Sec. IV.

(1) *Tayheb*, 2 Hyde 63; *Futtah Ali Shah* v. *Mhd. Mookeemuddin*, (1864) W. R. 131; *Raj Begum* v. *Nawab Reza Hossein*, 2 W. R. 76; *Alimodeen* v. *Syfoora*, 6 W. R. 125; *Ameeroonissa*, 11 W. R. 297; *Idu* v. *Amiran*, 8 A. 322.

(2) *Khutija*, 5 B. L. R. 557; *Mohummuddy* v. *Comudutoonissa*, 13 W. R. 154, *Beedhun* v. *Fuzuloollah* 20 W. R. 411; *Hamid Ali* v. *Imtiazan*, 2 A. 71; *Nur Kadir* v. *Zubikha Bibi*, 11 C. 649.

(3) Macnaghten, Mah. Law, Ch. IV, case 17; Koran (Sale's Tr). ch. IV.

(4) *Miran Baksh*, (1905) P. R. No. 60.

(5) *Ayshabai*, 6 Bom. L. R. 536.

(6) *Wazeer Ali* v. *Kaim Ali*, 5 N. W. P. H. C. R. 196; *Khatija*, 5 B. L. R. 557; *Mahin*, 13 B. L. R. 160; *Nur Kadir* v. *Zuleika*, 11 C. 649.

(7) *Kolashim* v. *Didar Buksh*, 24 W. R. 34.

(8) Bailie's Dig., Pt. I, pp. 54, 125, 126.

(9) *Pemantle*, 8 C. 971.

(10) *Holmes*, 1 Hyde 99.

England that he is entitled to their custody until they attain the age of sixteen.(11) The Guardians and Wards Act now provides as follows:—

"S. 17. As between parents who are European British subjects adversely claiming the guardianship of the person, neither parents is entitled to it as of right, but, other things being equal, if the minor is a male of tender years or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father."(12)

This section, of course, only applies to guardians appointed by a Court. Where the Court awarded custody of a child of a union to the husband who had obtained a decree *nisi* for divorce and the wife removed the child whereupon she was being prosecuted for kidnapping under this section, the High Court quashed the proceedings holding that the wife had committed no offence so long as the decree *nisi* against her had not been made absolute.(13)

3819. In the case of illegitimate children English Law admits the claim of neither parent to custody. But the Court is empowered to appoint such person as it considers likely to protect the interests of the minor. In the case of young infants the mother would be naturally such person, at any rate during the period of nurture(14); after her it would naturally prefer the putative father to the mother's relatives.(15)

For this purpose the nationality of the children depends upon how they have been brought up.(16)

3820. So far as regards Natural Guardians.—Guardians may, however, be also appointed by deed or will, in which case the question depends upon the *factum* and the validity of the appointment. Guardians may also be appointed by the Civil Court under the provisions of the Guardians and Wards Act.(17)

3821. Lawful Custodians.—The question about the legality and validity of a guardian may sometimes raise nice questions of legal technicality. In that case law cannot be defeated, and Explanation I therefore lays down that the term is intended to include not only persons legally entitled to be guardians but also those lawfully *entrusted* with their custody. In short it is sufficient for the present purpose if the guardian, though not a *de jure* guardian, was still a guardian *de facto* if his custody was not illegal.(18) Such a case may arise where the natural guardian makes over his child to the custody of a friend who would then be its lawful guardian within the meaning of this section.(19) But it is clear that a minor may be so entrusted to another for permanent custody, or temporarily, and absolutely, or for a limited purpose.

Explanation 1.

(11) *Barford*, Cox. 405.
(12) Act VIII of 1890, s. 17.
(13) *Borthwick* v. *Borthwick*, 41 C. 714.
(14) *Pemantle*, 8, C. 971; *Barnardo* v. *McHugh*, (1891) A. C. 388; *Nash*, 10 Q. B. D. 454.
(15) *Kerr*, 12 I. R. L. R. 642; *Nash*, Q. B. D. 454.
(16) *Myna Boyee* v. *Ootaram*, 8 M. I. A. 400.
(17) Act VIII of 1890.
(18) *Pemantle*, 8 C. 971; *Sital Prasad* 42 A. 146.
(19) *Pemantle*, 8 C. 971; *Fatli* (1911) P. R. No. 7, 10 I. C. 97; *Tekchand*, (1915) P. R. No. 27, 31 I. C. 380; *Baij Natti* 1 O. L. T. 416, 25 I. C. 840.

For instance, the guardian sending his children to a boarding school for education "legally entrusts" them to the custody of the schoolmaster, and so long as they are at school they are under his guardianship as much as they are under their natural guardians while at home. But being at school for a limited purpose the schoolmaster cannot consent to their being taken for purposes other than those legitimately within the purpose of the trust. So it was observed: "It deserves good consideration before it is decided that an offender acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the Statute. For then every schoolmistress might dispose of in the same manner the children committed to her care, though such delegation of the custody of a child for a particular purpose be no delegation of the power of disposing of her in marriage, but the governance of the child in that respect may still be said to rest with the parent."[20]

The true view of guardianship is that it is a trust divisible by delegation for certain purposes for the welfare of the minor, and a person placed in temporary custody for any such purpose, though "lawfully entrusted" for that purpose, does not acquire all the rights and powers of its natural guardian, nor does the latter cease to be its guardian *pro tanto*.[21] A person may be under a duty to look after another, but it does not make him his guardian. For instance, the master looks after his servant; the mistress after her maid[22]; but the one does not on that account become the guardian of the other.

"Out of the keeping of the lawful guardian."

3822. This is the only reasonable view possible, but it is not the outcome of Explanation 1 which, it must be confessed, is too wide. The question whether the natural guardian had or had not ceased to have the custody of the child, must, of course, be decided with reference to all the facts of the case. But the cases are clear that a temporary guardian has no power to consent to an act so as to neutralize the mischief which this section was intended to meet. In England, a number of cases have been decided to determine when the guardian ceases to be in "possession" of the minor, But these difficulties are sought to be obviated by the use of the word "keeping," a word free from the taint of having acquired an artificial legal construction. "This word," said Batty, J., "connotes the fact that it is compatible with independence of action and movement in the object kept. It implies neither prehension nor detention, but rather maintenance, protection and control, manifested not by continual action, but as available on necessity arising."[23] The physical control of the minor is not then necessary to constitute "keeping" or custody. It is sufficient if there is maintenance, protection and control, for those are the essentials of guardianship. On the other hand, it is equally clear that if the minor abandons her guardian with no intention of

(20) East, P. C. 457. To the same effect *Jagannadha*, 24 M. 284; Ganesh, 31 A. 448.

(21) *Dhera Singh*, (1878) P. R. No. 8; *Ganesh*, 31 A-448.

(22) *Kessat* (1919) Pat. 33 F. B., 49 I. C. 481.

(23) *Jetha*, 6 Bom. L. R. 785 (788).

returning to him,[24] or where the legal guardian turns out the minor, he ceases to keep her, and if she is then seduced, the seducer commits no offence under this section.[25] But the mere fact that the minor leaves the protection of her guardian does not put her out of his keeping,[1] so long as the minor is free to return to his protection.[2]

Where one Saratamma, aged eight years, a daughter of one A, visited her sister B married to one C, who lived in the house of his uncle D, where she was for a month with her father's consent, and from where she was taken by four of A's nephews and married to one of them without A's consent, which was never solicited, as it was known that it would have been refused. The four accused were prosecuted for kidnapping, and the Court held that though they had taken the girl from the possession of her sister, she was nevertheless taken from the keeping of A, who was her lawful guardian, and that as such they were liable to be tried for kidnapping, of which the Session Judge had wrongly acquitted them, holding the girl to be in the custody of D, the uncle of her sister's husband.[3]

So in another case a girl under sixteen years of age, by name Jetki, lived with her widowed mother, who both eked out a slender existence by working as coolies in a vegetable bazar. One day at 10 A.M., Jetki was going for work with the labourer's basket and cloth when she was accosted by one woman Ganga, and taken home on promise to give her work. But on reaching home, she broached an indecent proposal and promised her jewellery and fine clothes if she gave in. She did not, and she was thereupon given some drugged sweets and then taken in a hackney carriage to an empty bungalow in a lonely place where the accused Jetha cohabited with her for two nights and two days. He was prosecuted with Ganga for kidnapping and it was held that Ganga was rightly convicted under section 363, inasmuch as she had enticed the girl away from the keeping of her lawful guardian, and that the other accused, Jetha, was rightly convicted under section 368 for wrongfully concealing her knowing that she had been kidnapped.[4]

3823. These decisions are in entire harmony with the English cases decided upon a much narrower Statute in which the offence required taking from the *possession* of a legal guardian.[5] But as has been before remarked, the word "possession" in the English Statute has given rise to cases which would be differently decided here. For instance, where a servant girl under sixteen years of age obtained permission from her master to visit her parent from Sunday to Monday

(24) *Gunder Singh*, 4 W. R. (Cr.) 6.
(25) *Pandhyaram*, (1912) M. W. N. 538; 16 I. C. 166.
(1) *Jetha*, 6 Bom. L. R. 785; *Jagannatha Rao* v. *Kamaraju*, 24 M. 284; *Manshomal*, 7 S. L. R. 71, 16 I. C. 768; *Mulla*, 8 S. L. R., 27 I. C. 181; *Bazand Mawaz*, 3 L. 213, 88 I. C. 620, (1922) A. I. R. (L.) 380.
(2) *Koochri*, 7 S. L. R. 17, 20 I.C. 599; *Asgar Ali*, (1907-09) U. B. R. 3 P. C. 27, 4 I. C. 901.
(3) *Jagannatha Rao* v. *Kamaraju*, 24 M. 284.
(4) *Jetha Nathan*, 6 Bom. L. R. 785; followed in *Katan Singh*, 14 A. L. J. 792.
(5) *Mycock*, 12 Cox. 28; *Baillie*, 8 Cox. 238.

night, and went to see them for a few hours on Sunday, and then left to join the prisoner, with whom she had made a previous arrangement telling her parents that she was returning to her master, but instead of which she remained with the prisoner for a number of days, it was held that the prisoner could not be convicted of kidnapping because the girl was not in the possession of the father at the time of the alleged offence, but was under the lawful charge of her master.(6) This view was reiterated in another case in which the girl was employed as a barmaid at a distance from her father's home.(7) Such cases would, of course, present no difficulty in view of Explanation I which was probably enacted to meet such cases.

3824. No Guardian: No Offence.—But such cases are distinguishable from those in which there is no legal guardian, permanent or temporary. They are, moreover, cases which verge on those in which it was held that there was no "taking" by the accused. For example, if a girl, say, aged fourteen, run away from her parents' home and roam about, to all appearance a free agent, and if some one meeting her on the road were to engage her as a coolie and then keep her as his mistress in a house situate in a populous neighbourhood, he could not be convicted of kidnapping, because he had neither taken nor enticed her away from the keeping of a legal guardian. So, in the case of waifs and strays there can be no "keeping" nor taking or enticing away as here required.(8) So the accused saw a girl aged about fourteen years living with a Brahmin woman in the serai of a village, where they maintained themselves by begging. From there Mt. Rukena lived in the house of a goldsmith by name Ghasi and was betrothed to his son; but as she was not given enough to eat, she easily lent herself to the persuasions of the accused Baldeo who seduced her, for which he was prosecuted. But the Court held that Ghasi, from whose house she had been abducted, was not her lawful guardian, as he had not been lawfully entrusted with the care or custody of her, and that, therefore, the accused could not be convicted.(9)

3825. General Summary.—The foregoing discussion establishes the following propositions: (*i*) The section has no application to minors other than those who are in the custody of a lawful guardian; (*ii*) such guardian may be either the natural, legally appointed or a testamentary guardian, or one who has been entrusted with the protection, maintenance or care of the minor by such a guardian; (*iii*) the accused must take or entice from his "keeping"; (*iv*) there can be no taking where the accused merely receives a minor after he has left the protection of the guardian; (*v*) the fact that the minor is in charge of the temporary guardian, *e.g.*, the schoolmaster or employer does not deprive the primary guardian of his control; but in such a case, the control of another guardian is superadded, from whose custody the taking of a minor entails the same penalties. But such guardian has only limited powers and cannot consent to acts inconsistent with

(6) *Per* Lush, J., in *Miller*, 13 Cox. 179.
(7) *Henkees*, 16 Cox. 257.
(8) *Kesar*, (1919) Pat. 33 F. B., 49 I. C. 481, 20 Cr. L. J. 161.
(9) *Buldeo*, 2 N. W. P. H. C. R. 286; *Hardeo*, (1880) P. R. No. 7; *Khuda Baksh*, (1887) P. R. 27.

his duty. Lastly, the section extends no protection to self-constituted guardians, or to waifs and strays in respect of whom no offence under this section can be committed.

3826. Good Faith as a Defence.—There remain other questions not directly raised in the section, but which necessarily underlie it. It has been stated before that this is one of those sections in which the mere doing of an act constitutes an offence irrespective of intention or knowledge. An instance has been given of a *bona fide* belief in the majority of the minor and of the accused being himself deceived by the minor overstating his age (§§ 3805, 3809). So if the minor was not in fact in the keeping of a lawful guardian, the offence cannot be committed whatever the belief of the taker may be. If the minor is in fact in such keeping and the accused is ignorant of the fact, it is for him to prove such ignorance in his defence, though it does not follow that such ignorance would be a complete answer to the charge of an offence under this section read with section 363.[10] But if not a complete answer, is it any answer at all? And if it is not a complete answer, are these offences an exception to the fundamental principle of all criminal responsibility—*Actus non facit reum nisi mens sit rea*? The question is by no means an easy one, and the authorities in England are divided on the subject. For while there are cases in which it has been held that the presence of intention or knowledge is the foundation of all criminality, there are others in which the act is regarded as *malum prohibitum* and, therefore, penal irrespective of intention. And the fact that the Statute says nothing about intention does not dispense with its proof. As Hill, J., said: "It is true that the Statute says nothing about this knowledge, but this must be imported into the Statute."[11]

(1) English Law.

So in another case Cockburn, C. J., said: "*Actus non facit reum nisi mens sit rea* is the foundation of all criminal procedure. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case, and must be imported into this Statute."[12] So Earle, J., in another case, said: "A man cannot be said to be guilty of a delict unless to some extent his mind goes with the act."[13] This was said in a case of an obstruction to prevent the purposes of an election at a vestry. In another case the girl had left her parents with another girl for a Sunday School. The prisoner

(10) *Khuda Baksh*, (1887) P. R. No. 27.

(11) *Per* Hill, J. (Pollock, C. B., Martin, B., Crompton, J., and Wiles, J., concurrent) in *Cohen*, 8 Cox. 41.

(12) *Sleep*, 30 L. J. M. C. 170, following *Cohen*, 8 Cox 41. In *Tinckler*, 1 F. & F. 513, the same learned Chief Justice (Cockburn, C. J.) charged the jury as follows: "It was clear the prisoner had no right to act as he had done in taking the child out of Mrs. Barnes' custody. But inasmuch as no improper motive was suggested on the part of the prosecution, it might very well be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise which he alleged he had made to her father, and that he did not suppose he was breaking the law when he took the child away. This being a criminal prosecution, if the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to an acquittal."

(13) *Buckmaster* v. *Reynolds*, 3 C. (N. S.) 62.

met them and induced them to go to Manchester, where he took them to a public house where he seduced one of them who was then under sixteen years of age. The prisoner had made no inquiry as to who the girl was, what her age was, and whether she had her parents alive. The jury found him guilty, but Lush, J., reserved the case, and in the Court of Criminal Appeal, Bovill, C. J., said: "In the present case there is no statement of any finding of fact that the prisoner knew or had reason to believe that the girl was under the lawful care or charge of her father or mother or any other person. In the absence of any finding of fact on this point the conviction cannot be supported."(14) The prisoner was consequently acquitted.

3827. But there are cases on the other side of the line, in which the doctrine of *mens rea* is not indeed denied, but the opposite view is supported on the ground that the fact that the person was a minor should be presumed to be known to the accused. As Bramwell, B., put it: "But what the Statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl.....No argument is necessary to prove this. It is enough to state the case. The Legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea;* so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the Statute, an act which, if he knew she was in possession and in care or charge of anyone, he would know, was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention if done without lawful cause."(15)

(1) English Cases Contra.

But though the Court was in this case all but unanimous in holding that the prisoner could be convicted of taking a girl below sixteen though he had reason to believe, and did in fact believe, and was even assured by the girl herself, that she was eighteen, Brett, J., however, dissented from the majority, and said: "And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be first a vicious will; and, secondly, an unlawful act consequent upon such vicious will. Now there are three cases in which the will does not join with the act. *First*, where there is a defect of understanding, etc. *Secondly*, where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case in all offences committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees with it.....Ignorance or mistake is another defect of will, when a man, intending to do a lawful act does that which is unlawful; for here the deed

(14) *Per* Bovill, C. J. (Channell, B., Pigott, B., Byles, J., and Lush, J., concurring) in *Hibbert*, 38 L. J. M. C. 61, following *Green*, 3 F. & F. 274 (*per* Martin, B.).

(15) *Prince*, 44 L. J. M. C. 122; *Watkins* v. *Major*, 44 L. J. M. C. 164. To the same effect, *Booth*, 12 Cox. 231; *Mycock*, 12 Cox. 28; *Olifier*, 10 Cox 402; *Robins*, 1 C. & K. 456 referred to *ante*.

and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law."(16)

3828. But the contrary held by the fifteen Judges of England have so far as that country is concerned set at rest all controversy on the subject and their view does not do away with *mens rea*, but, to quote the judgment, "gives full scope to the doctrine of *mens rea*."(17) But though this decision, being a decision of fifteen Judges, cannot be directly overruled, cases are not wanting in which weighty pronouncements are made against the soundness of the view there taken.(18) But though the formidable barrier which that case has created to the recognition of the doctrine of *mens rea* is admitted, the Courts have acknowledged the existence of the rule which has the effect of neutralizing the effect of that leading precedent. So on a case reserved, nine Judges held that in a case of bigamy a *bona fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence against the indictment.(19) And Wright, J., was even more outspoken in his condemnation of the doctrine enunciated in *Prince's case*(20) which he held was an isolated and an extreme case.(21) He then pointed out that except in three classes of cases not relevant for the present purpose, "there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him, generally, or in the particular matter in order to constitute an offence."(22)

3829. Mistaken Belief as to Age When a Defence.—But whatever may be the state of English Law on the subject, the question arises whether the presence of *mens rea* is required to constitute the offence as defined in this section. Of course, the question about good faith and reasonable belief can only arise in a case of minor verging on the extreme limit of prohibited minority. In the case of a child five(23) to ten years old(24) such a question is impossible, for *res ipsa loquitur*, and a man need not inquire about its age. But the question of good faith does not appear to have been raised or considered in some cases in which it could have been legitimately raised.(25) For instance, in one case it was held that the girl had been betrothed to the accused, and was even permitted to reside in his house occasionally. But afterwards he changed his mind, and thereupon the accused meeting her in company with two women carried her off to his house, but he used no force, and did not attempt to conceal her when the police went to him. It was said that "he was wrong in carrying off the girl without the consent of her lawful guardian; and he has, therefore, committed the offence of kidnapping."(1)

(2) Indian Rule.

(16) *Per* Brett, J. (*dissentiente*) in *Prince*, 44 L. J. M. C. 122, see s. 76 as to mistake of fact.

(17) 44 L. J. M. C. 122.

(18) *Per* Coleridge, C. J., in *Tolson*, 23 Q. B, D, 168, (203); "I believe all my learned brethren would concur with me in saying that they may perhaps be wrong in taking the view of that decision that they do take (nobody can be infallible), they intend to accept the decision of the majority of the Judges in *Reg* v. *Prince*, L. R. 2 C. C. R. 154.

(19) *Tolson*, 23 Q. B. D. 168.

(20) L. R. 2 C. C. R. 154.

(21) *De Rutsen*, [1905] 1 Q. B. 918 (921).

(22) *De Rutzen*, [1895] 1 Q. B. 918 (922).

To the same effect *Kershaw*, (1902) 18 T. L. R. 357.

(23) *Moodhoo Paul*, 3 W. R. 9.

(24) *Umsadbaksh*, 3 B. 178.

(25) *Gooroodoss Rajbunsee*, 4 W. R. 7.

(1) *Per* Kemp, J., in *Gooroodoss Rajbunsee*, 4 W. R. 7.

Good faith was assumed to offer complete vindication in some cases, in which the Hindu husband had carried off his wife, but in which the question of good faith was unnecessary as the husband being the natural guardian of his wife had right to her custody.(2) This was the *ratio decidendi* of the case in which the Mahomedan mother had employed an agent to bring away her married minor daughter, aged eleven or twelve years, from the house of her mother-in-law, in which case the accused being the lawful guardian of her infant daughter could not be convicted of kidnapping.(3) In such a case the person who should carry off her daughter before she attained puberty, without the mother's consent, would in his turn be guilty of kidnapping. But then there would be room for the plea of good faith. Should such a case ever arise there can be no question but that in view of the general exceptions the plea, if proved, should be a complete answer to the charge, but not being a part of the definition it will have to be established in defence.(4) And since the Code condones a wrongful act done under a mistake of fact, a mistake as to age would in this country be equally a good defence (§ 581).

3830. Indeed the second exception expressly admits the plea of good faith in the only case which may not have been said to be covered by the general exceptions. For the putative father of an illegitimate child, though not a natural guardian (§§ 3818, 3819) may still be permitted to believe himself to be entitled to the custody of his own offspring. And the fact that he is not the real father of the child he claims is in such a case equally immaterial, if he honestly believed himself to be its father. In such a case there is then a chance for a double mistake; the accused may erroneously, though honestly, believe himself to be the father of the child he wishes to own, and as such he may, erroneously, though honestly, believe himself to be entitled to its custody. But his good faith is a complete vindiction of his act if only it was not done for an "immoral or unlawful purpose." An immoral act would be such as to sell the child for prostitution, and an unlawful purpose would be to sell it for forced labour or the like. In order to take the case out of the exception such purpose must be present in his mind at the time of the act: it is immaterial if it occurs to him afterwards if his intention at the time of obtaining custody was honest and benevolent.

3831. Intention Immaterial.—It has already been stated elsewhere that criminal law takes no account of human motive, though it does of human intention. But in this respect this section is an exception to the rule, for it pays no regard even to the intention of the accused.(5) For instance, where the father removed his daughter from the lawful guardianship of her husband without his consent he rendered himself liable for punishment under this section. But this was a case in which the Magistrate had refused to issue process, and the High Court merely ordered the issue of a process against the father(6); though in another case, this was followed to support the view that intention did not count in judging of the accused's offence under this section, though it was material in considering the punishment.(7)

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(2) (1864). W. R. 12.
(3) *Korban*, 32 C. 444.
(4) This was conceded by Jardine, J., in *Mahakor*, (1895) B. U. C. 820 (823, 824).
(5) *Dhurnidhur*, 17 C. 298; followed in *Ganesh*, 31 A. 448.
(6) *Dhurnidhur*, 17 C. 298.
(7) *Ganesh*, 31 A. 448; *Ballia*. (1914) P. L. R. 161, 25 I. C. 839.

3832. Consent Necessary.—The question of consent is an important question, for it legalizes an act otherwise unwarrantable and illegal. The consent required must be of the lawful guardian of such minor. The latter's consent is, of course, inoperative,[8] but it may be express or implied,[9] though it must be antecedent to the commission of the offence.[10] Sufficient has been already said before as to the nature of the consent which is a justification for an act otherwise illegal and criminal[11] (§§ 858-868). The consent here required is then a free consent given by the guardian without fear or misconception of facts, and not wrung out of him by intimidation or coercion. Such consent then necessarily implies knowledge of the destination of the minor and the purpose for which it is being taken away from the guardian. If a person take away a child for tuition, and then give it away in marriage, the consent would rather aggravate than exculpate the crime. The question what would be the effect of a consent given for an immoral or unlawful purpose, or for a purpose beyond the scope of the guardian's authority, may raise complicated issues. But it is intimately connected with the subject. In the case of temporary guardians the question of consent is limited by their authority (§ 3821). But in the case of a natural guardian the solution of the question depends upon other considerations.

Suppose, for example, the case of a female Hindu guardian, who is entitled to the custody of a child. Now under Hindu Law, the right to dispose of a minor Hindu girl in marriage does not go with the right of guardianship,[12] for it is a right which belongs to the paternal relatives, though it is of course a right which, like the *patria potestas* of civil law, must not be used atrociously but benignly. It is a right for the benefit of the minor and not the profit of the relation. They may sue the guardian of the person for hurrying on a marriage if not to the interest of the minor.[13] On the other hand, they must consult the wishes of the personal guardian as to the suitability of the match. Where, therefore, the accused, paternal agnates, so empowered to marry a minor girl under the guardianship of a female acting under the will of her mother, hurriedly and forcibly attempted to marry her off to a person of their own choice and in order to defeat a previous betrothal and the consequent marriage, it was held that the accused were guilty of this offence.[14] If in such a case the guardian had consented to the marriage, without the knowledge of the paternal relation, the question of criminality would then have been one of intention and good faith. So where the accused, a Hindu, left her husband's house, taking her daughter for the express purpose of marrying her without his consent to the brother of the accused in pursuance of a previous arrangement between her and the accused, it was held that the mother was guilty of kidnapping and the accused of abetting her offence.[15]

3833. Abetment of Kidnapping.—The question of abetment raises another question of some moment in the offence under consideration.

(8) *Bhungee Aheer*, 2 W. R. 5; *Amgad Bugeah*, 2 W. R. 61; *Koordan Singh*, 3 W. R. 15; *Sookee*, 7 W. R. 36; *Gooroodoss Rajbunsee*, 4 W. R. 7; *Fatima* v. *McCormick*, 6 Bur. L. T. 21, F. B., 19 I. C. 149.

(9) 5 Bur. L. T. 157, 18 I. C. 669.

(10) *Ganesh*, 31 A. 448.

(11) S. 90.

(12) *Maharanee Ram* v. *Maharanee Sooth*, 7 W. R. 323.

(13) *Kashi Chunder Sen*, 8 C. 266.

(14) *Mahakor*, (1895) B. U. C. 820.

(15) *Prankrishna Surma*, 8 C. 969.

The offence of kidnapping is defined to be the taking of a minor out of the custody of the lawful guardian without his consent. Now, if the offence is completed, the moment the minor is removed from the lawful custody of the guardian, any subsequent co-operation of or assistance received from another could not render the latter liable as an abettor. But if, on the other hand, the offence be a continuing one, so long as the minor remains in the custody of the kidnapper, those who aid him in its removal or otherwise, are necessarily guilty of abetment. The Courts are now unanimous in holding that the offence is complete as soon as the taking is complete, and the taking is complete with the removal of the minor from the custody of the guardian. Of course, the Code discriminates between such acts as "taking" and such acts as "receiving," "retaining," "concealing," and "detaining," which have each a connotation distinct from the rest. If, therefore, A remove a minor from the house of B to his own house, and afterwards C should join in removing him to a place of greater security, C would not be liable for the abetment of B if he did not abet the removal to B's house.(16) But, it is explained, that if in such a case B's primary intention was to convey the minor beyond the limits of British India, then the taking would be a continuous act till the intended destination is reached. This has been held to be the distinguishing feature of the only case which inclines the other way.(17)

362. Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Abduction.

Synopsis.

Analogous Law (3834-3836).

3834. Analogous Law.—Abduction is a means or a subsidiary act: it is not an act which is in itself an offence, but when done with a certain intention it becomes an offence.(18) Abduction may be employed for kidnapping, as if the minor be seized by force and removed from the custody of the lawful guardian, or if he is decoyed "by any deceitful means" to leave that custody and go to the accused. Again, there may be abduction without kidnapping and kidnapping without abduction, for neither "taking" nor lawful custody of a guardian is required for abduction, nor, indeed, need the person abducted be a minor, or taken possession of by the accused. So there may be kidnapping without abduction, for there may be removal of a person without the employment of force or deceitful means. Abduction is thus neither correlated to, nor has anything in common with kidnapping. But they are, broadly speaking, members of the same family, with this difference that while kidnapping is not a continuing offence, but commences and is completed as soon as the taking

(16) *Nemai Chattoraj*, 27 C. 1041, F. B.; *Ram Dei*, 18 A. 350; *Ram Sundar*, 19 A. 109; *Tika*, 26 A. 197; *Chekutty*, 26 M. 454; *contra* in *Samia Kundan*, 1 M. 173, distinguished; *Chanda*, (1894) P. R. No. 6: *Muhammad Baksh*, (1894) P. R. No. 8; *Durga Das*, (1904) P. R. No. 13.

(17) *Samia Kundan*, 1 M. 173; distinguished in *Chekutty*, 26 M. 454; *Nemai Chattoraj*, 27 C. 1041, F. B.

(18) *Ganga Dei*, 12 A. L. J. 91, 22 I. C. 730; *contra* in *Ghulam Yusuf*, 75 I. C. 297, 24 Cr. L. J. 921.

is complete, abduction, when punishable, is a continuing offence, that is, the offence is being committed so long as the person abducted is taken from place to place by the continued use of force or compulsion.(19)

3835. Abduction by use of force requires no elucidation. But the completed offence must be distinguished from a mere attempt, where, for example, the accused had lifted a woman in order to carry her away, but on her giving an alarm they dropped her and ran away. The court held it to be only an attempt and punishable as such.(20) The use of deceitful means calls for comment. That term implies the use of misrepresentation by act or conduct. In either case all that is required to constitute abduction is that the person abducted must have gone *from* any place. It is not necessary that he should go to a place designated by the accused. A woman was released by her original abductors. The accused met her, and representing himself to be a police constable took her to her house and held her up to ransom. He was held to have abducted her by deceitful means and was convicted under s. 365.(21)

3836. It need scarcely be added that consent condones abduction, though not kidnapping; but the consent must be free and not itself induced by fraud. But while kidnapping is of itself an offence, abduction as such is not. In order to be punishable it must be accompanied by a *mens rea* described in the ensuing sections.

Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

363. Whoever kidnaps any person from British India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Punishment for Kidnapping.

[*Kidnaps from British India*—s. 360. *Kidnaps from lawful guardianship*—s. 361.]

Synopsis.

(1) *Analogous Law* (3837).
(2) *Procedure and Practice* (3838-3841).
(3) *Proof* (3842).
(4) *Form of Charge* (3843).
(5) *Proof of Kidnapping* (3844-3845).

3837. Analogous Law.—This section merely prescribes a penalty for the two offences described in sections 360 and 361. The sentence here prescribed is the same as for a similar offence in England (§ 3802). An act may fail to amount to kidnapping, but it may still amount to wrongful restraint or confinement, in which case it would be punishable as such. If, however, they were only the constituting parts of kidnapping, they would merge in the latter offence which alone would then be punishable.(22) For the purpose of lawful guardianship the age of majority is that laid down in section 3 of the Indian Majority Act; so that though a Mahomedan female attains majority upon her attaining puberty under Mahomedan Law she is still a minor, and subject to the control of her guardian till she attains majority according to the Majority Act.(23)

(19) *Ganga Dei*, 12 A. L. J. 91, 22 I. C. 730; *contra* in *Ghulam Yusuf*, 75 I. C. 297, 24 Cr. L. J. 921.
(20) *Allu*, 86 I. C. 1007, (1925) L. 512.
(21) *Bahadur Ali*, 73 I. C. 510; (1923) I. L. R. (L.) 158.
(22) *Mungroo*, 6 N. W. P. H. C. R. 293.
(23) *Muthu Ibrahi*, 37 M. 567.

3838. Procedure and Practice.—This offence is cognizable but warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable and, is triable by Court of Session, Presidency Magistrate or a Magistrate of the first class.

3839. There are a few points in connection with practice which call for notice. A *de facto* guardian, who has the keeping of the minor with the consent of the *de jure* guardian, is a lawful guardian within the meaning of s. 361, and he is, therefore, complaining of this offence.(24) The offence of kidnapping is international and is extraditable, but apart from extradition, a native British subject kidnapping in a foreign territory may be tried for the offence in British India.(25) And it has been held that even the subject of a Native State may be tried in British India for kidnapping committed in that State, though he could not be similarly tried for homicide.(1) But no reason is given for this view which is only possible if the offence be regarded a continuing offence, but which, it has been held, it is not.(2) The venue of the offence may be laid in a Court "within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted, or was conveyed, or concealed, or detained."(3) This amendment to the Procedure Code made in 1898 sets at rest the conflicting decisions of the High Court on the subject of jurisdiction.(4)

3840. This section prescribes a punishment for the offence of which the more aggravated forms are punishable under the following sections (ss. 364-367), and as some of these offences are exclusively triable by the Court of Session, Magistrates should be careful in ascertaining the exact form of kidnapping proved by evidence, and if it discloses a higher offence they should commit the case, unless they possess special powers to try such offence.(5) Where an act of restraint or kidnapping in an attempt to kidnap has been exercised in furtherance of the attempt and goes to form part of that offence, and is not done with an intention or object which can be separated from the general intention to kidnap, it will constitute an integral part of the offence, and should not form the subject of a separate conviction and sentence.(6) The maximum sentence of seven years is not a sentence to be ordinarily passed in each case, but should be reserved for a case of the most aggravated nature of the offence.(7)

3841. In his charge to the jury the Judge should as far as possible abstain from paraphrasing the section. In this case the Sessions Judge had misdirected the jury on the meaning of "lawful guardian" stating that when the girl left her husband for her father the latter became her *de facto* guardian, which would have been no doubt the case, if she had left her husband with his consent, of which there was little evidence.(8)

3842. Proof.—The points requiring proof are:—

(24) *Yelagupudi*, 10 I. C. (M.) 281.
(25) S. 4.
(1) *Dhurmonarain*, 1 W. R. 39.
(2) Cf. *Moorga Chetty*, 5 B. 338; *Ganpat Rao*, 19 B. 105; *Sunkor Gope*, 6 C. 307; *Nanhar Sao*, 5 Pat. 536.
(3) S. 181 (4), Cr. P. C.
(4) *Surja*, (1883) A. W. N. 164; *contra* in *Thakea*, 16 B. 200; followed in *Ram Dei*, 18 A. 350; *Abbi Reddi*, 17 M. 402.
(5) *Nga Po Saw*, (1901) U. B. R. 329.
(6) *Mungroo*, 6 N. W. P. H. C. R. 203.
(7) *Bhoodea*, 8 W. R. 3.
(8) *Nakul Kabirai* 13 C. W. N. 754, 4 I. C. 543.

I. *For kidnapping from British India.*—

(1) That the person kidnapped was at the time of the offence in British India.

(2) That the accused conveyed him beyond the limits of British India.

(3) That he did so without his consent or the consent of another legally empowered to consent on his behalf.

II. *For kidnapping from lawful guardianship.*—

(1) That the person kidnapped was then a minor under 14 years of age, if a male, and under 16 years of age, if a female; or that he was insane.

(2) That such person was in the keeping of a lawful guardian.(9)

(3) That the accused took or enticed such person out of such keeping.(10)

(4) That he did so without the consent of the lawful guardian.

3843. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you kidnapped A B (a minor male then under 14 years of age, *or* a female then under 16 years of age) from British India (*or* from the lawful guardianship of P Q, his——) and thereby committed an offence punishable under section 363 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

3844. Proof of Kidnapping.—The essential ingredients of the offence of kidnapping have been the subject of extended notice elsewhere (§§ 3803-3834). It will suffice here to indicate the main points required to be proved, and how they are dealt with in practice. The points requiring proof necessarily depend upon the kind of kidnapping to be proved. In kidnapping out of British India there must be evidence that the accused "conveyed" some person, major or minor, out of British India without his consent (§§ 3799-3800). The purpose for which he took him there is immaterial, for the offence lies in merely taking without consent and not in taking for any particular purpose. So if a person induce a number of coolies to go with him to a coal mine in a Native State falsely promising high wages and easy life, and relying upon such assurances the men were to leave their homes and go to their destination only to find themselves disillusioned, they would be justified in charging the person who had entrapped

(9) No conviction if the person had already abandoned her guardian; *Valliant*, 37 I. C. 513.

(10) It is a question of fact when once "taking" is complete; *Rekha Rai* 6 Pat. 471.

them for kidnapping under this section. But in such a case the question will depend upon whether what was falsely stated had induced the men to leave their homes.

Again, such an offence may be further aggravated by other falsehoods, for example, if their registration is necessary, then registering them under a false name and description, or the like. Women are sometimes induced to consent to leave for foreign parts on the faith of recruiters' promise to marry them. They are told of the place as being a part of India, whereas it may be as far away as Mauritius or Madagascar; they are told of the high wages payable, whereas the wages paid are not sufficient to keep body and soul together. Sometimes the men may be kept closely confined and taken under threat of personal injury. In all such cases there is wrongful confinement, which may amount to kidnapping beyond the limits of British India, if the aggrieved party cross the frontier.

3845. The second class of kidnapping, equally atrocious, consists in "taking or enticing" a minor under fourteen, if male, and under sixteen, if a female, from the keeping of a lawful guardian without his consent. In this case the mere removal of the minor from the custody of the guardian is sufficient to constitute the offence. His or her transportation beyond British India is not necessary. The question of taking or enticing is important, for without either of them the offence loses its one essential ingredient.(11) What these words mean has been already set out before (§§ 3799, 3807-3811). There must not only be taking or enticing, but it must be out of the custody of a lawful guardian. The custody may or may not be lawful, but the guardian must be "lawful." For instance, if a lawful guardian wrongfully confines his ward, a stranger has no right to take him out of his custody without his consent; and if he does so, he is guilty of kidnapping. When it is said that the guardian must be a "lawful" guardian, it is not intended that he must also be a legal guardian (§ 3821).

The motive or purpose is entirely out of the question, and so is the question of intention; but evidence of intention is admissible in defence, in exculpation of the crime. But in such cases intention must be distinguished from motive or purpose. For while law allows the plea of want of criminal intention, it pays no regard to the plea of meritorious motive or purpose. For instance, if a person kidnaps a minor girl to marry, law will punish the kidnapper howmuchsoever eligible may have been the match. In such a case law will not suffer evil so that good may come, though that fact would naturally mitigate the sentence.(12) The case is otherwise where the object is to hold the kidnapped to ransom;(13) or to make him join a theatrical Company.(14)

For the rest of the commentary under this section, reference should be made to ss. 360 and 361.

364. Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with

Sessions Cognizable Warrant. Not bail. Not comp.

Kidnapping or abducting in order to murder.

(11) *Neela Bebee*, 10 W. R. 33; *Mohim Chunder*, 16 W. R. 42.
(12) *Wali Mahamed*, 96 I. C. (L.)874, (1926) L. 677; *Valliant* v. *Eleazar*, 30 C. W. N. 215, (1926) C. 467.
(13) *Samundar*, 91 I. C. (L.) 240.
(14) Mhd. Hussain, 23 A. L. J. 19, (1925) A. 295.

transportation for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations.

(*a*) *A* kidnaps *Z* from British India, intending or knowing it to be likely that *Z* may be sacrificed to an idol. *A* has committed the offence defined in this section.

(*b*) *A* forcibly carries or entices *B* away from his home in order that *B* may be murdered. *A* has committed the offence defined in this section.

[*Person*—s. 11. *Murder*—s. 300. *Kidnap*—ss. 360, 361. *Abduct*—s. 362.]

Synopsis.

(1) *Analogous Law* (3846).
(2) *Procedure and Practice* (3847).
(3) *Proof* (3848).
(4) *Form of Charge* (3849).
(5) *Kidnapping for Murder* (3850-3851).

3846. Analogous Law.—This section is intended to punish kidnapping and abduction which exposes the abducted to the danger of losing his life. The two illustrations refer to abduction of persons to be offered as a human sacrifice and those destined to die at the hands of Thugs. But the section is more general and punishes an abduction if the intention was to commit murder or offer the person abducted for the purpose of being murdered. The section presupposes no consequential murder; for in case of murder he may be liable for that offence or its abetment in addition to the offence here described.

3847. Procedure and Practice.—This offence is cognizable but warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable exclusively by the Court of Session.

3848. Proof.—The points requiring proof are:—

(1) That the accused kidnapped or abducted some person.

(2) That he did so in order that the person so kidnapped or abducted may be murdered, or may be disposed of for being murdered and be put in danger of being murdered.

3849. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at—— you kidnapped (*or* abducted) A B in order that the said A B might be murdered (*or* might be so disposed of as to be put in danger of being murdered), and thereby committed an offence punishable under section 364 of the Indian Penal Code, and within the cognizance of the Court of Sessions (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3850. Kidnapping for Murder.—The aggravating circumstance enhancing the penalty of the ordinary offence of kidnapping, present in the offence here punishable is the intention or knowledge of the kidnapper to murder the person or dispose him of for that purpose so that he incurs the risk of being murdered. The actual murder of the person is not a prerequisite. Indeed, if the intended murder takes place the offence may be dealt with as a capital crime, or as its abetment with or without the addition of this offence.

The first essential element of this offence is kidnapping or abduction as those terms have been defined in sections 360-362. There must be then proof of the purpose, or intention, or knowledge. This may not be susceptible of direct proof. But it must nevertheless be proved. The ordinary cases of kidnapping for such purposes are those in which the minor is destined to be offered as a sacrifice to propitiate the goddess *Kali* or *Devi*. For this purpose only young boys are selected. Girls are never offered in sacrifice. They must be young and fair, and, if possible, high caste Hindus. Persons of other nationalities are not admissible for the purpose. They are taken and well housed and fed, and enjoy an unbounded license till the advent of the propitious fatal day. They are never sacrificed without their consent, but it is wrung out of them by cajolery and threats. The victim is then suspended to a tree or a pole in front of the goddess duly anointed with turmeric and oil, and on the priest giving the signal, he is beheaded by a stroke of the sword, and his head offered to the goddess for propitiation. Such sacrifices were once made merely out of piety and in order to earn the favour of the blood-thirsty deity. They are becoming rare now, but the practice has not yet died out. But such sacrifices are now made as a votive offering in case of serious calamity or illness. Formerly boys eligible for sacrifice used to be bought and sold—they are now stolen. The reference to disposal alludes to this practice, but it is quite possible that men may even now be employed to kidnap an inconvenient heir or an enemy out of the way, in which case this section should be applicable.

Disposal for Murder.

3851. Where, however, murder is not the direct object of the offender, there must be evidence that the accused had disposed of the person for the purpose of being murdered, or that in consequence of the disposal the person stood in danger of that contingency. In the last case the accused may not have intended or known that the transferee would murder the person, though it is not likely. If, however, a person were to dispose of a person for forced labour, and his employer were afterwards to murder him, it does not appear upon what principle the abductor would be liable for the danger due to his disposal, but both unexpected and unforeseen.

Such was held to be the case of a person abducted and held up to ransom. In such a case, though the person abducted may run the risk of being murdered, yet, since it is not the primary purpose, this section is inapplicable, and the more appropriate sections in such a case would be s. 365 or, 387,[15] though, of course, the sentence must keep in view the provisions of s. 71.

(15) *Po Lan*, 6 Bur. L. T. 77, 19 I. C. 167.

Session. Pres. Mag or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

Kidnapping or abducting with intent to secretly and wrongfully confine a person

365. Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Person*—s. 11. *Wrongfully confined*—s. 340. *Kidnap*—s. 361. *Abduct*—s. 362.]

Synopsis.

(1) *Analogous Law* (3852).
(2) *Procedure and Practice* (3853).
(3) *Proof* (3854).
(4) *Form of Charge* (3855).
(5) *Kidnapping and Abducting for Secret Confinement* (3856-3857).

3852. Analogous Law.—This section is in point of its gravity equal to the offence described in section 363. It, however, deals with "abduction" not punishable under that section.

3853. Procedure and Practice.—This offence is cognizable but warrant should, ordinarily, issue in the first instance. It is both non-bailable non-compoundable and, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

Though proof of motive is no part of the offence it is, when proved, a ground for mitigation. So where A was abducted to put pressure on A's friends to restore to the accused a young girl B, which was done, the accused were held entitled to escape with a light sentence.(16)

3854. Proof.—The points requiring proof are:—

(1) That the accused kidnapped or abducted a person.

(2) That he did so with intent to confine him secretly and wrongfully.(17).

(3) That he had such intention at the time of kidnapping or abduction.(18)

3855. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the ——day of——at——you kidnapped (*or* abducted) one A B with intent to cause the said A B to be secretly and wrongfully confined, and thereby committed an offence punishable under section 365 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

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(16) *Waris*, (1916) P. L. R. 89, 36 I. C. 152.
(17) *Akbar Ali*, 26 P. L. R. 733. (1925) L. 614.
(18) *Baharuddin*, 18 C. L. J. 578, 22 I. C. 187.

"And I hereby direct that you be tried (by the said Court) on the said charge."

3856. Kidnapping and Abducting for Secret Confinement.—Wrongful confinement is not necessarily distinct from the offence of kidnapping.[19] It may be necessary for effecting kidnapping and it may be the means of committing that offence. In that case it cannot be regarded as an aggravation of the offence, nor is it so regarded in this section. But when confinement intended is both wrongful and secret, that is, when superadded to kidnapping, the act done is one which aggravates the offence of confinement,[20] and it is necessarily regarded as aggravating also this offence. But since secrecy in such cases is necessarily a part of the plot, the section does not visit with any special penalty the offence of kidnapping with intent to confine the person kidnapped secretly and wrongfully. So far this fact is immaterial except that it will probably be taken to be a circumstance of some aggravation. But if there is no kidnapping but abduction, the case is different, for it then deals with a new offence not elsewhere provided for. Such a case may arise where a person is decoyed into a confinement where he is then secretly confined. For instance, if a woman is called in, on the pretence of doing some work, and is then secretly confined, it would be abduction with intent to cause that person to be secretly confined.

The purpose is immaterial—it may be to facilitate some ulterior, illegal object, or it may be to protect the person from the hostile claims of others—as where a minor is locked up by a person claiming to be his guardian and that to prevent his going over to another person to whom he is attached. The *mens rea* in such a case consists in the illegal means employed and in abridging the personal liberty of the person wrongfully confined. Where the accused had dacoited the house of a person whom they took away and kept him for 4 days after which he managed to escape, it was held that the accused were liable to conviction for the two offences of dacoity and under this section, the two offences being distinct though they were committed in the course of the same transaction.[21]

3857. It has been held by Aikman, J., that a previous conviction under section 452 does not bar another trial for abduction under this section. In this case the stepmother of one of the nine accused was a widow and lived with her stepson Nitanand. She afterwards contracted an intimacy with one Merai to whom she bore a child. She is said to have gone through a form of marriage with him also. Nitanand resented her misbehaviour and aided by her late husband's relations, Nitanand invaded Merai's house, assaulted him and his two brothers and carried off the woman and her child to Nitanand's house. They then concealed her so that her whereabouts could not be traced. For this, they were prosecuted and convicted under this section. Merai then searched for the woman but she could not be found, and consequently, he instituted another prosecution, and they were now convicted under this section, upon which the prisoners contended that they could not be convicted a second time on the same facts, but their contention was overruled on the strength of section 235.[22]

(19) *Mungroo*, 6 N. W. P. H. C. R. 293.)
(20) S. 346.
(21) *Dangar Khan*, 68 I. C. (P.) 817.
(22) *Baldeo Prasad*, (1906) A. W. N. 32.

Session. Cognizable. Warrant. Not bail. Not comp.

Kidnapping or abducting woman to compel her marriage, etc.

366. Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine,

and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing it to be likely that she will be forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.[23]

[*Woman*—s. 10. *Kidnaps*—ss. 360, 361. *Abducts*—s. 362.]

Synopsis.

(1) *Analogous Law* (3858-3859).
(2) *Procedure and Practice* (3860-3862).
(3) *Proof* (3863-3864).
(4) *Form of Charge* (3865).
(5) *Principle* (3866).
(6) *Meaning of Words* (3867).
(7) *Abduction for Forcible Intercourse* (3868-3872).
(8) *What is Seduction* (3870).
(9) *Another View of Seduction* (3871).
(10) *Illicit Intercourse* (3873).
(11) *Intention or Knowledge of Forced Marriage or Intercourse* (3874).
(12) *Abetment* (3875).
(13) *Abduction of Married Woman* (3876).
(14) *No Offence* (3877).

3858. Analogous Law.—The second paragraph has been added by the Penal Code (Amendment) Act, 1923[24] in order to include intimidation and abuse of authority within the definition of abduction in cases where that offence is perpetrated for the purpose of procuration.[25] This offence is another aggravated form of the offence of kidnapping punishable under section 363 of the Code. Its constituting elements are again kidnapping or abduction, but the offence is committed with the intention of forced marriage or illicit intercourse. Seduction of an unmarried woman as such, and apart from force or compulsion, is not an offence either in this country or England, but seduction after kidnapping or abduction is highly criminal and punishable under this section, and seduction of a married woman without kidnapping may be punishable under section 498.

(23) The second paragraph has been added by Act XX of 1923 which came into force on the 1st May 1924 (*vide* Notification No. F.—58—11-1-1922, dated 24th March 1924, published in the Gazette of India, Pt. I, dated 29th March 1924, p. 252).

(24) Act XX of 1923.

(25) § 2, Report of the Select Committee on the Bill, dated 8th February 1923.

3859. In England, however, the abduction of a girl under eighteen years of age, with intent that she should be carnally known, is only a misdemeanour punishable with imprisonment up to two years, but it is then a good defence that the person so charged had reasonable cause to believe that the girl was of or above the age of eighteen years.(1)

3860. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

3861. The punishment for kidnapping is seven years, the extra three years are most appropriate for the intention to bring force or persuasion to bear on the girl after she has been removed from the shelter of her home and deprived of the support which her guardian's presence would give her in resisting either threats or enticements.(2) Separate sentences may be awarded for abducting a woman with intent to rape, and for actually committing rape on her, since the actual commission of rape is not a necessary ingredient of the offence.(3)

3862. It is not competent to a Judge in appeal to alter a charge under section 376 to one under this section, because a charge under this section involves different elements and different questions of fact from a charge under that section.(4) And as this offence is merely an aggravated form of the offence punishable under section 363, the accused must be convicted under one or other of the two offences, but not of both.(5) Five or more persons using force for the commission of this offence cannot be convicted both of this offence as well as s. 147.(6) But where the complainant was not only removed with the intention specified in the section but was moreover robbed of her jewels the accused were held liable to conviction both for this offence as well as robbery.(7)

3863. Proof.—The points requiring proof are:—

(1) That the accused kidnapped or abducted.

(2) That the person kidnapped or abducted was a woman.

(3) That he then intended or knew that it was likely—

(*a*) that such woman would be compelled to marry some person against her will, or

(*b*) that she would be forced or seduced to illicit intercourse.(8)

Or the following points:—

(1) That the accused induced a woman,

(1) Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, s. 7.

(2) *Nga Nge*, (1905) U. B. R. 17, 2 Cr. L. J. 476.

(3) *Ghulam Muhammed*, 7 L. 484; *contra* in *Imam Ali*, 72 I. C. 850, (1926) L. 212; *Buta Singh*, 89 I. C. (L.) 912.

(4) *Sakharam Ganu*, 8 Bom. L. R. 120.

(5) *Isree Panday*, 7 W. R. 56.

(6) *Khizar* 4 L. L. J. 322, (1922) A. I. R. (L.) 410.

(7) *Chandu Singh*, 3 L. L. J. 574, 67 I. C. 731.

(8) *Mehran*, (1916) P. R. No. 13, 34 I. C. 1003.

(2) to go from any place—

(*a*) by means of compulsion, or

(*b*) criminal intimidation, or

(*c*) abuse of authority.

(3) That he then intended or knew that it was likely.

(4) That such woman would be forced or seduced to illicit intercourse.

3864. Having regard to the definitions of the terms "kidnapping" and "abduction" in ss. 359 and 362 consent of the person abducted or kidnapped is not a *sine qua non* of the crime, though consent may in some cases mitigate it.[9]

Kidnapping is distinct from abduction, and the charge should state whether it is one or the other which the accused has to meet.[10] A Judge cannot, without amending the charge, convict the accused for abduction, when the only charge framed against him was one of kidnapping.[11]

3865. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you kidnapped or abducted a woman, or by means of compulsion (*or* criminal intimidation, *or* abuse of authority) induced to wit——with intent that she may be compelled (or knowing it to be likely that she will be compelled) to marry C D against her will [*or* in order that the said A B may be forced (*or* seduced) to illicit intercourse, *or* knowing it likely that she will be forced (*or* seduced) to illicit intercourse] and thereby committed an offence punishable under section 366 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3866. Principle.—This section is not directed against seduction, which is persuading a woman to surrender her chastity, or elopement which is the running away of a woman, married or unmarried, with a lover, but it is directed against seduction with coercion or under circumstances when she is entirely in the power of the seducer, and when her consent would be nothing more than a mere submission to the will of her seducer. The same considerations apply to kidnapping for the purpose of forcible marriage or forced intercourse, which last is manifestly the most egregious form of the offence. The person holding such intercourse may be guilty of abetment or of the principal crime according to the nature of his participation.

3867. Meaning of Words.—"*Compelled to marry*": The term "marry" in this section bears the same meaning as in s. 494, *i.e.*, the going

(9) *Khem Das*, 95 I. C. 931, (1926) L. 547.
(10) *Mafizaddi*, 31 C. W. N. 940, 104 I. C. 245, (1927) C. 644.
(11) *Isu Sheikh*, 31 C. W. N. 171, 99 I. C. 937, (1927) C. 200.

through a form of marriage whether the marriage should prove in fact legal and valid or not.[12]

3868. Abduction for Forcible Intercourse.—This offence prescribes the punishment for kidnapping and abduction of a woman with the intention of forcibly marrying or holding sexual intercourse with her. Now as kidnapping may be within or without British India, and as abduction may be of a major or minor, the kidnapping or abduction for the present purpose depends upon the age of the woman, and the other facts necessary to constitute the offence; that is—

I. *In the case of a woman* of *or* over *16 years of age*:—

(*a*) She must have been conveyed out of British India; or

(*b*) she may have been by force compelled to leave any place; or

(*c*) she may have been by any deceitful means induced to leave any place.

II. *In the case of a woman* below *16 years of age*:—

(*a*) She must have been in the keeping of a guardian;

(*b*) that guardian must be a lawful guardian;

(*c*) she must have been taken or enticed; and

(*d*) her taking or enticement must have been without the consent of such guardian.

3869. The question whether a woman was kidnapped or not depends upon her age and the presence of other circumstances before set out. They are not common to all cases, but such of them as are required to prove the primary offence of kidnapping or abduction must be proved to start with in each case, after which the special ingredients of this offence must be established. These ingredients are (*i*) an intention directed to a certain purpose, namely, (*ii*) that the woman whom he has kidnapped or abducted may be compelled to submit to a forcible marriage, or (*iii*) to a forcible illicit intercourse, or (*iv*) to seduction for illicit intercourse. It is not necessary that the kidnapper should himself marry or compel or seduce her to an illicit intercourse. It is sufficient if she is compelled or seduced to it by any one else, but it must have been the object of his abduction. The essence of the crime is then compulsion, and if the woman was never unwilling to sexual intercourse and willingly yielded to it or to marriage, the accused could not be convicted under this section though he might be for simple kidnapping. But so far as the woman herself was concerned it would be a case of her elopement. She may not be *sui juris* and so competent to consent to the surrender of her chastity, but the offence, does not depend upon non-consent but compulsion and there can be no compulsion when a person is not unwilling.

The accused Nga Nge aged 29, induced a girl a little over 13 years of age to accompany him, and the girl went because he had promised her clothes. It was found that, previously to her elopement, the girl

(12) *Taher Khan*, 45 C. 641.

had consented to having sexual intercourse with the accused. They cohabited for two days before the girl's father discovered her. The prisoner was convicted under section 363, and the question was whether he should not have been convicted under this section. The inducement offered to the girl to leave her parents' house amounted to her abduction. The accused undoubtedly intended to have an illicit intercourse with her after elopement, but he did not need to seduce her then, for she had already consented to the intercourse before the abduction. He was, therefore, held to have committed only an offence under section 363, the Court observing: "The extra three years prescribed by section 366 are most appropriate for the intention to bring force or persuasion to bear on the girl after she has been removed from the shelter of her home and deprived of the support which her guardian's presence would give her in resisting either threats or enticements If the Legislature intended that the offender should be liable to the right punishment in every case in which he intended that the girl should have illicit intercourse with some man, it would be easy to say so in plain terms. In my opinion it is contrary to the well known rule of construction of penal Statutes to say that an intention to seduce to illict intercourse can be presumed when the girl has already consented to illicit intercourse."[13]

What is Seduction.

3870. The essential part of this offence is then an intention to seduce subsequent to elopement. But what is seduction ? It is inducing a woman to consent to unlawful sexual intercourse by enticements which overcome her scruples. Seduction is then completely successful as soon as the woman consents to surrender her person. Such consent given by a woman of or above the age of thirteen years amounts to a good consent sufficient for the exculpation of the offence of rape.[14] Being therefore, a valid consent to sexual intercourse, if it is given prior to the kidnapping, it should be sufficient to take the case out of this section. But in the case of a girl under thirteen years of age any consent given by her would be immaterial, and cohabitation with her is rape irrespective of her consent. In such a case there can be no seduction prior to abduction, and if a person below thirteen was abducted for illicit intercourse, the offence would be, it is apprehended, one punishable under this section. But in any other case the intention to use compulsion or practise seduction must be executed after the offence of kidnapping is complete. But on this point all the decided cases do not agree.[15]

One Mt. Malto, a girl about sixteen years of age, was the lawfully wedded wife of one Bali Ram who was absent on duty at Kohat, the

(13) *Nga Nge*, (1905) U. B. R. 17; dissenting from *Nga Po Saw*, (1897—1901) U. B. R. 328; *Nga Ni Ta*, (1903) U. B. R. (P. C.) 15; following *Nga Chan Mya*, 1 L. B. R. 297; to the same effect, *Durga Das*, (1904) P. R. 13; *contra* in *Safdar Raza* 49 C. 905; followed in *Hussain Bibi*, 20 S. L. R 74, 92 I. C. 248, (1926) S. 15.

(14) S. 375, "*Fifthly*."

(15) *Srimotee Poddee*, 1 W. R. 45; *Durga Das* (1904) P. R. No. 13; *Nga Nge*, (1905) U. B. R. 17; *Nga Chan Mye*, 1 L. B. R. 297; held that previous seduction excludes this section, while *Nga Ni Ta*, (1903) 10 Bur. L. R. 199 and *Ngo Po Saw*, (1897-1901) U. B. R. 328 held that the previous seduction, followed by subsequent seduction, brings the case within this section.

girl living then with her mother-in-law. She was not content to live with her and so went off with a man of her village who took her to one Raman of Mouza Dewa in Jammu territory. Raman cohabited with her for about a week and then brought her to his sister in the Sialkote district. There the accused, Mt. Kesri, wife of the other accused Durga Das, purchased her for Rs. 50 and took her to her husband then employed at Alipur, returning then to her own home. Durga Das kept her for a couple of months, after which he sold her to Washasha for Rs. 25. Her husband Bali Ram had been in the meantime searching for her. The two accused, Durga Das and his wife Mt. Kesri, were eventually prosecuted and convicted, the former under sections 372 and 419 and the latter under this section coupled with ss. 372 and 419 of the Code, but it was held that Durga Das could only be convicted under section 420, and as for Kesri, she could not be convicted of any offence, because she had purchased her from Raman who was not her lawful guardian, and her offence under sections 372 and 419 was held not to have been made out.(16)

So in another case, a married woman, 20 years of age, in consequence of the ill-treatment of her husband, decided to exchange the drudgery and hard living for that of a Calcutta prostitute. The accused Poddee, a procuress, thereupon enticed her to leave her husband, which but for the enticement of the accused, she would not have done. She secretly confined her in her own house but with the woman's consent, as she wanted to get to Calcutta without the husband's knowledge. Poddee was convicted under this section, but the Court altered her conviction to one under section 498, holding that the only thing proved against her was the enticing of a married woman, the other elements of this offence being wholly wanting. For there could be no intention of seduction in the case of a woman who had already made up her mind, and as she was not a minor there could be no kidnapping the two essential elements requisite to constitute this offence being thus wholly wanting, she could only be convicted of enticement of a married woman, for which, however, she was awarded the maximum punishment provided in that section.(17)

Another View of Seduction.

3871. The term "seduction" has, however, been the subject of another interpretation. "I am unable to hold" said Adamson, J., that the words in section 366 'seduce to illicit intercourse' refer only to the first act of seduction, or the surrender of chastity. To 'seduce,' as defined in Webster's Dictionary, is to draw aside from the path of rectitude and duty in any manner, to entice to evil, to lead astray, to tempt to lead to iniquity. I think that it would be a monstrous proposition, and one that would strike at the very root of social and moral rectitude to hold that, because a man has induced a girl while in the custody of her parents to surrender her chastity, he committed no further act of seducing to illicit intercourse when he persuaded her to live with him in a condition of concubinage not sanctioned by law."(18) But it

(16) *Durga Das*, (1904) P. R. No. 13.
(17) *Srimotee Poddee*, 1 W. R. 45.
(18) *Per* Adamson, J., in *Nga Ni Ta*, (1903) 10 Bur. L. R. 190; *Nga San Nin*, 6 Bur. L. J. 25, 101 I. C. 456; *Tufail*, 101 I. C. 189, (1927) L. 370

is submitted that this view is erroneous. Seduction, no doubt, implies enticement, but no one speaks of subsequent acts of cohabitation as seduction. Moreover, how can there be seduction of a woman who had already had illicit intercourse with her seducer?

Again, the language of the section points to futurity and implies that but for the kidnapping and abduction, the seduction intended was not possible or was difficult. At the same time it cannot be categorically asserted that because the woman has once yielded to her seducer, therefore, the latter can never be convicted under this section. For if the seduction was only employed as an inducement to make the woman leave her guardian or home, and the woman is afterwards made to prostitute herself to another, it would be a case meriting conviction under this section, in spite of the previous seduction. Such was the case of the accused, who, by false representations and deceitful means, induced a girl to marry him and leave her home and accompany him to Kohat where, upon their arrival, he instigated her to prostitute herself, and it appeared that it was with this end in view that he had induced the girl to marry him. It was held that the accused's marriage, contracted as a means to the end in view, with the aid of the deception practised upon the girl did not prevent his act of inducing the girl to leave her home being an act of abduction as defined in section 362, or entitle the accused to be acquitted of an offence under this section.[19]

3872. The question is, of course, one of intention and it cannot be categorically asserted that if the abductor has had intimacy with the woman prior to her abduction, there could be no offence under this section. There can be no such offence in respect of his own seduction, but if the accused uses it as a lever to compel the woman to marry another against her consent, or to have sexual intercourse, then he would be undoubtedly guilty of this offence.

3873. Illicit Intercourse.—Again, the force or compulsion must be used to secure a forcible marriage or an illicit intercourse. The term illicit intercourse, implies sexual connection not warranted by law. Such would be the case where a person marries another, but the marriage is void for want of some formality sufficient to vitiate it. For instance, a Mahomedan[20] or a Buddhist cannot contract a valid marriage with a minor without her guardian's consent. Therefore, if he goes through the form of marriage with her without such consent, it would not legalize the subsequent intercourse which would then be illicit for the purpose of this section.[21] The question whether the intercourse was or was not believed to be illicit is immaterial; if it was illicit it is sufficient, whatever may have been the accused's belief. But the fact that the accused, a lawfully married husband of the woman, a minor in the custody of her lawful guardian, had kidnapped her to force her to have intercourse with him would not make the intercourse illicit, but it the girl was below thirteen years of age he may be guilty of rape.

(19) *Bahadur*, (1881) P. R. No. 7. (1925) C. 578.
(20) *Ahmad Bepari*, 84 I. C. 434. (21) *Nga Ne U*, (1883) S. J. L. B. 202.

3874. Intention or Knowledge of Forced Marriage or Intercourse.—It has been already observed that the gist of the crime is intention, and that intention must be that the person abducted should be forced to marry or hold an illicit intercourse with another person. Actual marriage or intercourse is not necessary to complete the crime, but what is necessary is evidence to show the intent or to raise the presumption that illicit intercourse was likely to result from the abduction.(22) Such is not necessarily the intention of a recruiter, though it may be its usual prelude. Consequently a recruiter enticing a girl to an emigration office for the purpose of recruitment where she is forced or seduced to illicit intercourse cannot be convicted of this offence.(23) In another case the accused was convicted upon the following facts. Two girls below the age of sixteen had run away from their houses. They were wandering about and found their way to the village where the accused lived. The latter, who was a *Naikin* (procuress) by profession, entertained them for a day or two. She was convicted of this offence,(24) but—it is submitted—wrongly, as the Court did not find that the accused had taken or enticed them from their guardian.(25)

3875. Abetment.—A question may arise in this connection whether in such a case a married woman being a consenting party to her own abduction, need be convicted of abetting the offence. It has been held that she could not be,(1) though she may have assisted the other accused by changing her name and concealing herself from her husband and otherwise aiding and abetting her own removal from the custody of her guardian.

3876. Abduction of Married Woman.—it may be that all the ingredients of the offence as here set out are not present. In that case, the question may be whether the offence of the accused does not fall under section 498 of the Code, which punishes a similar offence, but only when the taking or enticing does not amount to kidnapping or abduction. It is, however only applicable to married woman.

Section 498.

See Commentary to that section.

3877. No Offence.—This section does not cover a case of elopement or the removal of a girl with her consent.(2) One Fatima, a married girl of 6, was stated to have been removed by force to the well of the accused Jalla Singh and two others, where she was kept for 6 days and then restored to the husband on his paying Rs 60. Neither of these facts being proved there remained the bald fact of

(22) *Mear Alleem Khan*, (1868) P. R. No. 23; *Kalimdayan*, 9 M. L. T. 401, 10 I. C. 290; *Naba* (1911) P. L. R. 193, 11 I. C. 577.

(23) *Ganga Dic*, 12 A. L. J. 91, 22 I. C. 730.

(24) *Jasauli*, 34 A. 340; dissenting from *Gunder Singh*, 4 W. R. (Cr.) 6. *See* also *contra* in *Ewaz Ali*, 37 A. 624.

(25) S. 361.

(1) *Natha Singh*, (1883) P. R. No. 11; *Jhundoo* v. *Ahmed Deen*, (1866) P. R. No. 40; *Phalla* v. *Jiwan Singh*, (1871) P. R. No. 6; *Wahabji*, (1875) P. R. No. 14; *contra* in *Syed Ahmud*, (1866) P. R. No. 17; overruled in *Jhundoo* v. *Ahmed Deen*, (1866) P. R. No. 40.

(2) *Haribhai*, 42 B. 391; *Lakhu*, 2 L. L. J. 536; *Harditt*, 6 L. L. J. 622, (1925) L. 274.

removal which the Court ascribed to elopement.[3] Two accused, brother and sister, the latter aged 13 or 14, were convicted of this offence for having abducted another girl whom the brother raped. The brother was convicted but the sister, whom he appeared to have employed as the decoy duck, was held to be innocent owing to her youth and improbability of possessing the intention necessary to constitute this offence.[4]

The accused wanted to marry a girl to her brother. She removed her from the house of her maternal uncle who was equally anxious to marry her to his own brother. When the accused removed the girl her mother was present and accompanied her. It was held that the accused could not be convicted of this offence for removing the girl from her lawful guardian, since the guardianship of the maternal uncle ceased as soon as the mother appeared upon the scene and that her accompanying the girl took the act out of the category of this crime.[5] The accused was convicted of this offence for having forcibly removed a widow to his house. It appeared that she had been previously in his keeping and that though he had used force to remove her to his own house, this time to marry her, she was at first unwilling though she very soon gave up resistance and accompanied him more or less willingly. It was held that on these findings no conviction for this offence was possible.[6] Several accused were convicted of this offence. It was proved that they had removed the girl over 16 from the guardianship of her mother and that one of the accused wanted to marry her. The accused were the girl's nearest paternal relations and the mother merely objected to her forcible removal by them because they had not paid her compensation for the trouble and expense of her up-keep. It was held that the accused were technically guilty of this offence which only called for a nominal sentence.[7]

Session. Cognizable. Warrant. Not bail. Not comp.

366-A. **Procuration of minor girl.** Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Synopsis.

(1) *Analogous Law* (3878).
(2) *Principle* (3879).
(3) *Procedure and Practice* (3880).
(4) *Proof* (3881).
(5) *Form of Charge* (3882).
(6) *Meaning of Words* (3883).
(7) *Procuration of Minors* (3884).

(3) *Mohabhat Singh*, 5 L. L. J. 38, (1823) A. I. R. (L.) 274.
(4) *Mehran*, (1916) P. R. 13, 34 I. C. 1003, 17 Cr. L. J. 283.
(5) *Natesa Padayachi*, 27 I. C. (M.) 909, 16 Cr. L. J. 237.
(6) *Bhajan Das*, 72 I. C. (P.) 533, 24 Cr. L. J. 421.
(7) *Sher*, 5 L. L. J. 337.

3878. Analogous Law.—This and the next section were added by Act XX of 1923 passed to give effect to certain Articles of International Convention for the suppression of the Traffic in Women and Children. Articles 1, 2 and 3 of the International Convention for the Suppression of the White Slave Traffic which was signed at Paris on the 4th May 1910 ran as follows:—

"(1) Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.

"(2) Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished notwithstanding that the various acts constituting the offence may have been committed in different countries.

"(3) The contracting parties whose legislation may not at present be sufficient to deal with the offence contemplated by the two preceding articles engage to take or to propose to their respective Legislatures the necessary steps to punish these offences according to their gravity."

The principle of this Convention was endorsed in the International Convention regarding the Traffic in Women and Children, which was adopted by the second assembly of the League of Nations. Article I of this Convention required the Government to place the Paris Convention before their Legislatures for ratification. It was ratified by both Houses of the Legislature[8] subject to their right to substitute the age of 16 or any greater age as may be decided upon. This reserved acceptance was notified to the White Slave Traffic Convention of 1910. The ages in this section was raised by the Legislative Assembly from 16 to 18 in spite of the opposition of Government.[9] This section and the next came into force on the 1st May 1924.[10]

3879. Principle.—This section and the next were enacted to punish the export and import of what was at one time known as the "White slaves," i.e., girls for the purpose of prostitution. Both the offences require the presence of intention or knowledge of likelihood, terms which have been used in defining the offence of culpable homicide (s. 299) and whose connotation is fairly understood. This section does not penalize prostitution, since a woman is free to go to any place for that purpose; but no one should *induce* her to do so. Nor is the inducement penal unless the inducer intends or knows it to be likely that the person he has induced will be "forced or seduced to illicit intercourse." Seduction implies inducement. A person is seduced if she is induced or enticed to surrender her chastity. It excludes the solicitations of street strumpets but includes woman maintained in a brothel to or for whom payment is made by visitors seeking their company.

(8) By a resolution of the Council of State on 31st January 1922 (*see* Debates, pp. 719-722) and by the Legislative Assembly on the 7th February 1922 (*see* Debates, pp. 2221-2240).

(9) *See* Debates, dated 26th February 1923, pp. 2802-2824 (passed by the Council of State on 15th March 1923—*see* Debates, pp. 1304-1324).

(10) Note F-58, 11-1-22, published in the Gazette of India, Pt. I, dated 29th March, 1924, p. 252.

3880. Procedure and Practice.—This offence is cognizable. Warrant may issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

3881. Proof.—The points requiring proof are:—

(1) That the accused induced.

(2) That the person induced was a girl under the age of eighteen years.

(3) That the accused had induced her with intent that she may, or knowing that it is likely that she will, be forced or seduced to illicit intercourse.

(4) That the inducement caused the girl to go from any place or to do any act.

3882. Charge.—The charge should run thus:—

"I (*name and office of the Judge, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you induced A B a minor girl under the age of eighteen years to go from——(*here name the place*) [*or* to do the following act, namely,——] with the intent that the said A B may be (*or* knowing that it is likely that the said A B will be) forced (*or* seduced) to illicit intercourse with C D and thereby committed an offence punishable under s. 366-A of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3883. Meaning of Words.—"*By any means whatsoever*": By force, fraud, payment or mere persuasion, by word of mouth or correspondence. It is not necessary that the means employed should be illegal. There need be no misrepresentation, since the inducer may truthfully reveal the destination of the person he is inducing to go. "*Or to do any act,*" such as meeting a person, or the like. "*Forced or seduced,*" *i.e.*, by use of coercion or persuasion. "*Illicit intercourse,*" that is, immoral sexual intercourse. Illicit means unlawful—an intercourse not permitted by law.

3884. Procuration of Minors.—This section punishes the procuration of minors. As such, the intention or knowledge that the minor girl abducted was to be forced to illicit intercourse is the gist of the crime.[11] The fact that the minor had already been seduced is immaterial, since it is not necessary for seduction that the girl should be a virgin.[12]

(11) *Rati Ram*, 28 P. L. R. 260.

(12) *Cf.* s. 373; *Saran*, 99 I. C. 98, (1924) s. 104.

366-B. Whoever imports into British India from any country outside India any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, and whoever with such intent or knowledge imports into British India from any State in India any such girl who has with the like intent or knowledge been imported into India, whether by himself or by another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.[13]

Session. Cognizable. Warrant. Not bail. Not comp.

Importation of girl from foreign country.

Synopsis.

(1) *Analogous Law* (3885).
(2) *Principle* (3886).
(3) *Procedure and Practice* (3887).
(4) *Proof* (3888).
(5) *Charge* (3889).
(6) *Importation of Women* (3890).

3885. Analogous Law.—For the history of this section, *see* note on the last section.

3886. Principle.—The last section deals with inter-territorial offence. This deals with an extra-territorial act; penalizing as it does importation into British India girls below 21 for the purpose of prostitution. The section punishes imports whether directly made or through any State in India, *e.g.*, *via* Goa, Pondicherry or any other state bordering on the sea coast.

3887. Procedure and Practice.—This offence is cognizable. Warrant may issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

3888. Proof.—The points requiring proof are:—

(1) That the accused imported into British India;

(2) From any State in India or from any country outside India (not necessarily British India);

(3) That the person imported was a girl below the age of 21.

(4) That the accused intended to import the girl with intent or knowledge that it is likely;

(5) That the girl so imported will be forced or seduced by another person;

(6) To illicit intercourse with him or any other person.

(13) The Act (Act XX of 1923) embodying these sections came into force on the 1st May 1924 (*vide* Notification No. F.-58—11-1-1922, dated 24th March, 1924, published in the Gazette of India, Pt. I, dated 29th March 1924, page 252).

3889. Charge.—The charge should run as follows:—

"I (*name and office of the Judge, etc.*) hereby charge you (*name of the accused*) as follows:—

That on or about the——day of——at——you imported into British India from——a country outside India (*or* from a State in India) by yourself (*or* by another person to wit——) A B a girl under the age of 21 years with intent (*or* knowing it to be likely) that she will be forced (*or* seduced) to illicit intercourse with another person, *viz.*, C D, and thereby committed an offence punishable under s. 366-B of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3890. Importation of Women.—This section penalizes a person for importing girls below the age of 21 for the purpose of prostitution. If the accused had reason to believe that the girl was not under 21 he cannot be convicted of this offence. Again, if the girl was a willing party she cannot be said to have been induced or seduced to illicit intercourse. This and similar sections cannot and do not punsh girls for offering themselves for prostitution. All that they do is to remove a temptation from their path.

Session. Cognizable. Warrant. Not bail. Not comp.

Kidnapping or abducting in order to subject person to grievous hurt, slavery etc.

367. Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Person—s. 11. *Grievous hurt*—s. 320. *Kidnaps*—ss. 360, 361.
Abducts—s. 362. *Slavery*—ss. 370, 371. *Unnatural*—s. 377.]

Synopsis.

(1) *Analogous Law* (3891).
(2) *Procedure and Practice* (3892).
(3) *Proof* (3893).
(4) *Form of Charge* (3894).
(5) *Kidnapping for Grievous Hurt, Slavery or Sodomy* (3895-3896).

3891. Analogous Law.—Kidnapping or abduction of a woman for the gratification of natural lust is punishable under the last section: kidnapping or abduction of boys for the gratification of unnatural lust is punishable under this section, which is, moreover, directed also against his being exposed to grievous hurt or slavery. The kidnapping of boys for the purpose of emasculation would thus be punishable under this section. If such a person is confined into a harem, he is doubly injured, and the offence would be probably considered as proportionately aggravated.

3892. Procedure and Practice.—This offence is cognizable but warrant should ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

3893. Proof.—The points requiring proof are:—

(1) Kidnapping or abduction by the accused.

(2) That the person was kidnapped or abducted—

(*i*) in order that he may be disposed of put in danger of so as to be—

(*a*) grievous hurt; or

(*b*) slavery; or

(*c*) unnatural lust;

or (*ii*) that he may be disposed of for any of the purposes mentioned in (*i*);

or (*iii*) knowing it likely that he will be so subjected or disposed of.

3894. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you kidnapped or abducted A B in order that the said A B may be subjected (*or* may be so disposed of as to be put in danger of being subjected) to grievous hurt [(*or* slavery or to the unnatural lust of C D] *or* knowing it to be likely that such person will be so subjected or disposed of] and thereby committed an offence punishable under section 367 of the Indian Penal Code, and within the cognizance of the Sessions Judge (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3895. Kidnapping for Grievous Hurt, Slavery or Sodomy.—This section is in a sense supplementary to the last: in other respects it differs. It is suplementary in so far as it punishes kidnapping for the illegal gratification of lust, it differs in so far as it mentions two other circumstances as aggravating the crime. These are the causing of grievous hurt and slavery. In so far as it punishes kidnapping for the purpose of causing grievous hurt the section is of a piece with section 364 which punishes the same offence committed with the object of committing murder. The language of the two is similar, and they must both be understood in the same sense. But in one respect this section differs, as it punishes not only the intention but also the knowledge of likelihood. And the reason is not far to seek. As the section relates to objects such as slavery and sodomy, knowledge apart from intention answers the same purpose. For, if a slave-dealer were to dispose of his human cargo to a skipper for transport to Arabia or Turkey, he does not intend that the slaves should continue in slavery but

he knows that they are likely to so remain, and it is then sufficient. So again, it is a custom with eunuchs to draw recruits to their rank. Their kidnapping young boys would inevitably carry with it a presumption that the boys would be emasculated, which is causing grievous hurt within the meaning of section 320. Then, again, the disposal of such boys to persons, who gratify upon them their unnatural lust is, for an obvious reason, esteemed a crime of the same magnitude. It should be noted that the word "person" is not confined to male persons, for it is possible to commit the offence with the three objects specified in the section on woman as well.

3896. Lastly, in order to prove that the object was such as is therein mentioned it would be permissible to give evidence of other facts, making the fact in issue highly probable or improbable.(14)

Session. Cognizable Warrant. Not bail. Not comp.

Wrongfully concealing or keeping in confinement kidnapped or abducted person.

368. Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

[*Person*—s. 11. *Wrongfully confines*—s. 340. *Kidnapped*—ss. 360, 361. *Abducted*—s. 362.]

Synopsis.

(1) *Analogous Law* (3897).
(2) *Procedure and Practice* (3898).
(3) *Proof* (3899).
(4) *Principle* (3900).
(5) *Knowingly concealing Abducted Person* (3901-3902).
(6) *Wrongful confinement* (3903-3906).

3897. Analogous Law.—This section punishes what was termed in the Draft Bill a subsequent abetment, and what is designated accession after the fact in English Law. The "whoever" referred to must obviously be some person other than the actual kidnapper, though the accessory need not know the person who the kidnapper is, so long as he is furthering his purpose by wrongful confinement or concealment.

3898. Procedure and Practice.—This offence is cognizable but warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

It will be observed that as wrongful confinement is the essence of the offence here punishable, a person convicted of this offence or its

(14) S. 11, Act I of 1872.

abetment could not be again convicted on the same facts under section 343.(15)

But a person acquitted of this offence may still be liable for some other offence under the Code, as, for example, cheating or abetment of bigamy.(16)

3899. Proof.—The points requiring proof are:—

(1) That the person in question was kidnapped or abducted.

(2) That the accused knew of such kidnapping or abduction.

(3) That he knowingly concealed or confined such person wrongfully.(17)

Since this section deals with a person other than the kidnapper, the latter cannot be cumulatively convicted of this offence.(18)

3900. Principle.—This is another instance of subsequent abetment which is punishable as a substantive crime. A person who knowingly conceals or confines wrongfully a kidnapped person is either an abettor or a conspirator. In either case his offence is scarcely distinguishable from that of the principal kidnapper, and he is consequently declared here as punishable in the same manner as the principal kidnapper, that is, he may be punished under any one of sections 363—367 or 369 according to the facts of the case and according to the offence of the principal kidnapper, though he may not himself have shared the same intention or knowledge. The case is another instance of the presumption which law makes of common intention from participation in a common design.

3901. Knowingly Concealing Abducted Person.—A person who kidnaps and then himself wrongfully confines or secretly conceals the person kidnapped may be liable under section 365. He is not liable under this section which is applicable to a person other than the kidnapper himself.(19) Indeed, the section refers to the latter as one whose liability is co-extensive with the offender under this section. Such person is presumably his *particeps criminis*, for he assists in the furtherance of his purpose by wrongfully concealing or confining the person kidnapped or abducted knowing him to be so.

3902. The knowledge that the person he is confining was kidnapped or abducted is the essential element determining his offence. He may not know the actual kidnapper by name, for in the case of persons working in gangs it is not possible—but he must not merely suspect,(20) but know that the person whom he is wrongfully confining or concealing was secured by kidnapping or abduction. This may be a matter for proof or presumption. It may be proved by the evidence of the kidnapped who may have told the accused of the circumstances of his

(15) *Ishwar Chandra Joyce*, (1864) W. R. 21.
(16) *Ibrahim*, (1894) P. R. 7; *Durga Das*, (1904) P. R. 13.
(17) *Amar Ali*, 93 I. C. 1050, (1926) L. 384.
(18) *Bannu Mal*, 97 I. C. 960; (1926) O. 560.
(19) *Sheikh Ooseer*, 6 W. R. 17.
(20) *Gadadhar*, 87 I. C. (C) 845.

case, or it may be inferred from the facts evidencing conspiracy and common purpose. For instance, where a girl under sixteen, who was in the keeping of her mother, and used to eke out her living by working as a coolie in the vegetable market, was one day, while on her way to her place of business, accosted by a woman who induced her to accompany her, promising to give her work, whereupon she accompanied her to her house, where she was detained the whole day and in the evening the accused took her to a solitary bungalow where he cohabited with her for two days and nights after which she was permitted to return to her house, it was held that the accused was guilty of this offence, and the procuress of an offence under section 363.(21) In another case a Rajput girl, aged 11 years, knew the wife of the first prisoner (A), whom she often visited. One day A induced her to accompany him to pick mangoes. She went. He then told her to accompany him to see the tazzia, and that if she went he would give her dice and pice. She refused. He thereupon took her by the hand and led her away to the house of one Bissessur, a Brahmin, who died before the trial. He told him that he had brought the girl for his son and sold her to him for Rs. 20. The girl remained there two days, and as she cried, Bissessur took her to the house of his relative B where she remained a month, and B then took her from place to place till she was discovered by the police. It was held that A was guilty under section 363, and B under this section.(22)

3903. Wrongful Confinement.—Besides knowledge of the kidnapping or abduction the accused must confine or conceal the person so kidnapped wrongfully. The term "wrongful confinement" is here used in the sense defined in section 340. The term "wrongful confinement" has been held to imply a withdrawal of that person from the actual observation of others, by removal or otherwise. It does not include merely giving false information about such person.(23) But it does not appear to be essential to concealment that the person should be altogether hidden from human view. A person may, for instance, be abducted from Rangoon to Kohat where the accused knows there is no fear of detection. Would it not then be sufficient concealment if he took only such precautions as are under the circumstances sufficient to safeguard his detection by persons interested in him? In short, wrongful concealment would appear to mean no more than wrongful confinement in secret as defined in section 346. Moreover, there can be no concealment without that intention. The mere fact of a girl being received into a house and retained there by the owner even after he may have become aware or found reason to believe that she had been kidnapped, does not amount to concealment of her, unless an intention of keeping her out of view be apparent.

3904. A little Kahar girl was taken to a field by her uncle and told to watch it. While there, she was enticed to a house and then taken to one Jhurrup with whom she remained for eight days and who then sold her to the prisoner Bhanjan Singh for Rs. 10. He in his turn sold her as a Rajputni to the prisoner Shonandan who married

(21) *Jetha Nathoo*, (1904) 6 Bom. L. R. 785.
(22) *Isree Panday*, 7 W. R. 56.
(23) *Phula Singh*, (1874) P. R. 10.

her and with whom she lived for a year, after which she confessed being only a Kahar, and who thereupon sold her to one Hookum Singh who reported the matter to the Police. All the prisoners were convicted of this offence, but on appeal it was held that as none of the prisoners with the exception of Jhurrup made any effort to conceal the girl for the purpose of baffling and defeating any search that may be made for her, they could not be convicted of this offence, as against them there was no evidence that they said or did anything calculated and designed to prevent her from being seen or found. The misrepresentations made by them, or some of them seem to have been made to particular individuals for the purpose of obtaining money by the disposal of her, rather than for the purpose of concealing her, and it may be that they were guilty of the offence of cheating. But they could not be said to have wilfully concealed her.(24) The same view was reiterated in another case of the same Court in which a Mahomedan girl, aged 11 years, was picked up by some of the accused who sold her as a Chuttri to the accused Jaipal and Naipal for the purpose of marriage for Rs. 63 and a bullock. The girl stayed in the family of these accused when their women folk discovered that she was not a Chuttri girl but of the Mahomedan weaver class. They were convicted of this offence, but their conviction was quashed on the ground that the fact of their having kept the girl in their house for a couple of days was no evidence of concealment. In fact, if they knew her to be an orphan they equally knew that no search would be made for her. And since the girl was not carefully kept out of the sight of the people, there was nothing to suppose that the accused were wrongfully concealing her. They were accordingly both acquitted.(25)

3905. The element of criminality consists in the confinement being wrongful. Now in a society where all women observe some degree of seclusion, and where in some cases concealment from view is the normal state of womanhood, criminality cannot be inferred from mere concealment unless it is shown to be wrongful. This may be shown by facts inconsistent with the ordinary usage of the caste and only consistent with a desire to secure privacy against search. For instance, such concealment of a girl may be from members of the same sex, or on occasions when other women of the household appear in public. In short, the wrongfulness of the concealment or confinement must be such as should be indicative of the desire to hide the person from those likely to be in search of her.

3906. The penalty for this offence is stated to be co-extensive with that of the kidnapper. If, therefore, the latter had kidnapped with intent to murder, he who wrongfully confines under this section would be subject to the high penalty of section 364 though he may not be privy to the murder. But being concerned in the furtherance of that crime, and the act he knowingly did being highly unlawful, he is made to abide the consequence of his wrongful act apart from his community of intention and purpose with the actual kidnapper.

(24) *Jurrup and others*, 5 N. W. P. H. C. R. 133; *Ram Shastri*, 15 C. P. L. R. 185.

(25) *Mt. Chubba and others*, 5 N. W. P. H. C. R. 189.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

Kidnapping or abducting child under ten years with intent to steal from its person.

369. Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any moveable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Moveable property*—s. 22. *Dishonestly*—s. 24. *Kidnaps*—s. 361. *Abducts*—s. 362.]

Synopsis.

(1) *Analogous Law* (3907).
(2) *Procedure and Practice* (3908-3909).
(3) *Proof* (3910).
(4) *Form of Charge* (3911).
(5) *Theft by Abduction* (3912).

3907. Analogous Law.—This section is directed against thieves stealing or attempting to steal things from the person of a child below ten years of age. The high criminality of theft united to kidnapping makes the offence a heinous form of crime, for which, however, the section curiously provides no more punishment than for simple kidnapping under section 363.

3908. Procedure and Practice.—This offence is cognizable and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

3909. The offence of abducting little children for the purpose of stealing their clothes or ornaments is a very serious and dangerous one, and the High Court commend such cases as being ordinarily fit for committal to the Session. Anyhow, they should not be disposed of as cases of simple theft.(1) As, however, the offence punishable under section 363 is included in the offence punishable under this section, the accused could not be convicted of the two offences on the same facts. Where he is proved to have kidnapped for the purpose of theft this is the appropriate section under which he should be convicted.(2)

3910. Proof.—The points requiring proof are:—

(1) Kidnapping or abduction by the accused.

(2) That the person kidnapped or abducted was a child then under ten years of age.

(3) That the accused thereby intended to steal movable property from the child's person.

3911. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

(1) *Soboy Dome*, 6 W. R. 2. (2) *Shama Sheikh*, 8 W. R. 35.

"That on or about the——day of——at——you kidnapped (*or* abducted) A B, a child then under the age of ten years, with the intention of taking dishonestly any movable property, to wit,—from the person of the said A B and thereby committed an offence punishable under section 369 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

3912. Theft by Abduction.—As remarked before this is a highly serious offence, for persons who decoy infants of tender age do not scruple to murder them after stealing all they have upon their person. In that case, of course, the offence would be dealt with under section 364 or 302 as the case may be. And if in stealing such property any force is used the offence may aggravate into robbery. But the actual taking of property from the person of the child is not necessary. It is enough if that was the intention, and with that intention the accused kidnapped or abducted the child.

Session. Non-cog. Warrant. Bailable. Not comp

Buying or disposing of any person as a slave.

370. Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis.

(1) *Analogous Law* (3913-3918).
(2) *Historical Retrospect* (3914-3915).
(3) *Anti-Slavery Legislation* (3916).
(4) *Forced Labour* (3918).
(5) *Procedure and Practice* (3919).
(6) *Proof* (3920).
(7) *Form of Charge* (3921).
(8) *Principle* (3922-3923).
(9) *What is a Slave* (3924-3927).
(10) *What Acts are Prohibited* (3928-3929).

3913. Analogous Law.—This is the section against slavery. It definitely prohibits all dealing in slaves, making it a high offence not only to carry or convey them, but also to keep or retain them.

(1) Historical Retrospect.

3914. Slavery was at one time an accepted condition of some portions of humanity. The ancient nations of all countries recognised the *status or rather* the want of *status* of a slave. Slavery originated with the conquest of victorious generals who saved (*servare*) the lives of their prisoners instead of killing them. They were called *mancipia* also because they were taken from the enemy by the strong hand (*manu*).(3) In modern times the notion of war amongst civilized nations is that

(3) Just., Bk. I. tit. 3, s. 3. But this source of slavery is disputed.—Maine's Ancient Law, p. 163.

the employment of force against all enemy is no further justified than is required by his resistance; but in ancient times war destroyed all socialities and placed the vanquished entirely at the mercy of the conquerer: *Voe victis.*(4) If the victor could take the life of his prisoner *a fortiori* he could his liberty. Slavery was thus the exercise of the victor's clemency. Aristotle compared the slave to the body, of which the master was the spirit. There were said to be no degrees in slavery. As compared to slaves the lot of serfs was somewhat better. They were slaves attached to the soil and were regarded as a part of it, so that they could not be removed from the place on which they were born, nor could they be sold apart from the land.

3915. Slavery was recognized amongst Hindus and Mahomedans, but it was opposed to the common law of England, so much so that a slave on landing in England *ipso facto* became free, and so long as he remained on English soil no right could be acquired or enforced against his person.(5) But the same state of civil liberty did not obtain in the English Colonies, and the passing of the Act of 1824 thus created an epoch in the manumission of slaves which had become an established institution amongst all civilized communities.

(2) Anti-Slavery Legislation.

3916. In England the earliest statutory provision against slavery was enacted in 1824 when under a Statute of George IV(6) slavery was declared illegal, their importation into Colonies was forbidden, and all contracts, wills and securities relating to slaves or the slave trade were declared illegal, and heavy penalties were prescribed for those engaging in that trade. In 1833 another Statute was passed (7) abolishing slavery in the Colonies, and in 1843 the previous Acts abolishing slavery and for the suppression of slave trade were extended to all British subjects wherever residing.(8) These were the principal statutory provisions against the abolition of slavery. Other Acts were passed authorizing the payment of compensation to slave owners, and the like. In 1873 the earlier Statutes against slavery were consolidated and their scope still further enlarged by providing for the payment of bounties on captures, and legalizing the seizure and condemnation of vessels engaged in the slave trade (9) and in 1876 a Statute was passed providing for the trial and punishment of offenders whether British subjects or

(4) Blackstone is right when he says that the victor has a right *ex jure gentium* to kill his captive, and, having spared that, to enslave him. He has only the right to kill him in cases of absolute necessity, or self-defence. War is itself justifiable on the principle of self-preservation. It gives the belligerents no further right than to disable their adversaries.—4 Black, 423.

(5) 1 Black, 123; *James Sommersett*, (1771-2), 20 St. Tr. 1, see *post*. It may perhaps be added that legal writers of great eminence have defended slavery as in accordance with the laws of nature and nations.—*Puffendorf*, Law of Nature and Nations, B. 6, c. 3, s. 10; Ulricus Huberus—Proslect., Jur., Civ., p. 16; Alberious Gentilis De Jure-Gent, Can *de servitude*; Grotues *De Jure Bell*, Bk. 3, c. 7, s. 5. In England the spirit of the people was always opposed to slavery. In 1517 (1 Edw. VI, c. 3), a Stature was, indeed, passed declaring all idle vagabonds to be slaves and compelling them by beating, clearing or otherwise to work. It could not be, however, endured for more than a couple of years after which it was repealed.

(6) 5 Geo. IV, c. 113.

(7) 3 & 4 Will. 4 c. 73.

(8) 6 & 7 Vict., c. 98.

(9) 36 & 37 Vict., c. 88.

subjects of the allied Princes of India committing on the high seas any offence against the provisions of sections 367, 370 and 371 of the Code or abetment of the said offences, and who is in respect of them liable to be tried in the same manner as if the offence had been committed in any place within British India.[10] The Statute of 1824 against the Slave Trade extends to this country, and it condemns slavery and direct and indirect traffic in slaves.[11] And the Statute of 1843[12] extends the penalties of the earlier Statute to all British subjects in and out of the dominion of the Crown. The remaining Statutes apply equally to this country. Thus then the abolition of slavery in this country was due to the reforming zeal in England which led to the abolition of slavery on the West Indies Sugar plantations and the provisions of which were subsequently extended also to this country. In the year 1843 an Act was also passed, called the India Slavery Act,[13] which extended the prohibitions against slavery by prohibiting public officers to sell slaves in execution of decree, to entertain suits relating to the enforcements of rights arising out of alleged property in person as a slave. Property could be legally acquired by slaves[14] and offences committed against them were punishable in the same manner as if they had been committed on freemen.[15]

3917. Such was the state of the law when these provisions against slavery were enacted. That slavery was in vogue in this country prior to its abolition and continued to linger many years afterwards cannot be denied. Under the Bom. Reg. XIV of 1827 it was penal to sell a child under ten years of age, although in a state of slavery and the sale of a free child into slavery except by its parent in time of slavery was deemed to be an offence. These provisions put an end to all traffic in children by parents or others whether at the time of distress or in the hours of plenty. They declare slavery as *per se* a crime and any rights over man for his forced labour are punishable not only under the provisions of this section but of those which relate to wrongful restraint and confinement. So an infliction of the slightest chastisement is under the provisions of the Slavery Act, 1843,[16] punishable to the same extent as if the person chastised had been a freeman.

Forced Labour.

3918. Against these provisions must, however, be noted those relating to the emigration of labour [17] which are stated to be Acts legalizing slavery. But between them and true slavery there is a difference. In the words of the draftsmen of the Code: "The essence of slavery, the circumstances which make slavery the worst of all social evils, is not in our opinion this, that the master has a legal right to enforce the performance of those services without having recourse to the tribunals." Slavery is the state of entire subjection of one person to the will of another. "A slave," said Stuart, C. J., "is a creature without any rigths or any

(10) 39 & 40 Vict., c., 46, s. 1.
(11) 5 Geo. 4, c. 113, (Slave Trade Act, 1824), Vol. I, Eng. St. relating to India, p. 118.
(12) 6 & 7 Vict., c. 98, ss. 1, 3, 4.
(13) Act V of 1843.
(14) Act V of 1843, s. 3.
(15) *Ib.*, s. 4.
(16) Act V of 1843, s. 4.
(17) Act XXI of 1883, Act VI of 1901.

status whatsoever, who is, or may become, the property of another as a mere chattel, the owner having absolute power of disposal by sale, gift or otherwise, and even of life or death, over the slave, without being responsible to any legal authority."[18] "I apprehend," said Oldfield, J., "that the sections of the Penal Code with which this reference deals were enacted for the suppression of slavery, not only in its strict and proper sense, *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another."[19]

3919. Procedure and Practice.—This section is non-cognizable but warrant should ordinarily issue in the first instance. It is bailable but non-compoundable and is triable by the Court of Session. The jurisdiction to try such an offence is not affected by a resale of the person as a slave in another district.[20]

3920. Proof.—The points requiring proof are:—

(1) That the accused imported, exported, removed, bought, sold or disposed of a person.

(2) That the person was so imported, etc., as a slave.

(3) That the accused accepted, received or detained the person in question as a slave.

(4) That he did so against the will of that person.

3921. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you imported (*or* exported, removed, bought, sold or disposed of) A B as a slave (*or* accepted, etc., the said A B against his will as a slave), and thereby committed an offence punishable under section 370 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

3922. Principle.—Slavery creats an obligation of perpetual service, an obligation which only the consent of the master can dissolve. It creates a property in the slave, the latter being regarded as a chattel and a possession of his master. The slave has no right, no personality, no *status*, and being classed as property he may be transferred and sold like any other property. Slavery descends from parent to child; whatever a slave acquired became the property of his master: *quicquid acquiritur servo acquiritur domino.*[21] In England there never

(18) *Ram Kuar*, 2 A. 723, F. B.
(19) *Ram Kuar*, 2 A. 723, F. B.
(20) *Nga Shwe Pe*, (1894) P. J. L. B. 81.
(21) Co. Litt., 117 *a*.

was any legal justification for the existence of slavery. All its laws were opposed to it. So in a case in which a Mr. Steuart purchased a Negro slave in Virginia, where by the law of the place Negros were slaves, and saleable as other property. He came to England and brought the slave with him. Here he left Steuart without his consent, and whereupon Steuart sent men to catch him, and they caught him and forcibly carried him on boardship bound to Jamaica, with the avowed purpose of selling him there. The Negro's friend applied for a writ of *Habeas Corpus*, and he being produced before the Court sued for the restitution of his liberty. Steuart contended that slavery was not opposed to the common law of England, whereupon Lord Mansfield said : The "power of the master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion and time itself from which it was created, is erased from memory. It is so odious, that nothing can be suffered to support it by positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."(22)

3923. This section does not directly prohibit slavery. It merely penalizes those who receive, retain or detain persons against their will as slaves, or who dispose them of as such, or who export or import them. The effect of this provision coupled with the other provisions relating to assault, hurt, wrongful restraint and wrongful confinement is to destroy the last vestige of slavery, if any remained after the passing of the Act of 1843. The present section is thus only one of the series calculated to secure the perfect equality of all men in the eye of the law.

3924. What is a Slave?—No Statute enacted against slavery defines a "slave," but the term implies that civil relation in which one man has absolute power over the life, fortune and liberty of another.(23) But there may be degrees in slavery due to the abridgment of personal liberty and subordination of one's life and fortune to the will of another. But slavery, whatever be its form or nature, is now no longer agreeable to the laws of England or India. It will, therefore, be suppressed in whatever guise it may appear. Of course as soon as slavery is declared illegal, new forms are invented which, though conforming to the letter of the law, violate its spirit. But as Oldfield, J., said the sections of the Penal Code dealing with slavery were enacted for the suppression of slavery not only in its strict and proper sense, *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another."(24)

(22) 20 St. Tr. 1 (82).

(23) For various other definitions, see *James Sommersett*, 20 St. Tr. (25).

(24) *Ram Kuar*, 2 A. 723; *Koroth Mammad*, 41 M. 334.

3925. The assertion of an *absolute* power over the liberty of another is the crux of slavery. It is not slavery to acquire rights over the liberty of another. The Code itself recognizes the existence of such rights.[25] Such are rights which a master exercises over his servant, parent over his child, schoolmaster over his pupil but they are rights necessarily limited and qualified by the nature and purpose of the employment or *status* of the other. And in no case do they confer an absolute right over the liberty of another. The moment the right is absolute, the subject of the right becomes a chattel, a property which he may buy and sell. The mere fact that a person was sold to another does not argue in favour of his being sold into slavery. One Mt. Parichura kidnapped a girl aged about 13, whom she sold to the appellant's wife. She was described as an orphan. The appellant converted her to Mahomedanism, changed her name and employed her as a menial domestic. She worked without wages, was given food and clothes, but was not allowed to leave the house. The girl remained in the house for four years when she left the house and was found in the possession of a procuress to bring her up as a prostitute. The appellant was prosecuted by the Police and he was convicted in the alternative of an offence under section 368 or 370 or 373. On appeal Turner and Turnbull, JJ., quashed his conviction under section 368 on the ground that the appellant was not present when the girl was sold to his wife, but his conviction under section 370 was maintained, the Court holding, that as the appellant asserted a right to restrain the liberty of the girl, and to dispose of her labour, and as she was detained in the house as a slave, his offence was one covered by this section. "It is urged that to constitute a person a slave, not only must liberty of action be denied to him, but a right asserted to dispose of his life, his labour and his property. It is true that a condition of absolute slavery would be so defined, but slavery is a condition which admits of degrees. A person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, of guardian or a jailor."[1]

3926. The finding in this case was referred to and animadverted upon by Stuart, C. J., in a Full Bench case of the same Court which arose upon similar facts. There the accused Ram Kuar met a shepherd girl, aged 11 years, in the town of Agra. He induced her to accompany him promising her maintenance and support. The girl was married and unwilling to go with him, but he took her against her will to the house of a Jat to whom he sold her for marriage to his brother, falsely stating her to be a Jat for Rs. 4 and a buffalo. Relying upon the last case, the Sessions Judge convicted the accused under this section, holding that as he claimed property in the girl and disposed her of he had offended against the provisions of this section. But on appeal it was held that though it is exceedingly difficult to understand what is meant to be intended by this section, it did not appear to apply to the case of the appellant: "The actual accomplishment of placing a human

(25) Ss. 490-492.

(1) *Sikandur Bukhut*, 3 N. W. P. H. C. R. 146.

being in the condition of a slave could not have been contemplated, inasmuch as the possibility of accomplishing anything unknown to the law cannot be supposed to have been meant or understood; section 370, therefore, can only be understood as directed against attempts to place persons in the position of slaves, or treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, services, or conduct, in any respect."[2] But as in the case under reference the girl was sold not as a slave but for marriage, no right of property in and over her was asserted by her purchaser in employing her in menial and enforced services against her will, and by restraining her liberty. The appellant's conviction was, therefore, quashed. But if suppose that in such a case Ram Kuar had sold the girl as a slave and the purchaser had asserted his right to treat her as such, the offence under this section would have been completed. Such a case arose in Madras where the appellant, Amina, purchased a girl, aged 13 years, from persons who had enticed her away from her employer. The purchase was reduced to writing and the vendor therein professed to transfer all his right in his slave for Rs. 25 paid to him by the purchaser. The latter claimed to hold the girl until her Rs. 25 was paid. The Court held that the use of the word "vellati," which signified a slave, in the documents was of very great weight as showing the *status* of the girl recognized by the accused. The Court then held following the Allahabad case,[3] that the section did not apply only to slaves in the strict and proper sense, but also to the selling and disposal of human beings whereby one who claims to have a property in the person as a slave transfers that property to another.[4]

3927. The question whether a person was a slave then depends, not only upon how he is treated, but upon what right is claimed in him by another. It is agreed that the purchase and sale of girls for the purpose of marriage is outside the scope of this offence.[5] The question is one of intention. The purchase of a girl in foreign territory, knowing her to be a slave, is not in itself an offence punishable under the Code, and to make the importing of her into British territory an offence, it is necessary that it should appear that the accused imported her as a slave. Where, therefore, the accused alleged that he had imported a girl, the subject of the charge against him, with a view to marry her, but was prevented from doing so by his fellow castemen, and there was nothing to show that his intention was to keep her as a slave, or to dispose of her as a slave, and it appeared that when he did dispose of, he disposed of her for the purpose of marriage, it was held that a conviction under this section could not be sustained.[6]

3928. What Acts are Prohibited?—The acts reprobated by the section thus are (*i*) the importation and exportation of a person *as a slave*, (*ii*) the disposal of a person *as a slave*; and (*iii*) the acceptance, reception or detention of any person against his will as a slave. In the first

(2) *Ram Kuar*, 2 A. 723, F. B. To the same effect, *Doda*, (1867) P. R. 19; *Nanda*, (1882) P. R. 26; *Ganpat*, (1884) P. R. 20.
(3) *Ib*.
(4) *Amina*, 7 M. 277; *Korotti Mahammud*, 41 M. 334.
(5) *Ram Kuar*, 2 A. 723, F. B.; *Roda* (1867) P. R. 19; *Ganpat*, (1884) P. R. 20.
(6) *Nanda*, (1882) P. R. 26.

two cases the acts are offences apart from and independently of the volition of the slave; in the last case criminality consists in doing those acts in the course of the treatment of the person as a slave and against his will. Both the conditions are material. For, if a person detain another against his will, but *not* as a slave, he may be guilty of wrongful confinement, but he is not guilty of this offence. On the other hand, if he detains him as a slave and the slave consents, no law can interfere, for a person is free to dispose of his services as best he can. The only time when Law does interfere is when placing himself absolutely at the disposal of his master he seeks the protection of law to dissolve his contract. In that case Law protects him in spite of his compact, because it regards them illegal and opposed to public policy.

3929. As regards persons "importing, exporting, removing, buying, selling, or disposing of persons as slaves" the question depends upon the nature of the right claimed over the slaves and the purpose for which they were being conveyed. This section evidently refers only to persons who engage in inland traffic in slaves, for the English Statute against piracy applicable to India contains the following more drastic provisions relating to traffic in slaves by sea[7]:—

"S. 9. If any subject or subjects of His Majesty, or any person or persons residing or being within any of the dominions, forts, settlements, factories or territories now or hereafter belonging to His Majesty, or being in His Majesty's occupation or possession or under the Government of the United Company of Merchants of England trading to the East Indies, shall, upon the high seas, or in any haven, river, creek, or place where the admiral has jurisdiction, knowingly and wilfully carry away, convey or remove, or aid or assist in carrying away, conveying, or removing any person or persons, as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her or their being sold, transferred, used or dealt with as a slave or slaves, or shall upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully ship, embark, receive, detain or confine, or assist in shipping, embarking, receiving, detaining, or confining on board any ship, vessel or boat, any person or persons for the purpose of his, her, or their being carried away, conveyed, or removed as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used or dealt with as a slave or slaves, then and in every such case, the person or persons so offending shall be deemed and adjudged guilty of piracy, felony, and robbery."

Session. Warrant. Cognizable. Not bail. Not comp.

371. Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves shall be punished with transportation for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Habitual dealing in slaves.

Synopsis.

(1) *Analogous Law* (3930-3931).
(2) *Procedure and Practice* (3932).
(3) *Proof* (3933).
(4) *Principle* (3934).
(5) *Professional slave-dealing* (3935).

(7) The Slave Trade Act, 1824 (5 Geo. IV, c. 113), s. 9.

3930. Analogous Law.—The last section evidently refers to a casual offender. This section refers to a professional slave dealer. The corresponding provisions of the English Statute(8) on the same subject run as follows :—

"S. 10. If any persons shall deal or trade in, purchase, sell, barter, or transfer, or contract for the dealing or trading in, purchase, sale, barter or transfer of slaves, or persons intended to be dealt with as slaves, or shall, otherwise than as aforesaid, carry away or remove, or contract for the carrying away or removing of slaves or other persons, as or in order to their being dealt with as slaves, or shall import or bring or contract for the importing or bringing into any place whatsoever slaves or other persons, as or in order to their being dealt with as slaves, or shall, otherwise than as aforesaid, ship, tranship, embark, receive, detain, or confine on board, or contract for the shipping, transhipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves or other persons, for the purpose of their being carried away or removed as or in order to their being dealt with as slaves, or shall ship, tranship, embark, receive, detain, or confine on board or contract for the shipping, transhipping embarking, receiving, detaining, or confining on board of any ship, vessel or boat, slaves or other persons, for the purpose of their being imported or brought into any place whatsoever as or in order to their being dealt with as slaves. . . . . .

"Then and in every such case the person or persons so offending, and their procurers, counsellers, aiders, and abettors shall be and are hereby declared to be, felons and shall be transported beyond seas for a term not exceeding fourteen years or shall be confined and kept to hard labour for a term not exceeding five years, nor less than three years, at the discretion of the Court before whom such offender or offenders shall be tried and convicted."

3931. In view of the ampler provisions of the same Statute relating to engaging in the slave trade, this section would probably be put in force only in the case of intra-territorial offences relating to the slave trade.

3932. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

3933. Proof.—The points requiring proof are:—

(1) That the accused imported, exported, removed, bought, sold, trafficked or dealt in slaves.

(2) That he has done so habitually.

3934. Principle.—The supply of slaves cannot be continued without the help of the slave-dealer. A slave-dealer by sea is treated as a pirate and is punishable with the penalty due to that heinous crime. A slave dealer on land would be punished under this section.

3935. Professional Slave-dealing.—This section punishes an *habitual* slave-dealer. An habitual slave-dealer is a professional trader in slaves. A person who is open to buy and sell slaves is such a trader. A person who traffics in slaves is nothing more than one who trades in them. The word "traffic" is intended to include acts *ejusdem generis* with those enumerated. Probably it will include a middleman who

(8) The Slave Trade Act, 1824 (5 Geo. IV, c. 113), s. 10.

negotiates the purchase and sale and charges a commission thereof. Recruiters and kidnappers who steal children for selling them into slavery are also exposed to this penalty besides that of kidnapping for which they may be primarily liable.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

Selling minor for purposes of prostitution, etc.

372. Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a *quasi*-marital relation.[9]

Synopsis.

(1) *Analogous Law* (3936-3938).
(2) *Procedure and Practice* (3939).
(3) *Proof* (3940).
(4) *Form of Charge* (3941).
(5) *Principle* (3942).
(6) *Meaning of Words* (3943).
(7) *Old Law and the New* (3944).
(8) *Disposal of Minors for Immoral Purposes* (3945-3949).
(9) *Sale* (3946).

(9) By Act XVIII of 1924 the following words are substituted for those enclosed within crochets, namely "person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be."

The Amended Act, XVIII of 1924 came into force on the 1st January, 1925 (*vide* Notification No. F.-820|22, dated 9th Oct. 1924, published in the Gazette of India, Pt. I, dated 11th October, 1924, p. 896).

(10) *Let on Hire* (3947-3949).
(11) *Position of Devadasis* (3950-3953).
(12) *Meaning of "dispose of"* (3952).
(13) *Minor must be under Eighteen* (3953).
(14) *Intent and Knowledge* (3954).
(15) *Presumption of Prostitution* (3955-3956).
(16) *Prostitution and Illicit Intercourse* (3957).
(17) *Unlawful and Immoral Purpose* (3958).
(18) *Meaning of "immoral"* (3959).

3936. Analogous Law.—This section has been amended, and its scope much enlarged, but the offence here punished is again a special case of kidnapping, which has been defined in section 361. But it need not possess all the elements of that offence. In short, the offence is complete by mere disposal, apart from the ingredients which go to make up kidnapping or abduction. The gist of the crime is in the immoral intention There is no offence exactly corresponding to this in English Law, though by the Criminal Law Amendment Act, 1885,[10] provision is made for the punishment of abduction of unmarried girls below eighteen out of the possession or against the will of the lawful guardian, so that they may be carnally known, is a misdemeanour punishable with imprisonment up to two years. The section assumes that a reasonable belief as to the age of the girl is a good defence.[11]

3937. Of course, the present section applies to all minors below 16, whether male or female, married or unmarried, and, as will be presently seen, it has nothing to do with their being in the keeping of a lawful guardian.

This and the next section were recently proposed to be amended with the object stated below:—

"The general intention of these sections was to protect young girls from sexual contamination at an age when they were too young to appreciate the moral degradation involved upon them by the action to which they submitted.

"But practical experience has shown that there are many loopholes by which the guilty parties to these nefarious transactions might escape. For example, it might be pleaded that, though the girl was made over to a prostitute, it was not intended that she should actually be used for this purpose until she had passed the age of 16. Or, it might be urged that though the girl was handed over to a particular man for his carnal knowledge of her, it was not intended that she should be a prostitute at all, and that though the act or acts for which she was given may have been immoral, they were not unlawful.

"Again, the prosecution in such a case might also be challenged to prove the guilty intention or knowledge, a duty which it might be extremely difficult for the prosecution to discharge.

"Under the amendment of these sections proposed in the Bill, these pleas can no longer be sustained; but the wording of the amendment makes the handing or taking over of the girl criminal if there is intent or knowledge of a likelihood that the minor shall or will at any age be employed or used for the purpose of prostitution or illicit sexual intercourse with any person or for an unlawful and immoral purpose. A defence that the girl was to be kept chaste until she had passed the age of 16 will no longer avail an accused person nor will he be able to rely on the plea that the child was not destined for a life of prostitution, but merely for a single act of sexual intercourse.

(10) 48 & 49 Vict., c. 69, s. 7. (11) *See* s. 79.

"Finally, Explanation I to section 372 and the Explanation to section 373 throw the *onus* of proving innocent intention upon the accused person in the case where the giver of the child has handed her over to a common prostitute, or where the receiver is herself a common prostitute.

* * *

"It will be observed that among the purposes for which the handing over or receiving of a minor in the ways contemplated by these sections is made an offence, the purpose of illicit sexual intercourse with any person is now specifically included in the body of the two sections. It was at first thought that the object might be secured by altering the wording from 'unlawful and immoral' to 'unlawful or immoral,' or by omitting the words 'unlawful or' and simply leaving the word 'immoral'. Further consideration has, however, shown that either of these suggestions might have undesirable consequences. For, if the purpose which would make the disposal and reception of a minor a criminal act might be either unlawful alone, or immoral alone, we might make liable to the heavy punishment provided by the sections engagement or hiring of minors for purposes, which, though nominally unlawful, could not be described as immoral, or which, if immoral, were not connected with sexual immorality. Moreover, the word 'immoral' is not sufficiently clearly defined by law or usage as to stand alone as a guide to the interpretation of the section. The changes that I have mentioned might then have had the effect of making acts penal which were beyond the scope of sections that had been particularly designed to deal with sexual contamination of minors.

"The use of the expression 'illicit sexual intercourse' has, however, necessitated a definition of the term which is contained in Explanation II to section 372, but which naturally governs both sections. The definition in 'illicit sexual intercourse' means 'sexual intercourse not sanctioned by law or custom.' In some communities it might no doubt be possible to class all sexual intercourse as illicit except that, between husband and wife; but the information obtained in reply to the reference made shows that there are classes and tribes in India in which union short of actual legal marriage is recognized. The looser forms of marriage, which are open to some communities and tribes, shade off into forms of concubinage, which, though they might not rank as legal marriages, at the same time are recognized as unions by the classes among which they obtain, and do not necessarily involve any slur or immorality or sexual degradation.

"The definition has, therefore, been drawn so as to protect unions of this kind, which have the sanction either of law or custom."(12)

3938. The Bill embodying these amendments reached the stage of a Select Committee which disagreed as to its wording and utility, with the result that it was ordered to be republished.(13)

It lapsed but was re-introduced and passed in 1924.(14) And in introducing its provisions the Home Member said:—

"We have not.....definitely assumed that employment as *Devadasis* is equivalent to employment for purposes of prostitution, but should such employment actually prove to come within that definition our Bill will enable it to be dealt with more effectively than hitherto. Then again, we have thought it necessary to exercise a certain caution in regard to the definition of 'immoral purposes' or 'illicit intercourse.' The Bill will extend to the whole of India, including many backward tracts. We believe it is only proper in the circumstances that we should recognize that there are certain relationships in those tracts which have the force of *quasi*-marital relationship, though not strictly matrimonial."(15)

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(12) Home Member's Speech, Imperial Council Proceedings, dated 17th September 1913, pp. 60, 61.

(13) Proceedings of Council, dated 18th March 1914, p. 894.

(14) *See*, for its history, the Statement of Objects and Reasons, published in the *Gazette of India*, Pt. V, dated 16th February 1924, p. 36.

(15) Assembly Debates, dated 11th February 1924, pp. 447, 448.

3939. Procedure and Practice.—This offence is cognizable and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. The person who gives and the person who takes possession of a minor each commits a distinct offence and they cannot be both tried together, unless the two offences are shown to have been committed in the same transaction.(16)

3940. Proof.—The points requiring proof are:—

(1) That the accused sold, let to hire, or otherwise disposed of a person.

(2) That the person was under eighteen years of age.

(3) That he did so (*i*) for the purpose of—

(*a*) prostitution, or

(*b*) any unlawful and immoral purpose;

(*ii*) or knowing it to be likely that she would be so employed at any age.

3941. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you sold (*or* let to hire *or* disposed of) one A B, then a minor under the age of eighteen years, with intent that the said A B shall at any age be employed or used for the purpose of prostitution or illicit intercourse [(*or* for any unlawful and immoral purpose, to wit——) *or* knowing it to be likely that such minor will be employed *or* used for any such purpose] and thereby committed an offence punishable under section 372 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

3942. Principle.—This section and the next are counterparts of each other, and they both refer to the same offence committed by the two parties to the bargain, this dealing with the seller, and the next with the purchaser of such minors. The mere sale or disposal of a minor below eighteen to another is not an offence; indeed, such sales are often made for the purpose of adoption or marriage. What the criminal law reprobates is not a sale, but sale for an immoral purpose. What is "immoral" the Code does not define, nor can it, for it must in a great measure depend upon the social habits of the people. Thus amongst polygamous communities the sale of a minor below eighteen years of age for a polygamous marriage would not be immoral. But acts which are regarded as obviously immoral by the enlightened members of the community cannot be vindicated on the plea of religious sanction unless there is a clear authority for it. And even

(16) *Ramunna*, 12 M. 273.

if there be such authority, law has authority to suppress them if they are in their effect baneful to the best interests of society. The suppression of *Sutti* is an instance.

3943. Meaning of Words.—"*Sale or hire*": These words do not necessarily connote immediate transfer of possession, though possession usually follows such transfer as a necessary consequence. But the offence is complete on proof of the sale or hiring without any proof of change of possession.(17)

"*Or otherwise disposes of*": The term "dispose of" has many meanings. It denotes, *inter alia*, "to bestow for an object or purpose." "*To make a change in the circumstances*": It does not imply an actual change of possession,(18) or that the possession was obtained from a third person.(19) But a mere recommendation that a girl should join a brothel is not a disposal.(20) "*Shall at any age*": This amendment overrules the cases in which it was held under the old section that the disposal of a girl for prostitution after she had attained the age of 16 was not punishable.(21)

"*For the purpose of prostitution*": Prostitution is the act or practice of offering the body to an indiscriminate intercourse with men. If a minor is sold to be another's mistress, it would not then be prostitution, though it would be sale for "*unlawful and immoral purpose*," which words mean that the purpose of the sale should be both unlawful as well as immoral. It should not be one without the other. If the employment of minor girls below sixteen, say in a factory, is prohibited, hiring them out for such employment would be "unlawful," but it is not immoral. Again, the sale of a female to a person to be his mistress is undoubtedly immoral, but it is not necessarily unlawful.(22) So adulterous or incestuous intercourse is unquestionably immoral, but it is not necessarily illegal. Polyandry which is customary in certain tracts of Malabar is another instance of an act which may be regarded as immoral though by no means unlawful. "*Of illicit intercourse*," as distinguished from prostitution. The amendment overrules the cases in which a person disposing of a girl for carnal knowledge of a person but not for promiscuous intercourse, which was held to be not punishable under this section.(23)

3944. Old Law and the New.—This and the next section penalize traffic in minors for immoral purposes. This section penalizes their sale and the next its counterpart their purchase. Under the law as it stood before its amendment the protection only extended to persons below the age of 16. Apart from this limitation it contained at least 4 loopholes upon which the courts were divided. For example, it was held in some cases that the section did not empower the punishment of the sale of a minor under the age of 16 if she was not to be used for prostitution until she had passed the age of 16.(24) The amendment overrules these cases by providing for

(17) *Anon.*, (1881) 1 Weir 359 (362), F. B.
(18) *Anon*, (1881) 1 Weir 359, (362), F. B.
(19) *Shamsunderbai*, 45 B. 529.
(20) *Nari*, 48 M. L. J. 594, 86 I. C. 804, (1925) M. 716.
(21) *Ramanna*, 12 M. 273: *Karuna Baistavi*, 22 C. 164; *Mula*, (1888) P. R. No. 13.
(22) *Pourangam*, (1885) 1 Weir 373.
(23) *Dowlat Bae* v. *Sheikh Ali*, 5 M. H. C. R. 473.
(24) *Ramanna*, 12 M. 273; *Karuna Baistavi*, 22 C. 164; *Mula*, (1888) P. R. No. 13.

extending the punishment to cases in which the procuration is intended to use the minor "at any age" This amendment equally overrules the cases in which it was held that the performance of an initiatory ceremony leading up to prostitution did not amount to a disposal for prostitution.(25) The dedication of girls to a *pagoda* would now have to be judged from that standpoint, in that it cannot now be pleaded that while the present intent is merely to dedicate the minor to the service of a temple, the fact that she would in course of time, if she followed the set course become a prostitute could not be taken into account unless it is shown that the minor must plunge into this life before she is 16. In the second place while the old section justified a construction that it was intended to penalize the conversion of a minor into a prostitute, that is, into one who was consigned to promiscuous intercourse, its language did not justify the conviction where she was handed over to a man for a casual connection or for his own carnal knowledge.(1) The section now provides for the punishment even in such cases. But in doing so it makes a notable exception stated in the second explanation, namely that where the minor is sold to one who contracts an alliance with her which amounts to a *quasi*-marital relation it will not be deemed to be an "illicit intercourse" punishable under this section.

There was some doubt as to the meaning of the terms sale, hire, and disposal; but it has not been explored. The section as now amended therefore settles only some of the controversies raised in the past. The ensuing commentary will set out the points upon which the old law remains and those which the new section strives to elucidate.

Again, it was held that the section did not extend to immoral acts if they were not at the same time unlawful; that is to say, cases now expressly provided by the first explanation stood the chance of escaping punishment.(2)

3945. Disposal of Minors for Immoral Purposes.—Neither this section nor the next prohibits by prescribing a penalty the transfer of a minor above the age of eighteen years. They both refer only to minors below that age. But otherwise both the sections are unrestricted as to sex, and custody, the offence being committed whether the minors were in the keeping of a guardian or not, and whether they were sold by their parents(3) or a procuress. The object of both the sections is to prevent the social degradation of minors before they have attained the age of majority and so attained adolescence and maturity of understanding so as to be able to exercise their own judgment.

Sale.

3946. The section absolutely prohibits the sale, letting to hire or disposal of such minors. The words "sale" and "let to hire" imply transfer of the person of the minor to another for the purpose of prostitution. The word "sale" implies

(25) *Parameshwari*, 22 Bom. L. R. 894, 58 I. C. 145; *contra* in *Shahebara*, 27 Bom. L. R. 1022, 89 I. C. 1050, was (submitted) wrongly decided, as the ceremony of tying *Talimani* symbolized the dedication and was not a mere preliminary, *see* § 3950, *post; Kannammal*, 24 M. L. J. 211, 18 I. C. 257.

(1) *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473; *Yenku* v. *Mahalinga*, 11 M. 393; *Srinivasa* v. *Annasami*, 15 M. 323; *Khusbala*, (1880) P. R. No. 27: *Mula* (1888) P. R. 13; *Nourjan*, 14 W. R. 39; *Sukee Raur*, 21 C. 97, *Ahmed Khan*, (1898) B. U. C. 962.

(2) *Ramanna*, 12 M. 273; *Mula*, (1888) P. R. No. 13.

(3) *Pourangam*, (1885) 1 Weir 373.

a transfer in permanency for a consideration. In the view of the Madras High Court it is not necessary that the sale should be followed up by possession, though it is the rule. But for the purpose of this section the offence is held to be complete the moment the contract of sale is completed, though there may not have been actual delivery of possession (4) (§ 3947).

Let on Hire.

3947. The phrase "let on hire" similarly implies the making over of a minor in perpetuity or for a term. This phrase is naturally the counterpart of the word "hire" in the next section—the one gives, the other takes—the object of the parties being in each case the same.(5) But even here the words, it is said, do not necessarily require immediate transfer of possession, though they necessarily contemplate it, so that the offence is complete as soon as the contract is made in which the transferor agrees with the transferee for the transfer of the minor for a consideration, in permanency or for a term fixed or understood.

But the necessity of the transfer of possession was assumed to be *sine qua non* in a case in which Scotland, C.J., said: "But to bring the case within the section, it is, in my opinion, essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be, for some time, completely in the keeping and under the control and direction of the party having the possession, whether ostensibly for a proper purpose or not. The words 'buys' and 'hires' convey that meaning according to their ordinary acceptation; and giving them due effect, it seems to me that the associated words, 'or otherwise obtains possession' were not intended to do more than include other modes of obtaining the same kind of possession as that of buyer or hirer. This, I think, is shown more clearly to be the meaning intended by the provision which follows as to the other essential of the offence—the intent or knowledge of its being likely that such minor shall be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose indicating plainly, as it does, an employment or use of the minor at some time future to the obtaining of possession; its effect is to my mind strong to show that complete possession and control of the minor's person obtained by buying, hiring, or otherwise, with the intent or knowledge that, by the effect of such possession and control, the minor should or would afterwards be employed or used for either of the purposes stated, is what the section was intended to make punishable as a crime. The provision seems to me to exclude the supposition that 'on obtaining of possession' in the sense in which that expression is, no doubt, sometimes used, of merely having sexual connection with a woman, could have been in the contemplation of the framers of the section."(6)

3948. In this case the accused met a girl, aged 11, in a street, and he asked her to allow him sexual intercourse, promising to give her a pice. She consented and entered with him an uninhabited house where the accused was surprised while in the act of having sexual intercourse. The

(4) *Anon*, (1881) 1 Weir 359 (362) F. B.; To the same effect, *Arunachellam*, 1 M. 164.

(5) *Ahmed Khan*, (1898) B. U. C. 962, 963.

(6) *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473.

girl who had gone out without permission, was a *virgo intacta* and had not attained puberty. The jury found the prisoner guilty under this section, but the High Court set aside the conviction, holding that the accused was not in possession of the girl, Holloway, J., observing: "I must guard myself against being supposed to think that nothing more is required than minority, a contract, and an intent to have sexual connexion, to render the man who hires punishable under this section. The intention or knowledge must be made out, and it may well be, looking at the whole scope of the sections, that the previous ones deal with the corruption of girls without the consent of their guardians, or of women by suppressing their will by force or deceit, and that these deal with the case of trafficking in innocence. They are perhaps not intended by confounding the province of law and ethics, to make men virtuous by legislative enactment."(7)

Curiously, the Full Bench in the anonymous case do not refer to this case, nor do they combat the views therein expressed. They only say this: "The term 'dispose of' has many meanings. It denotes (*inter alia*) to bestow for an object or purpose, 'to make a change in the circumstances;' it does not necessarily imply that there has been a transfer of possession, nor, indeed, do the terms 'sell or hire' necessarily connote a present or immediate transfer of possession, and where, as is no doubt generally the case, a transfer of possession is contemplated, the offence is complete on proof of the sale or hiring and without any proof of the transfer of possession. In the familiar expression of a friend to a friend 'dispose of me as you please; I place myself at your disposition,' it is not contemplated that the person places himself physically in the possession of the other; he makes a proffer to him of his services, and to a certain extent places himself under the other's control."(8)

3949. The earlier Madras case(9) has been followed in Calcutta in a case in which two men were in a house when they were approachd by a procurer who told them that he could get them a girl for Rs. 2, which being paid, the previous accused with two others brought a girl, aged between 12 and 13, which they offered for an immoral purpose for Rs. 5 for a short time and absolutely for Rs. 50. The Sessions Judge held the charge under this section unsustainable, and the case went up before the High Court for quashing it, whereupon Pigot, J., held with Scotland, C.J., that the words "sells, hires or otherwise disposes of" imply transfer of possession, and that the use of the words "employed or used" in that connection strengthen the same view. Merely having a sexual intercourse with a girl was not such possession, and the accused were therefore entitled to be acquitted.(10) The same view was taken by Jackson, J., in a case in which he held this section to contemplate the selling, letting to hire, or otherwise disposing of, any minor with intent that such minor should be employed as stated, that is to say, "making her over to a person either in perpetuity or for a term for a consideration or otherwise transferring the possession of a minor."(11) The Bombay High Court has followed these cases, and

(7) *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473; *per* Scotland, C. J., Holloway & Innes, JJ.

(8) *Anon*, (1881) 1 Weir 359, F. B.

(9) *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473.

(10) *Sukee Raur*, 21 C. 97, following *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473.

(11) *Nourjan*, 14 W. R. 39.

held the change of possession for at least a term essential to constitute hiring.[12] But here again a discordant note had been previously struck by an earlier case in which the transfer of possession was not considered essential.[13] Curiously again, this case was not even referred to in the latter case in which the delivery of possession was held to be essential.[14]

3950. Position of Devadasis.—The chief controversy has centred round the words "disposed of" which have been, on the one hand, held to mean a mere offer and acceptance not necessarily followed up by an actual delivery of possession,[15] and, on the other hand, they have been held to include not only a contract for delivery, but a contract including delivery.[16] In some of these cases the presiding Judge was the same,[17] so that it becomes necessary to examine the cases to see if they are not distinguishable. In the Madras Presidency there is an ancient custom of dedicating young girls to the *Pagodas* as *dasis*, variously called as *Aradhins*, *Baoris*, *Bhawanis*, *Devadasis*, *Jogins* or *Murlis* or maids and dancing girls, but who, it is notorious, are used for the purpose of prostitution. Both *dasis* and dancing girls are dedicated to the temple, by the performance of certain ceremonies, after which they cannot marry, but lead the lives of lifelong prostitutes. They are called *Devadasis* or dancing girls of the temple and by custom they claim a right to vote on or veto the admission by dedication of new *dasis*. It appears that after dedication, girls pass through a period of novitiate during which they learn singing and dancing. The dedication is accompanied by the registration of their names as belonging to the *Pagoda*.

The order in which the several acts of dedication may be performed would appear to be these: (*i*) application by the minor's guardian for permission to dedicate; (*ii*) acceptance by the *Pagoda* authorities; (*iii*) her registration on the *Pagoda* list from which date she commences to draw her pay; (*iv*) tying of *botti* a ceremony of nominal marriage with the idol (called *Basavi*)—consigning her to lifelong spinsterhood; (*v*) period of novitiate, during which she learns singing and dancing; (*vi*) dancing at *Pagoda* ceremonials—and, of course, prostitution for which there is no starting point. In such cases the Courts were confronted with two questions: (*a*) when was their disposal complete so as to make the dedicators liable under this section? and (*b*) was such disposal saved by the sanction of religious usage? As to the first, the view of the Courts in Madras appears to be unanimous to the effect that as soon as a minor is offered in dedication and it is accepted and she commences to work for the temple and draw her pay, her disposal is complete, because her dedication is irrevocable, and all concerned in her dedication, including the manager of the temple, become liable under this section.[18]

(12) *Ahmed Khan*, (1898) B. U.C. 962.
(13) *Jaiji Bhavin*, 6 B. H. C. R. 60.
(14) *Ahmed Khan*, (1898) B. U. C. 962.
(15) *Padmavati*, (1869) 5 M. H. C. R. 415; *Anon.*, (1881) 1 Weir 359, F. B.; *Dasi Marimuthu*, 1 Weir 364; *Arunachellam*, 1 M. 164; *Basava*, 15 M. 75; *Srinivasa* v. *Annasami*, 15 M. 41; *Jaiji Bhavin*, 6 B. H. C. R. 60; *Tippa*, 16 B. 737.
(16) *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473; *Nourjan*, 14 W. R. 39; *Sukee Raur*, 21 C. 97; *Ahmed Khan*, (1898) B. U. C. 962.
(17) *E. g.*, Holloway & Innes, JJ., in *Padmavati*, 5 M. H. C. R. 415, and in *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473.
(18) *Annasami*, 15 M. 41; *Rajammal*, 2 M. W. N. 479, 12 I. C. 654.

3951. This would also appear to be *ratio decidendi* in *Basava's case,* in which the ceremonies attending a formal dedication were probably all performed, and the girl dedicated as a *Basavi* had commenced to practise promiscuous prostitution.(19) The point of possession was, however, definitely raised and decided in Bombay in a case in which, following a similar custom, a girl had been dedicated, by the prisoner who had brought her up, by the customary nominal marriage to a dagger. It was shown that such marriage dooms the girl to lifelong service of the temple, that girls so dedicated are thenceforward incapable of marriage, and that though they are nominally attached to the temple as *Bhavins* and perform menial service therein, in reality they lead a life of prostitution. Lloyd, J., held that if a minor girl is so dedicated, the accused becomes immediately liable, though possession of the girl may not be transferred owing to her extreme youth.(20) This case was followed by Jardine, J., in another case in which, however, the dedication had been made probably four or five years before, and at any rate the essentials of disposal were not considered.(21) At the same time the Courts regarded the performance of the dagger marriage as a final plunge towards prostitution and as completing disposal within the meaning of this section. Of course, between such step and a preliminary candidature, there is the same difference, as there is between a preparation and a final act.

So where it was found that certain minor girls were being taught singing and dancing and were made to accompany their grandmother, a *Dasi,* to the temple to take part in its ceremonials to qualify themselves as its *Dasis,* there was held to be no disposal. "It may be evidence of present intention to dispose of, which may or may not be carried out, but even if it is carried out eventually, there is no evidence of an intention to dispose of the girl before she attains the age of 16.(22) This view was reiterated in a case in which it appeared that in order to complete a girl's dedication to a life of prostitution in a temple, two ceremonies were the prerequisite—(*i*) the *gejje* ceremony and (*ii*) the *falshobhan* ceremony which is the wedding of the votaress and her god; the first being in the nature of a mere betrothal to him. It was held that the mere performance of this ceremony does not amount to the disposal of a minor girl with the intent punishable by this section.(23) This view is supported by other cases decided under the unamended section.(24) But in view of the amendment since embodied in the section the view taken in them will have to be reconsidered.

Meaning of "Dispose of."

3952. The term "dispose of"(25) is certainly wide enough to include a case of mere assignment without delivery of possession. The term is one of which popular use has made the sense elastic. For it is used in at least two senses bearing on the present question,(*i*) as meaning to determine the fate or destination of, and (*ii*) as meaning to alienate, to relinquish or part with. The first view may be justified

(19) *Basava,* 15 M. 75; *Rajammal,* 2 M. W. N. 479, 12 I. C. 654.
(20) *Jaiji,* 6 B. H. C. R. 60.
(21) *Tippa,* 16 B. 737.
(22) *Dasi Marimuthu,* (1884) 1 Weir 364.
(23) *Parameshwari,* 22 Bom. L. R. 894, 58 I. C. 145.
(24) *Kannammal,* 24 M. L. J. 211, 18 I. C. 257.
(25) Litt. Fr. *disposer—dis,* apart, *poser,* to place; to put away, to apply to a particular purpose. *Srinivasa* v. *Annasami,* 15 M. 223.

in the words of Muthuswamy Ayyar, J., who said : "The policy of the Penal Code, as it seems to me, is not to obliterate altogether the line of distinction between the province of ethics and that of law, but to protect the chastity of minors and to assure to them the freedom of choosing married life when they attain their age, whether they are the natural or adopted daughters of dancing woman, and to have otherwise the incidents of their legal *statuts* as daughters untouched, whether the parties concerned are dancing women or ordinary Hindus."(1) The other view was justified on the ground of *locus penitentiae*, for though the dagger marriage may be an irrevocable step yet the minors are not absolutely debarred from marrying and in some cases do in fact marry rather than lead a life of prostitution.(2) There is also the consideration that a penal Statute must be strictly construed, and if its terms are susceptible of two constructions, the narrower construction should prevail.(3) Here again, the rewording of the section generally would seem to render obsolete the view that the mere possibility of a marrige suffices to take the act out of the crime.

Minor must be Under Eighteen.

3953. In any case, the person disposed of should be at the time of disposal under eighteen years of age. If she has attained that age, then this offence cannot be committed whatever may be the immorality of the transaction. And after the girl has attained the legal age of majority (*i.e.*, eighteen years) she is free to dispose herself of as best she likes. Now since the exact age of the minor at the time of the disposal is an essential element in the composition of the crime, it is necessary that it should be clearly established. In the case of persons of tender age, such as ten or twelve years, the question does not present the same difficulties as one when the minor verges on the age of consent. The question about age is then not always an easy one for solution, and its solution is not simplified by the fact that the preparation of horoscopes in the case of female children is by no means customary in this country. Even if a horoscope be prepared, it is not likely to be produced by the accused unless its production would be to his interest. Moreover, even if a horoscope is forthcoming, there is no knowing that it might not be a faked one. In this state of uncertainty, the evidence of a medical witness should be useful, but no medical witness can testify as to the precise age of a minor, as it is always possible for medical testimony to err within a year or two of the correct age.(4) But with all its uncertainty it is evidence which should not be despised, for it may corroborate the direct testimony of witnessess on the point.

3954. Intent and Knowledge.—Again, another circumstance of equal moment is the intent of the transferor which must be that the minor shall be employed or used for the purpose of prostitution. Now in the case of *Davadasis* and other religious dedications of minor females made to *Pagodas*, the *actual* intention of the dedicator may not be that the minor should be employed as a prostitute. But it is one of those

(1) *Venku Mahalinga*, 11 M. 393 (402), followed *per* Jardine, J. in *Tippa*, 16 B. 737.

(2) *Tippa*, 16 B. 737.

(3) *Srinivasa* v. *Annasami*, 15 M. 323.

(4) Conceded in *Ponrangam*, (1885) 1 Weir 373 (374).

cases in which the Code apparently deviates from its strict search for actual intention regarding the offence committed, if the fact of prostitution was present in his mind at the time of dedication. Though ordinarily, such dedications are made by the prostitutes attached to the temples, they are sometimes made as votive offerings to the gods, and the dedicated females, though to all intents and purposes prostitutes, do nevertheless perform certain priestly functions, such as offering lamps to the deity and entertaining them by their music and songs. As such, they probably occupy the same position as the priestesses of Juno or the vestal virgins of an earlier age, or the nuns of a certain monastic order of the present day. It may then be a question whether persons who are moved to make dedications by devout feelings can be held to *intend* that their devotees shall be used for the purpose of prostitution.

If the word "intend" be held to have been used in its strict primary sense as implying actual determination of the mind, then there can be no doubt but that such dedicators do not possess it. This was conceded, where the Court, however, said : "It may be notorious that girls devoted to the service of Hindu temples almost universally lead a life of prostitution, and that the class by which such dedications are made are usually the class of professional prostitutes who intend that the girls should follow the same life to which they themselves have been devoted or which they may have adopted.....At the same time, it is not only conceivable, but it is within the knowledge of the Court, that the dedication to a life of celibacy may be an act not only innocent but influenced by the highest motives of religion and morality, and in the execution of the criminal law, no question of fact bearing on the guilt of an accused is to be presumed."

"Although, where a certain result is by common experience shown to be the necessary or natural result of a particular act, the Judge may presume on the part of the actor an intention to cause the result or a knowledge of its probability, as for instance, where a man cuts the throat of another, it may be presumed he intended to cause death, or when he gives him a violent blow on the head it may be presumed he did so with the knowledge it was likely to cause death, yet where the result is not the necessary or natural consequence of the act, there must be evidence of the probability of the result, and according to the degree of such probability it may be inferred that the actor had an intention to cause the result, or knowledge of the likelihood that it would ensue."(5)

But the intention or knowledge of likelihood required to be made out must be that the minor shall be, or was likely to be, employed or used for the purpose of prostitution or for any unlawful and immoral purpose. The mere fact that it was a possible contingency is not sufficient.

3955. Presumption of Prostitution.—In this connection the effect of the first explanation now appended to the section must be considered. The author of the Bill

Explanation 1.

(5) *Anon.*, (1881) 1 Weir 359, F. B.; *Khushala*, (1880) P. R. No 27.

explained it in his Statement of Objects and Reasons that while the attention of the Legislature was attracted by the practice of *Devadasis* it was intended to proceed cautiously in the direction of social reform. This explanation therefore eschews a specific allusion to any institution, but prescribes a rule of evidence equally applicable to it. If the alienee be a prostitute or the keeper of a brothel then the mere alienation or disposal suffices to create a rebuttable presumption that the disposal is made for the purpose of prostitution. But it is still of course, open to the alienee to prove that the acquisition was made for a purpose which is not unlawful and immoral. A prostitute may, for instance, have acquired the minor for an innocent purpose, say for domestic service or the like in which case the acquirer could not be visited with the penalty prescribed by the section.

3956. So it may be that the adoption of a girl by a prostitute was made for the purpose of bringing her up as a prostitute, but it is a fact which cannot be assumed as a matter of course. It has to be proved and what has to be proved is the giver's intention, and not the intention of the receiver. If the former gave innocently and the latter took with criminal intent, the latter would be liable under the next section, though the former would not be liable at all. But if the same intention animated both, then of course, both would be liable, the giver under this section, and the receiver under the next. So in a case in which the mother had given her daughter in adoption to a dancing girl, whereupon they were both prosecuted, Muthusami Ayyar, J., said: "It is reasonable to infer that there was no intention at the time of adoption to employ her at once for purpose of prostitution. It would also be no offence, if the intention was that the girl should be brought up as a daughter, and that, when she attains her age, she should be allowed to elect either to marry or follow the profession of her prostitute mother. If, on the other hand, the intention was that the girl should be employed as a prostitute whilst she continues to be a minor, the accused might then be liable. Though the adoptive parent may be a prostitute, yet she may have civil rights. In criminal cases the presumption of innocence must be displaced by positive evidence."(6) "But while this was no doubt true, under the old section, such presumption would now be displaced by another presumption authorised by the first explanation under which the presumption of innocence will only arise if the alienor could show that he did not know that the alienee was a prostitute or the keeper of a brothel and it must not be overlooked that criminality under this section depends not merely upon intention, but also the knowledge or likelihood. And while no doubt it may not be predicated to a moral certainty that a prostitute buying a girl from another was not moved by mere philanthropy, the natural probability does not certainly incline that way. At any rate, in such cases it is perfectly admissible to show the intention of the accused by shewing the intention of others in the same profession.

3957. Prostitution and Illicit Intercourse.—Under the unamended section the object prohibited was described as "prostitution or for any

(6) *Ramanna*, 12 M. 273; followed *per* Banerjee & Sale, JJ., in *Deputy Legal Remembrancer* v. *Karuna Baistabi*, 22 C. 164.

unlawful and immoral purpose." It gave rise to a crop of controversy as to the meaning of prostitution which was held to mean the exposure of a person for promiscuous sexual intercourse with men.(7) The section as now amended penalizes the disposal of a minor " for the purpose of prostitution or illicit intercourse with any person, or for any unlawful and immoral purpose." Reserving these last words for subsequent examination the addition of the words " or illicit intercourse " comprises cases where the minor is acquired for a casual sexual connection though she may not be intended for habitual or indiscriminate intercourse.

3958. "Unlawful and immoral purpose."—The term " prostitution " is evidently used as regards a woman holding sexual intercourse with a member of the opposite sex. A person holding such an intercourse with another of the same sex would be guilty of an immoral and unlawful act—for such an act is punishable under the provisions of section 377. Again, the use or employment of a minor intended to be guarded against by this and the next sections is a use or employment of which a minor is capable, regarded as a natural person, and no other use or employment; the offender must, to come within the sections, contemplate a use or employment of a child as a natural person for a purpose both unlawful and immoral, or in the case of a female also for prostitution; if the purpose of the use or employment contemplated in a transaction falling within the sections is not an unlawful and immoral purpose in respect of the minor, regarded as a natural person, the use or employment does not become use or employment for an unlawful and immoral purpose, merely because the purpose may be unlawful and immoral in respect of the minor regarded as the subject of jural relations.

Where therefore, the accused was found to have disposed of a minor girl in marriage to a third party for a pecuniary consideration, in ignorance of a previous subsisting marriage, but presumably knowing it to be likely that the girl would be used for sexual intercourse, it was held that his act did not amount to an offence under this section, the provisions of which require at least knowledge that the girl is likely to be employed for a purpose which is both unlawful and immoral, and the result would have been the same even if the accused had had knowledge of the previous marriage, because even then her sexual intercourse would not be both unlawful and immoral taken as a natural person, though it may be a bigamous or adulterous intercourse in the ordinary sense, and it would then be *illicit* intercourse which is not necessarily unlawful, though it may be immoral.(8) The word " unlawful " is nowhere defined in the Code, though the word " illegal " is defined in section 43 as meaning anything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action. The term 'unlawful' is probably akin to illegal. In some cases, however, the term is used

(7) *Per* Scotland, C. J., in *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473; *Yenku* v. *Mahalinga*, 11 M. 393; *Srinivasa* v. *Annasami*, 15 M. 323; *Khushala* (1880) P. R. No. 27; followed in *Mula*, (1888) P. R. No. 13; *Khushala*, (1880) P. R. No. 27; *Sukee Raur*, 21 C. 97; *Ahmed Khan*, (1898) B. U. C. 962 *Nourjan*, 14 W. R. 39.

(8) *Mula*, (1888) P. R. No. 13, following *Khushala*, (1880) P. R. No. 27.

to denote a thing prohibited by law.[9] But if the act is not in any view unlawful, though it may be immoral in a purely ethical sense, no offence can be held to have been committed.

3959. Meaning of "Immoral" Purpose.—The fact that the act was immoral does not necessarily imply that it is also unlawful, and *vice versa* (§ 3942). Now an act may be unlawful in the sense that it is prohibited by law, or at any rate it is one which furnishes ground for a civil action. But what is the test of immorality? The Code does not define it, and it is apparent that beyond certain limits, no two people nor two places have the same notion about immorality. This will be evident if regard is had to the marriage laws and customs of the different people. For instance, a *Basavi*, or a woman dedicated to a temple, of whom much has been said before (§§ 3950, 3951) is at liberty, and is expected to have promiscuous intercourse with men generally, but neither she nor her children thereby become disqualified to inherit, for they both do inherit in her father's family.[10] Moreover, how could such practice be regarded as immoral, when it is sanctioned by religion? This argument was adverted to by Holloway, J., who said: "The argument that the treatment of such a transaction, as criminal is impossible, because the Hindu religion sanctions the practice, and the private law recognizes private rights as flowing from it is manifestly of no weight. An offence is every transgression of a penal law, and a rule of penal law is a rule of public law, and necessarily overrides every precept of private law and cannot be affected by any argument derived from that law.....With respect to the argument from religion, it is only necessary to observe that if the precepts of a particular religion enjoin acts which transgress the rules of penal law, these acts will clearly be offences. Where the Legislature intended that acts which otherwise would be offences should not be so because connected with religious observances, they have expressed that intention."[11]

These observations were concurred in by the Full Bench who added: "The cases in which persons have been held amenable to the penal law for participation in *Sati*, in Meriah sacrifices and in the procuring of slaves though these acts were sanctioned by the religious law of the parties implicated, show that the plea, that the practice is enjoined or allowed by the religious law of the accused, is not allowed to prevail over the injunctions of the penal law."[12] In this view the test of immorality is its prohibition under a penalty. But in that case the act is necessarily unlawful, but is it also immoral? There are a number of acts prohibited by the Code. They are then offences and, as such, penal, but they do not thereby become necessarily immoral. As applied to the practice of *Basavi*, the necessary prohibition may be said to be employed in the use of the word "prostitution" which then could not be endured even under the sanction of religion. But is the word "immoral" necessarily limited to such acts? It would seem to be so, for otherwise the term would become far too elastic to subserve the purpose the section has in view.

(9) *Cf.* s. 23, Indian Contract Act (IX of 1872).

(10) *Basava*, 15 M. 75.

(11) S. 292, Expl.; *Padmavati*, 5 M. H. C. R. 415, cited and followed in *Anon.*, (1881) 1 Weir 359, F. B.

(12) 1 Weir 359 (360, 361), F. B.

For a further commentary on this section, reference should be made to the next section.

373. Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Buying minor for purposes of prostitution.

Session. Pres. Mag or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

Explanation I.—Any prostitute, or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.—"Illicit intercourse" has the same meaning as in section 372.(13)

Synopsis.

(1) *Analogous Law* (3960).
(2) *Procedure and Practice* (3961).
(3) *Proof* (3962).
(4) *Form of Charge* (3963).
(5) *Principle* (3964).
(6) *Meaning of Words* (3965).
(7) *Purchasing Minor Prostitutes* (3966-3970).
(8) *"Or otherwise Obtains Possession"* (3969).
(9) *What Intention or Knowledge is Material* (3971).
(10) *Prostitution Intended must be When Under Eighteen* (3972).

3960. Analogous Law.—This section is a counterpart of the last and punishes the receiver of a minor if he is animated by the same intent as the giver. The two sections thus punish both the giver as well as the receiver of a minor for an immoral purpose. In the majority of cases it is not possible that the one should possess the requisite criminal intent which the other lacks, but such a case is easily imaginable. For the receiver may obtain possession of a child under false pretences from the giver who may not know of his felonious design. In that case the receiver would be liable under this section, though the giver would be wholly innocent. Moreover, it is by no means necessary

(13) Amended by Act XVIII of 1924, which came into force on the 1st January 1925. (*Vide* Notification No. F.-820|22, dated 9th Oct. 1924, published in the Gazette of India, Pt. I, dated 11th Oct 1924, p. 806.)

that in order to render a person liable under this section there should be a corresponding offender under the last section. If, for instance, the accused takes possession of a minor under eighteen, there may be no one to give him or her, and yet the person taking possession would be punishable under this section.

3961. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first class.

An offender under this section commits an offence as distinct from one who is punishable under the last section, so that they cannot both be tried conjointly, unless there is evidence to show that the offence was committed in the same transaction.(14)

3962. Proof.—The points requiring proof are:—

(1) That the accused bought, hired or otherwise obtained possession of any person.

(2) That the person in question was then under eighteen years of age.

(3) That he did so with intent or knowing it to be likely that such person shall or will be employed or used, for the purpose of prostitution, illicit intercourse, or for any unlawful and immoral purpose.

3963. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you bought (*or* hired or obtained possession of) A B, a person then under eighteen years of age, with intent that the said A B shall be employed (*or* used) for the purpose of prostitution [(*or* illicit intercourse *or* for any unlawful and immoral purpose), *or* knowing it to be likely that the said A B will be employed or used for any such purpose] and thereby committed an offence punishable under section 373 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

3964. Principle.—Neither this section nor the last is intended to suppress traffic in immorality, for it does not punish the purchase and sale of persons for that purpose. The two sections are, however, intended to save young persons below the age of eighteen from being trafficked in for that purpose. Beyond that age criminal law withdraws its control and leaves the parties the freedom of contract, though it is necessarily an immoral contract, and as such one which law would not

(14) S. 239, Cr. P. C.

enforce, and for the breach of which it will give the parties no relief. But when the contract relates to the transfer of young persons for prostitution, and when the persons affected are below the age of 18, it punishes those who give and those who receive them for an immoral purpose. Thus, while immorality is not pleasing to the law, it is cautious in restricting its penalties only within defined limits. Why has it fixed the age of 18 years, it may be asked. The reason will be found in the provisions of the Indian Majority Act,[15] which fixes that age as the age of majority, the law deeming it right to protect minors against contamination during their nonage, but leaves them free to act after they have attained the legal age of discretion.

3965. Meaning of Words.—"*Or otherwise obtains possession*": This would refer to possession not necessarily taken from a third party. "*With intent that such person shall be employed*": The offence is completed with possession with the intent to employ the minor for the purpose of prostitution, etc. His actual employment, as such, is not a prerequisite. "*Or knowing it likely*": This will scarcely apply to one who employs the minor for the purpose of prostitution. It probably refers to a middle man. "*That such person will be employed or used*": The word "such" refers back to the words "under the age of eighteen years" as the words[16] "any such purpose" refer back to the purposes before stated.

3966. Purchasing Minor Prostitutes.—This section, like the last, refers to a minor irrespective of sex. It will, therefore, equally apply to minors of both sexes below the age of eighteen years. It is also applicable to them whether they be married or unmarried, and whether they are or are not in the keeping of a lawful guardian. Orphans below that age are thus equally protected with those who are in the custody of their parents and guardians. The essence of the crime is the vice of procuring young people for purposes of immorality. They need not be procured habitually, though one who trades in them would be naturally subjected to a higher punishment than another who is a casual offender in this respect.

The offence lies (*i*) in "buying, hiring or otherwise obtaining possession" of a minor, (*ii*) below the age of eighteen, (*iii*) for the purpose of immorality as stated in the section. The word "buys" corresponds to the term "sells" and the term "hires" to the term "lets to hire" as used in the last section. The phrase "or otherwise obtains possession" is said to correspond with "or disposes of" of the last section. The rest of the section is the same as the last section. The terms "buy or buys" naturally imply the obtaining of the custody of a minor in permanency or for a term for a consideration. The word "hired" does not imply the having of sexual intercourse.[17] But do they necessarily involve a transaction with a person other than a minor herself? Suppose, for instance, a person were to contract with a minor girl, aged 17, for prostitution, permanently or for a term on payment of a price; would it be buying or hiring her within the meaning of this section? In the opinion of Scotland, C.J., it would be; for he says: "It is not, I think, essential to the offence

(15) Act IX of 1875.
(16) *Chanda*, 18 A. 24
(17) *Ahmed Khan*, (1898) B. U. C. 963

that the buying, hiring, or otherwise obtaining of the possession of the minor should be from a third person. The language of the section is quite applicable to an arrangement or understanding come to with the minor without the intervention of a third person, and the vice against which the section is directed is certainly not of any less enormity in the latter case."(18)

But this view was not concurred in by Holloway, J., who in the same case remarked: "I think that even the construction of the bare words of this section is in favour of the conclusion that there must be a transaction of which other parties are the subjects, and the minor the object. It is, of course, not to be denied that in common discourse we speak of a man or woman selling himself or letting himself to hire, but in countries, at all events, in which slavery is unknown, what is really sold or let is the labour or skill of the seller or lettor. Here the language of the section points to a contractual or contract-like obligation—'whoever by buying, hiring or other similar transaction, obtains possession, etc.' This conclusion, preferable on the mere words, is, I think, shown to be the only true one by the sections which precede this. Sections 361 and 363 provide an adequate punishment for taking or enticing out of the keeping of a lawful guardian, and the definition of this person renders the operation of the sections very wide: ss. 364, 365, 366, 367 and 369 provide for other offences of the same character. Then by natural transition, section 372 seeks to protect the minor against the act of the parent or guardian. After consideration I can entertain no doubt that the person aimed at in section 373 is the other party to the transaction in section 372. The whole of the words point to something having the form of a contract. A minor is, *ex vi termini*, incapable of binding himself by one; but if s. 373 applies to him, who, without any dealing with a third party, obtains possession for the purpose or with the knowledge specified, then the minor is equally punishable under section 372."(19)

3967. This is a construction *noscitur a sociis* which has commended itself in subsequent cases. There can be no doubt that the section is primarily intended to prohibit the purchase of minors from third parties, and it is unquestionable that the buying or hiring does not ordinarily import purchase or hire of an object as distinct from the vendor. And if the words "or otherwise obtains possession" must be construed *ejusdem generis*, then they do not operate to enlarge the terms of the earlier words. At the same time there is nothing in the section to prevent its being construed in accordance with the view of Scotland, C.J., but such a construction would be necessarily strained and unnatural, and it can only be resorted to if it is necessary to avert a mischief which should otherwise ensue if that construction were not adopted. Now, with the exception of waifs and strays, all minors are presumably in the keeping of a guardian so that persons who kidnap or abduct them would be punishable under the foregoing sections, though they may not be under the provisions of this section. Only an inconsiderable class of minors would probably remain whose case

(18) *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473.

(19) *Ib.* followed in *Ganga (Mt.)*, 11 C. P. L. R. 6; *Bhutia (Mt.)*, 7 N. W. P. H. C. R. 295; *Sukee Raur*, 21 C. 97; *Sham Shundar*, 45 B. 529; *contra*, following the view of Scotland, C. J., in *Hardeo*, (1880) P. R. No. 7.

would not fall under those sections, and it does not appear to justify an unnatural enlargement of the terms of this section to meet them.

3968. The word "buys" otherwise requires no explanation. It is used in the same correlative sense as the term "sells" in the last section (§ 3945). The term "hires" is similarly self-explanatory. It means the receiving of a minor for the purpose of prostitution for a term and usually for a consideration. It does not refer to a casual connection had on payment. (20) So where the accused who had been a prostitute by profession, brought up her niece, and when she was about 12 years old she took to prostitution which was the profession of the family, plying her trade at the door of her aunt's house and supporting her aunt by her earnings it was held that the accused could not be convicted of letting the girl to hire within the meaning of section 372,(21) and consequently persons visiting her could not be held liable for "hiring" her under this section(22) (§§ 3947-3949).

3969. The words "or otherwise obtains possession" it was held must also be construed *ejusdem generis* with "buys and hires." In other words they were held to point to the obtaining of possession not for a casual connection but for a short term at least.(23) In view of the amendment of the section this view is no longer tenable, since a person obtaining possession for illicit intercourse, *i.e.*, a casual connection, is now made expressly liable.

3970. There can, of course, be no offence where a person commits an immoral act with a female member of his own household. In that case there is neither obtaining possession nor the other element necessary for the offence. Where a girl under 16 years of age while travelling with a chance protector (not her lawful guardian) eloped with the accused voluntarily and without any force or fraud on his part, and without any agreement with her or her chaperon, and the accused subsequently hired out the girl on two occasions for the purpose of sexual intercourse, it was held that the accused could not be said to have taken possession of the girl with any of the objects specified in the section.(24)

3971. What Intention or Knowledge is Material?—This suggests the necessary inference that what law looks to is the actual intention or knowledge of the accused at the time of purchase or possession. His subsequent acts are immaterial. This has been pointed out under the last section with reference to the case of adoption of a minor girl by a prostitute, in whose case it has been held that it would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age, she should be allowed to elect either to marry or follow the profession of her prostitute adoptive mother.(25) The evidence of intention or knowledge must be that the receiver was at the time of receipt actuated by the desire of employing or using her as a prostitute. It is not necessary that he should intend to use her before she attains the

(20) *Mohubutt*, (1873) P. R. No. 16.
(21) *Rahiman*, (1872) P. R. No. 29.
(22) *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473; *Sukee Raur*, 21 C. 97; *Ahmed Khan*, (1898) B. U. C. 962.
(23) *Dowlath Bee* v. *Shaik* Ali, 5 M. H. C. R. 473; *Nourjan*, 6 B. L. R. (A. C.) 34; *Ahmed Khan*, (1898) B. U. C. 262; *Bhutia*, 7 N. W. P. H. C. R. 295; *Ganga*, (*Mt.*), 11 C. P. L. R. 6.
(24) *Hardeo*, (1880) P. R. No. 7.
(25) *Ramanna*, 12 M. 273.

age of eighteen years, nor is it necessary that he should use her so at all. What is, however, necessary is that at the time of buying, hiring or obtaining possession of the girl, he should be possessed of that intention or knowledge. As such, the offence is purely preventive, though it necessarily becomes punitive if the criminal purpose is put into execution.

But it is not necessary for the offence, which would be completed as soon as that intention governs the purchase or possession. But how is such intention to be proved? It is an intention as to the future course of conduct. How is the Court to judge of it by his mere act of possession? This question had created some difficulty of which a solution is to be found in the first explanation. If the purchaser was a prostitute, then the presumption of such intent would arise, though the presumption is rebuttable. In other cases the intent may be proved by the evidence of other acts of the accused by usage of the class to which he belongs and by the absence of any other purpose for which he could have acquired the girl. In short, such intention is a matter of probability and inference, which the Court would, having regard to all the circumstances of the case, find. So where the facts proved were that the accused, a dancing girl, purchased a young girl for a consideration, that it was the practice among dancing girls residing in the neighbourhood to acquire children for the purpose of bringing them up as dancing girls, and that there was no instance of a girl so acquired having been married, it was held that a conviction under this section was sustainable.(1) In this case there was no adoption, and the Court drew the natural inference which the proved facts of the case naturally warranted. But in case of adoption by a dancing girl, it was said that prostitution is not the essential condition or *necessary* consequence of, but is an incident due to, social influences. It is a question to be determined on the evidence, and on the circumstances of each case, whether the accused had acquired the minor with the criminal intention.(2)

Prostitution Intended must be When Under 18.

3972. Now, what are the ingredients of the criminal intention? The section no doubt lays down that the intention must be to use or employ the minor for the purpose of prostitution or for any unlawful and immoral purpose. The words "employed or used" have been collocated not with the object of presenting any contrast but merely because some acts aimed at may be more properly expressed by the one word, some by the other.(3) The word "use" would suggest use of the person by the accused himself, while the word "employed" would meet the other contingency of hiring out for general prostitution.

3973. Under the old section it was held that the employment of "such minor" implied that she was to be used as a prostitute when still under the then prescribed age of 16.(4) But this restriction if warranted by the old section has since been removed by its amendment.

(1) *Papa Sani*, 23 M. 159.
(2) *Venku* v. *Mahalinga*, 11 M. 393; followed in *Ramanna*, 12 M. 273.
(3) *Per* Holloway, J., in *Dowlath Bee* v. *Shaik Ali*, 5 M. H. C. R. 473.
(4) *Chanda*, 18 A. 24; *Bhagirath*, (1900); A. W. N. 133; *Sundar* (1904) A. L. J. 559; *Karuna Baistobi*, 22 C. 164 (172).

374. Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Any Mag. Cognizable. Warrant. Bailable. Comp.

Unlawful compulsory labour.

[*Person*—s. 11. *Unlawfully*—*cf.* s. 43.]

Synopsis.

(1) *Analogous Law* (3974).
(2) *Procedure and Practice* (3975).
(3) *Proof* (3976).
(4) *Form of Charge* (3977).
(5) *Principle* (3978).
(6) *Unlawful Forced Labour* (3979-3982).

3974. Analogous Law.—The provisions of this section are akin to those against slavery, and its appropriate place would be after section 371. It is enacted to suppress the ancient practice of forced labour which the landlords claimed as of right from their tenants, and which they still claim as customary service inspite of this section. But inasmuch as its nature and extent is now defined in the village record of rights, the service, though forced, is not taken unlawfully within the meaning of this section. Nor would it apply to service exacted under a contract, as in the case of coolies recruited for the tea gardens and colonial sugar plantations.

3975. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both bailable and compoundable, and is triable by any Magistrate.

3976. Proof.—The points requiring proof are:—

(1) That the accused compelled some person to labour.

(2) That such compulsion was unlawful.

(3) And it was against the will of the labourer.

3977. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you unlawfully compelled one A B to labour by——(*specify the labour*) which was against the will of that person, and thereby committed an offence punishable under section 374 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3978. Principle.—This section is based on the recognition of individual freedom as the inherent right of man. No one, not even the State, can compel him to render his service against his wish, and anyone compelling him to do so renders himself obnoxious to the penalties of this section. There are, however, certain necessary qualifications to this rule comprised in the word "unlawfully." For instance, the Jailor who is in charge of prisoners can compel them to work against their wish and

such compulsion is not unlawful, because it is authorized by law. So it is possible that in a case of great public emergency the State may enrol persons as special constables, and they may then be compelled to work if their enrolment is not "unlawful." So again, States have in times of national peril passed laws in favour of conscription and compulsory military service, in which case the employment of forced labour would be lawful. So there are certain regulations which empower the Government to impress men and beasts for transport and military supply. All these would be exceptional cases saved by the word "unlawfully" from the penalty here provided.

3979. Unlawful Forced Labour.—Three things are required to constitute this offence: (*i*) labour, (*ii*) its compulsion and (*iii*) unlawfulness. The word 'labour' would seem to suggest only physical exertion, but it is wide enough to comprise any exertion whether mental or physical. It means nothing more or less than toil or the performance of any work. So it is as much labour to dig a trench as to compose a poem or paint a picture. Consequently, a person who compulsorily employs another to do any work is punishable under this section whatever may be the nature and character of his work. But the work must be one which the person is compelled to do, and he must do it against his will. This would seem to suggest the use of consistent pressure up to the time the work is completed. But would not the offence be complete if the pressure was only used to overcome resistance?

This question arose in a case decided by the Calcutta High Court, upon the following facts. The accused Madan Mohan Biswas went with his servant to one Honto Labang to demand his loan which was magnified to be Rs. 200 or Rs. 300. He dismantled his house and ordered the debtor and his daughter to his house to work off the loan. They went accompanied by his wife and two other children who did not care to live alone. The case of the prosecution was that all these people were forcibly made to work during the day, and locked up at night under a guard, that they were given a scanty supply of meals, and that they had virtually become slaves of the accused. The Magistrate convicted him of slavery and exacting a forced labour under this section. The accused moved the High Court in revision, but as Beverley and Norris, JJ., differed as to the credibility of the evidence and on the construction of this section, the case was re-argued before Petheram, C. J., and the two previous Judges, when the Chief Justice agreeing with Beverley, J., quashed the conviction, holding that there was no credible evidence of compulsion. All that the accused had done was to induce Honto Labang to consent to live on his premises, and to serve him insisting upon their working for him and punishing them by beating them if they refused, adding "that a person who insists that another who has consented to serve him shall perform his work, unlawfully compels such person to labour, because it is the thing which he or she has agreed to do, and although if the employer assaults the servant for not working to his satisfaction, he undoubtedly renders himself liable to rigorous imprisonment under section 352 of the Penal Code (but) I do not think he thereby commits an offence under section 374."(5)

(5) *Madan Mohan Biswas*, 19 C. 572.

3980. In this case, then, the Court found that the men having freely consented to work off their debts, the creditor was justified in taking the promised work from them, and if he forced them to work by assaulting them, he could not be held to compel them to labour against their will—within the meaning of this section. The distinction drawn is somewhat fine, but it is based upon the fact that in order to constitute this offence the labourer should have at no time consented to do the work, and that he must do it because he is compelled to do it by the accused. Of course, consent given under fear or misconception is no consent at all,(6) so that what the prosecution have to prove is, either that there was no consent or that it was extorted by fear or misconception of facts. If, therefore, a creditor orders his debtors to pay up his debt or to work it off by his labour, and the latter remembering the old practice of bondage yields to his demand and meekly works for him, he could not afterwards turn round and complain that he was made to work under compulsion.

3981. This appears to be the *ratio decidendi* of the case last cited. Persons who erroneously continue to believe in the existence of a custom which has long since been exploded and for which there is no legal justification, have themselves to thank for their ignorance and folly, if another taking advantage of their ignorance calls upon them to work and to which they unresistingly yield. Indeed, it is on account of the force of such customs that the good intentions of this section have for long remained a dead-letter. These customs enjoin the performance of many duties on the part of ryots which they willingly render, and which they would stoutly resist, if they knew any better. For instance, it is a well-established custom to press a number of villagers to sleep at the police thana at night, to carry loads and escort Government Officials high and low safely from place to place. The rendering of *bhet bigar* or customary service by tenants to their landlord is not only time-honoured, but is recognized and enforced by Government. There are other similar relics of an old time villenage which are more or less legal and tolerated.

3982. Of course, no labour, howmuchsoever forced and exacted against the will of the labourer, is penal, unless it is exacted unlawfully. The term "unlawfully" has been in several places used in the Code, but it has been nowhere defined. As elsewhere remarked, it is probably used in much the same sense as illegally—a term defined in section 43.

Of Rape

375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:—

Rape.

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death or of hurt.

(6) S. 90.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under fourteen[7] years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under thirteen[7] years of age, is not rape.

[*Man*—s. 10. *Woman*—s. 10. *Hurt*—s. 319.]

Synopsis.

(1) *Analogous Law* (3983-3988).
(2) *Historical Retrospect* (3985-3986).
(3) *Principle* (3989).
(4) *What is Rape* (3990-3993).
(5) *Against her Will* (3991).
(6) *Without her Consent* (3992-3993).
(7) *No Consent* (3994-4008).
(8) *Want of Capacity* (3994).
(9) *Submission is Not Consent* (3995).
(10) *Consent Before or After the Fact* (3996).
(11) *Consent when Fraud is Immaterial* (3997).
(12) *Consent Obtained by Fraud* (3998-4000).
(13) *Consent by Fear of Death or Hurt* (4001-4003).
(14) *Consent under Misconception of facts* (4004-4007).
(15) *When Consent is Inoperative* (4008).
(16) *Necessity of Penetration* (4009-4011).
(17) *Rape and Homicide* (4012).

3983. Analogous Law.—The fifth clause has been twice amended since its enactment in 1860, when the age of consent was fixed at 10 years. It was raised to 12 by the Indian Criminal Law Amendment Act, 1891,[8] necessitated by the case of *Hurce Mohan Mythee*[9] tried at the Calcutta Sessions of 1890 by Wilson, J., with a jury, in which the accused had caused the death of his wife, aged 11 years and 3 months, by having forcible connection with her, and which drew the attention of the Legislature to the extremely low age fixed in this section, justifying its amendment, the purpose of which was thus stated: "The limit at which the age of consent is now fixed (*i.e.*, ten years) favours the premature consummation, by adult husbands, of marriages with children who have not reached the age of puberty, and is thus, in the unanimous opinion of medical authorities, productive of grievous suffering and permanent injury to child-wives and of physical deterioration in the community to which they

(7) The word "fourteen" in clause "Fifthly" and the word "thirteen" in the "Exception" were substituted for the word "twelve" by Act XXIX of 1925, which came into force on the 23rd September 1925 (*See* Gazette of India, Pt. IV, dated 3rd October 1925, pp. 57, 58).

(8) Act X of 1891, s. 1.

(9) (1890) 18 C. 49.

belong."[10] The fact that puberty is seldom attained before the age of 14 induced the present writer to introduce another amending Bill which resulted in raising the age of consent to 13 inside marital relations, and 14 outside marital relations. Both the Amendments of 1891 and 1925 were opposed by members of the orthodox community, but medical opinion was unanimous in supporting them. Indeed, at the present moment (1928), another Bill is on the anvil of the Legislature for further raising the age to 14 and 15 respectively.

3984. Rape was defined by Lord Hale to be the carnal knowledge of a woman against her will,[11] and in a Statute[12] it was provided that "if a man from henceforth do ravish a woman, married, maid or other, where she did not consent neither before nor after, he shall have judgment of life and of member." This Statute is repealed, but it has been held to contain a right definition of rape, except as the subsequent consent is concerned.[13]

Historical Retrospect.

3985. The first Statute applicable both to England as well as this country, and prescribing a punishment for rape, was passed in 1828.[14] It has been repealed and re-enacted by the Statute of 1861.[15] But apart from Statute, rape has been always esteemed a high crime entailing even the extreme penalty. Under the Jewish law it was so punished if the damsel was betrothed to another man, otherwise she was forcibly married to her ravisher who was, moreover, fined and forced to maintain her without the power of divorce, which was in general permitted by the Mosaic law.[16] Rape was a capital crime under the civil law,[17] under which, moreover, consent of the woman was held to be immaterial. But civil law held prostitutes incapable of any injuries of this kind.

Manu graduates the punishment for the crime according to the relative rank of the parties, and it varies from death to a small fine which is, however, the sole punishment for a Brahmin ravisher.[18] "A man other than a Brahmin, who commits actual adultery with the wife of a priest, ought to suffer death."[19] "He who vitiates a damsel, without her consent, shall suffer corporal punishment instantly."[20] The early Anglo-Saxon law against rape regarded it a capital crime. But by the Statute of Westminster I, c. 13, passed in the twelfth century, the penalty was mitigated to two years' imprisonment, and the age of consent was by the same Statute fixed at 12 years. This penalty was, however, soon enhanced. But 12 years has remained the minimum age of consent[21] in spite of the other changes in the statutory law.

(10) Statement of Objects and Reasons to the Bill No. 3 of 1891, Gazette of India, Pt. V, dated 10th January 1891, p. 5.

(11) 1 Hale P. C. 628; 3 Inst. 60; 1 Hawk, P. C., c. 41, s. 2.

(12) 13 Edw. I St. 1, c. 34.

(13) *Fletcher*, 21 L. J. M. C. 85; *Camplin*, 1 C. & K. 149; but contra *Fletcher*, L. R. 1 C. C. 39.

(14) 9 Geo. IV, c. 31.

(15) 24 & 25 Vict. c. 100.

(16) Deut. xxii, 25.

(17) 4 Black. 210.

(18) Manu, c. viii, s. 378 (Sir Wm. Jones' Ed.), p. 189.

(19) *Ib.*, s. 359, p. 187.

(20) *Ib.*, s. 364.

(21) 1 Hale P. C. 631; followed in *Broom-Bridge*, 7 C. & P. 582; *Phillips*, 8 C. & P. 736; *Waite*, (1892) 2 Q. B. 600.

3986. Under the English Common Law a male infant below 14 years of age is presumed by law incapable of this crime and this presumption is irrebuttable, for though in the case of other felonies *malitia supplet cetatem*—in the case of rape the law supposes an imbecility of body as well as of mind.(22) So in a case, one Enoswaite, aged thirteen, was found to have had carnal knowledge of a girl aged eight years; Wright J., convicted the accused holding the offence "fully proved," but reserved the case on a question of law whether a male under fourteen could be convicted of rape, whereupon Coleridge, C. J., said: "The rule at Common Law is clearly laid down by Lord Hale, that in regard to the offence of rape *malitia non supplet cetatem*, a boy under fourteen is under a physical incapacity to commit the offence. There is a *presumptio juris et de jure*, and judges have time after time refused to receive evidence to show that a particular prisoner was in fact capable of committing the offence.(23) Then he went on to say that a person, who was incapable of committing an offence, could not be held to be guilty of an attempt,(24) though he may now, since the passing of the Criminal Law Amendment Act, 1885,(25) convicted of an indecent assault,(1) of which the equivalent is described in section 354 of the Code.

3987. There is, of course, no such presumption under the Code beyond the general irrebuttable presumption against criminality made in the case of children below seven(2) and a qualified presumption made in the case of children below 12.(3) In other respects the English and Indian rules agree.

3988. Sexual intercourse with a woman is not a crime punishable under the Code, unless it is effected on a married woman, in which case it is punishable as adultery, or on a woman married or unmarried without her consent, in which case it is rape. It is, then, no offence to have connection with an unmarried woman or a widow with her consent.

3989. Principle.—Rape is the forcible ravishment of a woman. As such, it is an offence, the gravity of which has greatly varied in the past ages and amongst different nations (§§ 3983-3988) But ever since the rape of Proserpine, it has been always regarded as an offence of great heinousness, and, as such, meriting even the sentence of death. The offence owes its enormity to the defilement and dishonour it reflects on the whole family. For if men prize anything above all others, it is the honour of their women, and their forcible ravishment arouses all those feelings of retaliation and revenge which have accounted for so much bloodshed in history.

3990. What is Rape?—The word "rape"(4) literally means a forcible seizure, and that element is a characteristic feature of the offence. For rape is essentially ravishment of a woman without her consent. It is a complete definition of the offence, and the five clauses appended to this section are merely explanatory of non-consent, which is of the essence of the crime. The offence is said to be rape when a man has carnal inter-

(22) *Ib.*
(23) *Waite*, (1892) 2 Q. B. 600 (601).
(24) *Ib.*, p. 601.
(25) 48 & 49 Vict., c. 69, ss. 4-9.
(1) *Williams*, (1893) 1 Q. B. 320.
(2) S. 82.
(3) S. 83, *Paras Ram Dube*, 37 A. 187.
(4) From Lat. *rapio*, to seize.

course with a woman (*i*) against her will, or (*ii*) without her consent. The meaning of these two clauses may not be apparent, but they are intended to cover two separate contingencies.

Clause—"Against her will."

3991. The first clause is evidently intended to refer to a fully conscious normal personage—one who is in full possession of her senses and reason and is capable of exercising her own volition. The terms "will" and "consent" would, ordinarily, refer to the same act of the mind. They are both functions of volition, but as the term "consent" is susceptible of some variation in construction, and may include a *subsequent* consent which the word "will" necessarily excludes, the Legislature has thought fit to couple it with the word "will" which is that faculty or power of the mind by which we determine either to do or not to do something. It implies consciousness, cognition and mental determination.

A person who ravishes a woman, who is asleep, and therefore unconscious, would thus be having sexual intercourse with her against her will. He will, therefore, be guilty of rape,(5) though the woman may on waking up consent to the act already consummated. But in such a case his act may equally be without her consent. There may be other cases when an act though done against her will may yet be done with her consent, commonly as that term is understood. Such would be the case where her consent was obtained when she was in a state of insensibility from liquor, and of which the accused was aware, and which he in fact administered, though with the object of exciting her.(6)

So again, where the prisoner had connection with a woman of weak intellect who was incapable of distinguishing right from wrong and who was found to be incapable of forming any judgment on the matter, he was held to have committed rape, even though she made no resistance.(7) But in view of the special provision of section 90 all these acts would be done not only against the will but also without the consent of the woman. The only distinction that the first two clauses then present is that while the term "will" refers to the *previous or concurrent* consent, the second clause may include also a subsequent consent. There may, moreover, arise a case where the consent may not be vitiated by any of the reasons contemplated in section 90 and still the act may be rape, because it was against the will of the woman ravished. Such case would arise where her will is completely subjugated by the mesmeric influence of another.

Taylor records the case of a girl aged 18, who consulted a therapeutic magnetiser as to her health. She visited him daily for some days. Four-and-a-half months afterwards she discovered that she was pregnant, on which she complained to the authorities against the magnetiser. They directed her medical examination, and the medical inspectors were satisfied that the pregnancy did not extend further back than the period mentioned by her. They reported that a person in magnetic sleep is insensible to every kind of torture and sexual intercourse might then take place with a

(5) *Mayers*, 12 Cox 311; *Young*, 14 Cox 114.

(6) *Camplin*, 1 Cox 220.

(7) *Fletcher*, 8 Cox 131; *Ryan*, 2 Cox 115.

young woman without the participation of her will and without her being conscious of the act, and consequently, without her being able to resist the act consummated on her.(8)

Clause 2—"Without her Consent."

3992. The distinction between volition and consent is sometimes fine, but it is unnecessary to examine it minutely, for as the clauses are worded, the effect of the act is the same whether the woman did not will or did not consent to it.

3993. The question of consent is by far the most important in the case. Of course, such consent may be express or implied. If it is an express consent, a case will seldom be taken to Court. And if it is taken to Court it will have to consider if such consent was likely to have been given by the prosecutrix. Excepting of course the case of prostitutes and other mercenaries, women are seldom prone to translate their thoughts in these matters into words. They usually leave the matter of consent to tacit understanding. In such cases consent becomes a matter of inference to be made from evidence of previous or contemporaneous acts and conduct and other surrounding circumstances. So consent may be inferred from non-resistance. The prisoner was indicted for rape on a girl aged thirteen, and it was proved that he had had connection with her before, and that on the occasion in question, the prisoner began having connection with her while she was asleep, but when she woke up she did not resist until she saw the witness, when she pushed him off, whereupon Coleridge, J. told the jury: "The question is, was she a consenting party? I and you cannot doubt, after the evidence you have heard, that although not in a state to give consent when the connection began, she betrayed no disposition to resistance when she might have done so, and that, too, before the connection was at an end. She had been so treated before without complaining nor would she, from her own statement, have complained now. I think, therefore, there is not such an absence of consent throughout as to justify a conviction for rape."(9)

The fact that the girl ravished was an idiot does not necessarily make her incapable of consenting, for notwithstanding her imbecility, she may have strong animal instincts. So it was held that it was no case for the jury where the prisoner had connection with an idiot girl who was capable of recognizing and describing the prisoner and who was a fully developed woman able to yield to the promptings of her animal instincts.(10) So on a trial for rape upon an idiot girl, Willes, J., told the jury that if they were satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty; but that a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape.(11) So in another case of rape on an idiot girl it appeared that she had made no resistance, though she knew

(8) 2 Taylor Med, Juris. 447.
(9) *Page*, 2 Cox 133.
(10) *Fletcher*, 10 Cox 248.
(11) *Anon*, stated by Wiles, J., in Bell, C. C. 70; *Ryan*, 2 Cox 115; *Pressy*, 10 Cox 635.

that the prisoner was having connection with her, and that it was wrong, the Court left it to the jury to say if she had consented to the act.(12)

3994. No Consent.—So there can be no consent when the woman raped is in a state of insensibility and therefore unable to exercise any judgment. Such would be the case where a woman is raped when she is asleep(13) or in a state of insensibility caused by the taking of liquor whether it was or was not given with the object of producing unconsciousness.(14) The unconsciousness may be natural or induced by the administration of stupefying drugs, but the result in each case is the same. If she did not consent because she could not, and the prisoner knew of her mental incapacity, he could not be acquitted of rape merely because he was offered no resistance. The prisoner was indicted for attempted rape on an idiot girl aged 14 years, who had been blind from six weeks old. She could go up and down the stairs unassisted ; otherwise she was wholly unable to take care of herself. If placed in a chair, she would remain there till night, passing her evacuations in the chair. If told to lie down, she would do so. The prisoner who knew of her mental condition was one day detected by her father lying on the girl who was lying quietly on the couch. Blackburn, J., held that the woman was mentally incapable of consenting to the act and the prisoner was convicted.(15)

(1) Want of Capacity.

3995. The consent to be operative in negative criminality must be a free consent. If it is induced by fear, it is no consent at all but a mere submission. The prisoner was indicted for rape on a young girl, and it appeared that she had used no violence and made no actual resistance, and so it was contended that as she offered no resistance, she must be deemed to have consented; but Coleridge, J., told the jury: "There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description was not consenting. On the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will, therefore, say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the second count of the indictment.(16)

(2) Submission is not Consent.

3996. Again, since the act to be excusable must have been done with her consent, it is no excuse that the woman consented at first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.(17)

(3) Consent Before or After the Fact.

(12) *Pressy*, 10 Cox. 635.

(13) *Per* Lush, J., in *Mayers*, 12 Cox 311.

(14) *Complin*, 1 C. & K. 746, in which the prisoner had given liquor for the purpose of exciting her; *Fletcher*, 35 L. J. M. C. 72; *Barratt*, 43 L. J. M. C. 7.

(15) *Barratt*, 43 L. J. M. C. 7; *Fletcher*, 35 L. J. M. C. 72.

(16) *Beale*, 35 L. J. M. C. 60.

(17) 1 Hawk. P. C. C. 41, s. 7.

3997. In England, as under the exception to this section, the husband of wife of thirteen years or more cannot be convicted of rape for having forcible intercourse with his wife. Now since consent is in such a case immaterial, a question may arise whether the husband commits any offence if, knowing that he is suffering from a highly contagious disease, such as gonorrhoea, he has intercourse with his wife communicating the disease to her. It was contended that if the wife had known of her husband suffering from the disease, she would not have consented to his sexual embrace. He was therefore, guilty of having obtained fraudulent consent to an act which in law is no consent at all and but for which sexual intercourse is rape. In such a case there is no doubt fraud, but fraud does not in all cases and irrespective of degree vitiate consent.

(4) Consent When Fraud is Immaterial.

As Stephen, J., puts it. "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance, by promises not intended to be fulfilled. The only sorts of fraud which so far destroyed the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act.(18) This is undoubtedly so, but why? It is one of those questions in which every one feels that the husband ought not to be held liable but as to the precise reasons, no two judges agree.

So in the last case considered by thirteen judges, Wills, J., defended the rule apparently on the ground that the fraud was too remote holding that otherwise every man who knowingly gives a piece of bad money to a prostitute to procure her consent to intercourse, or who seduces a woman by representing himself to be what he is not, would be guilty of assualt and, therefore, of rape.(19) Smith, J., upheld the rule on the general consent given at marriage.(20) Mathew and Stephen, JJ., were evidently of the same opinion as Wills, J., though Stephen, J., based the rule on the principle that the consent must be held to be full and conscious, because it was not obtained by any fraud either as to the nature of the act or as to the identity of the agent.(21) Manistry, J., supported the rule on the ground that the Statute as to assault intended to refer only to direct violence;(22) Pollock, B., discriminated between acts initially unlawful and those which are lawful in themselves but are infected with fraud;(23) while Coleridge,

(18) *Per* Stephen, J., in *Clarence*, 22 Q. B. D. 23 (43, 44).
(19) *Per* Stephen, J., in *Clarence*, 22 Q. B. D. 23, p. 28.
(20) *Per* Stephen, J., in *Clarence*, 22 Q. B. D. p. 23 (37).
(21) *Ib.*, p. 44.
(22) *Ib.*, pp. 55, 56.
(23) *Ib.*, pp. 63, 64.

C. J., defended it on the ground of inconvenience.[24] On the other hand, the four dissenting Judges[25] gave equally weighty reasons for holding the contrary, refuting the reasons which the majority considered sufficient in favour of their view.[1] Any how this case settles the question so far as England is concerned, but at the same time it settles a point by majority and after overruling the contrary held in previous cases.[2]

(5) Consent Obtained by Fraud.

3998. If the girl was capable of consenting and did consent, it is immaterial for the purpose of this offence, that the consent had been obtained by fraud. So where a medical man ravished his patient pretending to treat her, and she did not resist, Coleridge, J., told the jury: "An assault with intent to commit a rape is very different from an assault with intent to have improper connection. The former is with intent to have connection by force; but here, according to the statement of the prosecutrix, the prisoner desists the moment she resists, and at most it could only be an attempt by surprise to get possession of the person of the prosecutrix, and that is not an assault with intent to commit a rape, but is an assault. If in this case the prisoner had intended to have effected his purpose by force, the complete offence of rape would have been proved, or the prosecutrix states that the prisoner had penetrated her person, and the smallest penetration is sufficient to complete the offence of rape."[3]

But the question whether a consent obtained by fraud is such consent as is here contemplated is one upon which it is possible to entertain a reasonable doubt. And, indeed, even in England a discordant note was struck by another case,[4] in which the prosecutrix, a girl aged nineteen, was subject to fits. She went with her mother to the prisoner who kept an open stall in the market at which he professed, for money consideration, to give medical and surgical advice. The mother told the prisoner of her daughter's ailment, whereupon the prisoner told them that he could only advise after examination, for which purpose he invited them to a neighbouring inn, where the prisoner after putting a few more questions to the mother told her in the presence of the prosecutrix that "it was nature's string wanted breaking" and asked if he might break it. The mother said that she did not know what he meant, but that she did not mind it, if it would do her daughter good. The prisoner then took the girl into a room, as she believed, to perform an operation, and there had sexual connection with her, which she only suffered believing that he was performing a surgical operation on her. On a case reserved on the question whether the prisoner's act done with consent obtained by fraud amounted to rape, it was held that it did, the Court holding that where a man, by fraud induces a woman to submit to sexual connection it is rape.[5] As Wilde, C. J., said in another case in support of the same view: "She consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will."[6] But it is said that these cases have

(24) Per Stephen, J., in Clarence, 22 Q. B. D. 23, p. 65.
(25) Field, Hawkins, Day and Charles, J. J., *ib.*, p. 23.
(1) *Ib.*, see *per* Hawkins, J., p. 51.
(2) *Clarence*, 22 Q. B. D. 23, overruling *Bennett*, 4 F. & F. 1105; *Hegarty*, v. *Shine*, 14 Cox. 145.
(3) *Stanton*, 1 C. & K. 415.
(4) *Flattery*, 2 Q. B. D. 410.
(5) *Flattery*, 2 Q. B. D. 410 (413).
(6) *Case*, 19 L. J. M. C. 174.

since been overruled by the statute,(7) but this is doubtful.(8) But whatever may be the state of law in England, there can be no doubt but that, having regard to the provisions of section 90, such consent would be wholly inoperative to take the case out of the category of this crime(9) (§§ 859-864).

3999. In the words of that section such consent would be no consent as it was given under a misconception of facts. Nor is there any reason for holding otherwise. As Wilde, C.J., puts it: "The girl is fourteen years old. She might at that age be ignorant of the nature of the act, morally as well as physically, and of its possible consequences. It is said that, as she made no resistance, she must be viewed as a consenting party. That is a fallacy. Children who go to a dentist make no resistance; but they are not consenting parties. The prisoner disarmed her by fraud. She acquiesced under a misrepresentation that what he was doing was with a view to a cure, and that only, whereas it was done solely to gratify the passion of the prisoner. How does this differ from a case of total deception? She consented to one thing; he did another materially different on which she had been prevented by his fraud from exercising her judgment and will."(10)

4000. Indeed, in this respect the English cases are inconsistent with themselves. For if it is good law to hold, as has been held, that a woman consenting to sexual intercourse in the mistaken belief that the person having connection with her is her husband,(11) it is equally good law to hold that consent induced by fraud, is no consent at all. For in the one case there is a mistake as to the person, in the other case as to the nature of the act; otherwise the two cases are identical.

Clause 3—"Consent by fear of death or of hurt."

4001. So again, by parity of reasoning a consent obtained "under fear of injury" is no consent at all if the person doing the act knew or had reason to believe that the consent was given in consequence of such fear.(12) So much is evidenced from section 90. The terms of that section are larger than those of this clause which merely refers to two specified kinds of injury—death and hurt. But the term "injury" comprises a great deal more(13) (§§ 362, 363), and it is, therefore, evident that this clause must be regarded as merely illustrative and not exhaustive of the injuries which detract from the effect of consent as operating on the crime. But as it is, this clause was probably inspired by the English precedent of which the facts were these. The prisoner was indicted for a rape on

(7) (1885) 48 & 49 Vict., c. 69, s. 3 (2); so held *per Ridley*, J., in *O'Shay*, 19 Cox 76.

(8) Archbold's Cr. P. C. (22nd Ed.), p. 866.

(9) *Akber Kazee*, 1 W. R. 21.

(10) *Case*, 19 L. J. M. C. 174, the same view was evidently taken by Bayley, J., in *Rosinake*, 1 Lew. 11, in which a German quack had stripped a girl unnecessarily naked under the pretence of examining her, which was held to amount to an assault. *Flattery*, 2 Q. B. D. 410 has been followed in America—*Pomroy*, 94 Ind. 96. In *Watter*, v. *People*, 50 Barb. 144, the principle was conceded, though the prisoner was acquitted because it was held that the woman, who was thirty years old, must have understood that the prisoner's act was sexual intercourse and not merely medical examination.

(11) So enacted by 48 and 49 Vict., c. 69, s. 4, which overrules the contrary held in *Barrow*, 38 L. J. M. C. 20; *Clarke*, 24 L. J. M. C. 25; *Sweenie*, 8 Cox. 223. Prior to the Statute it was merely assault. —*Williams*, 8 C. & P. 280; *Saunders*, 8 C. & P. 265.

(12) S.90; *Akber Kazee*, 1 W. R. 21.

(13) S. 44.

his daughter, fourteen years of age, who had consented to his act because he had threatened to throttle her and kill her if she gave out what he had done; he had throttled her and had had connections many times before, on which occasions she had consented because she was afraid of him; whereupon Channell, B., told the jury that "if it is made out to your satisfaction that a kind of reign of terror was set up in this family, and in consequence of that terror and dread the girl allowed the connection to take place without resistance, then I am of opinion you may convict. It is possible she may have been a consenting party, and not influenced by dread; that is a question for you. She says the same thing had been done upon previous occasions, and her father had told her he would throttle her if she told her mother, and that is why she did not tell. She says she begged him not to do it, and to be quiet and leave her alone. This, in ordinary cases, would be quite insufficient; but in this case, if you think she remained passive under the influence of that dread and reign of terror which I have mentioned, and that is clearly made out, you may find the prisoner guilty."(14)

4002. The fact that the woman did not offer resistance is then only an element in the consideration of consent; it is by no means conclusive. There must be resistance of course, for without resistance there is at least acquiescence, but the resistance offered need not be physical, nor, on the other hand, should it be unreal. For there is such a thing as maiden modesty, and some resistance is simulated even by women who are most anxious for the connection. The threat of injury offered by the accused must be sufficient to convince the jury that the consent was wrung out of fear, and was as such involuntary. This is what is required to raise the presumption that the consent was not a free consent. It has been sometimes said that consent given owing to the superior position or influence of another is not such a consent as to be a defence against a charge of rape.(15) Examples are given of a schoolmaster taking indecent liberties with his female pupil,(16) of a father with his child,(17) master with his servant, but none of these cases were cases of merely moral influence or persuasion, and at any rate there is no justification in the Code for holding that a consent secured by persuasion and promises is not a free consent. The use of threats or force is insisted upon as the invariable concomitant of rape, as it is almost invariably necessary to overcome opposition and make the woman submit to the will of the ravisher.

So it was observed by Lord Cowan: "It is of the essence of the crime of rape that carnal knowledge of the woman's person should be had forcibly and without her consent—in other words, by the adverse will of the woman to the act being overcome by force on the part of the ravisher. It is this that constitutes the crime(18) according to all the authorities; and nothing short of it will support the charge."(19) Force is then essential to rape, but force is not fraud nor can fraud and stratagem take the place of force as an element of this offence. Fraud may, however, neutralize the operation of consent, but it then operates on the crime indirectly (§§ 3998-4000).

(14) *Jones*, (1864) L. R. 2 C. C. 10.
(15) *Woodhurst*, 12 Cox 443.
(16) *Nichol*, Russ. & R. M. C. 130; *Gavaran*, 6 Cox 64.
(17) *Jones*, L. R. 2 C. C. 10; Bailey 82; Vern. 107; *Sharp*, 15 Tex. App. 171.
(18) It is only *evidence* of the crime.
(19) *Sweenie*, 8 Cox C. C. 223.

4003. This clause does not say as to from whom the fear of death and hurt should emanate. But if regard is had to the provisions of section 90 it will be evident, that it is not necessary, though it may be expected, that it should emanate from the ravisher. For he may have hired others to overcome resistance. He must, however, be aware of the fact that the consent was due to fear or misconception of facts. He need not then know the process resorted to for that purpose.

Clause 4—"Consent under misconception of facts."

4004. The fourth clause, again, refers to a special case falling under the general terms of section 90. It appears, again, to have been enacted in view of some cases in which the contrary was laid down. So it was at one time the prevalent view in England that if a man had connection with a married woman by a fraud, which induced her to suppose that he was her husband and she therefore consented to the connection it was not a rape.[20] But all these cases have since been overruled by the Legislature, since the passing of the Criminal Law Amendment Act, 1885,[21] which declares such offences to be rape. Under the Code, of course, the interpretation of the clause presents no difficulty. It is, indeed, an instance of consent given under a misconception of facts (§§ 859-862).

4005. Such misconception must under the circumstances of the case be necessarily induced by the fraud of the ravisher, for if he was not actively participant in inducing that belief in the woman, he was *ex hypothesi* aware of it and did nothing to disillusion her. In the one case he was guilty of *suggestio falsi*, in the other case of *suppressio veri* and under circumstances when it lay on him to disclose the truth.

4006. It may be asked, how is it possible for a woman to mistake a stranger for her husband. But such a contingency is conceivable where the man approaches her during sleep or in the dark or under circumstances when recognition is impossible. The man approaching her is, of course, guilty of imposition, for he intends to pass for her husband. He may intend not go further by using force if he is detected, or he may be determined to complete the act even in spite of resistance. Then, as regards the woman, she may or may not discover her mistake before the act has been consummated. If before it is consummated she discovers her mistake and does not resist the act would probably cease to be rape if consent can be inferred from her non-resistance. It could not then be said that her consent being *ex post facto* was no consent at all.

4007. This clause may perhaps raise a delicate question. Suppose a person goes through the ceremony of marriage with another, but the marriage does not bind him. He knows it but she does not. Here he *knows* that he is not the husband of the woman who believes herself to be lawfully married to him. Is he then guilty of rape? It would

(20) *Saunders*, 8 C. & P. 265; *Barrow*, 38 L. J. M. C. 20; *Williams*, 8 C. & P. 286; *Clark*, Dears C. C. 397; *Middleton*, 42 L. J. M. C. 84.

(21) 48 & 49 Vict., c. 69, s. 4. It should be added that the Irish Supreme Court had always held this view—*Dee*, 15 Cox 579.

seem so, if he knows that she would not consent to a sexual act if she knew of the invalidity of her marriage.

Clause 5.—"When consent is inoperative."

4008. This is an important clause; and it has been twice amended (in 1891 and 1925) for reasons before stated (§§ 3983-3984). The clause simply declares that an act even though committed with the consent of a child then under fourteen years of age would be rape, her consent and precocity being both immaterial. The fact that such a girl can discriminate between right and wrong and had invited the accused to the act are both wholly irrelevant, for the policy of law is to protect children of such immature age against sexual intercourse. And hence the fact that the ravisher was the own husband of the girl is declared to be wholly immaterial for the purpose of the offence, if she is below thirteen years of age.

Explanation.

4009. Necessity of Penetration.—Penetration is not only sufficient but necessary to constitute the sexual intercourse necessary for this offence. This provision is in accordance with the English Law, under which the necessity of some penetration or *re in re* is essential to constitute the carnal knowledge which is an essential element of the offence of rape.(22)

4010. The penetration may not be sufficient to deprive the woman of the marks of virginity, by rupturing the hymen,(23) but then there must be some penetration without which there can be no rape, though there may be an attempt. But though the rupture of hymen is by no means necessary in law, the Courts are reluctant to believe that there could have been penetration when that which is so very near to the entrance has not been ruptured.(24) The emission of semen is not necessary to complete the crime. This is now settled in England by Statute,(25) which was passed to settle a conflict which previously existed on the subject.

4011. Of course, the proof of penetration is the least that is required, though usually there would be something more. But where the act stops short at penetration, that fact would have to be clearly established, either by the testimony of the woman or by independent medical evidence: If what the woman says is a mere opinion, it is insufficient to sustain so serious a charge. For in order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little.(1) This is only possible if the male organ had the power of erection, which, again, postulates that the man was potent.(2) In Bombay it appears to have been laid down that potency of the accused must be proved in each case,(3) but it

(22) 3 Inst. 59, 60; 1 Hale, P. C. 628; 1 Hawk, P. C. C. 41, s. 3; 1 East, P.C. 10, s. 3; now so enacted by 24 & 25 Vict., c. 100, s. 63.

(23) *Russel*, 1 East P. C. 438, 439; *Gammon*, 5 C. & P. 321; *McRue*, 8 C. & P. 641.

(24) *Jordar*, 9 C. & P. 118; *Allen* C. & P. 31; *Hughes*, 9 C. & P. 752; *Lines*, 1 C. & K. 393.

(25) 24 & 25 Vict., c. 100, s. 63.

(1) *Joseph Lines*, 1 C. & K. 393.

(2) *Gopala*, (1896) B. U. C. 865.

(3) *Ib.*, p. 866.

is submitted, this is not necessary, as potency being the usual and normal state of man, it will be presumed until the contrary is established by the accused. A person who is proved to be impotent could not, it appears, be even convicted of an attempt, for attempt implies the capacity to commit the offence.(4) But he may be convicted of an indecent assault(5) under section 354 of the Code.

4012. Rape and Homicide.—The question whether a person causing the death of the woman by rape can be convicted of homicide depends upon his intention and knowledge whether his act was the proximate cause of death and whether the offender could have been known to be likely. The fact that the offender was the husband does not vest him with greater immunity. For as Wilson, J., observed "under no system of law with which the Courts had to do in this country, whether. Hindu or Mahomedan, or that framed under British Rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her."(6) Following this case the Court in Sindh convicted the husband under s. 304-A and sentenced him to a year's rigorous imprisonment where it was shown that the accused an adult husband had had intercourse with his child wife before she had attained puberty with such violence as to rupture the vagina and destroy the partition between the vagina and the rectum and so caused her death. The Court held "that he did a dangerous act with a wanton disregard as to the consequences" for which he was liable.(7) Where, however, the accused, a youth of 18, had raped a girl of 12 rupturing her vagina, from the shock of which she died, the Court held it to be a case of rape and not one of culpable homicide punishable under s. 304.(8)

For the evidence in cases of rape, *see* the commentary under the next section.

If offender husband of the woman, who is under 13.—Session. Pres. or Dist. Mag. Non-cog. Summons. Bailable. Not comp. In other cases.—Session. Cognizable Warrant. Not bail. Not comp.

376. Whoever commits rape shall be punished with **Punishment for rape.** transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, [unless the woman raped is his own wife and is not under thirteen years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both] (9)

[*Rape*—s. 375.]

(4) *Waite*, (1892) 2 Q. B. 600, 601 (602); *Williams*, (1893), 1 Q. B. 320 (321).
(5) Cf. *Williams*, (1893) 1 Q. B. 320.
(6) *Hurree Mohun Mythee*, 18 C. 49.
(7) *Shahu*, 11 S. L. R. 76, 42 I. C. 731, 18 Cr. L. J. 1003.
(8) *Shambhu Khatri*, 3 Pat. 410.

(9) The words within crotchets [ ] were added by s. 3 of the Indian Penal Code (Amendment) Act, 1925, (XXIX of 1925) passed on the 23rd September 1925 (*See* Gazette of India, Pt. IV, dated the 3rd October, 1925, pp. 57, 58).

Synopsis.

(1) *Analogous Law* (4013).
(2) *Procedure and Practice* (4014-4022).
(3) *Punishment* (4020-4022).
(4) *Proof* (4023).
(5) *Form of Charge* (4024).
(6) *Principle* (4025).
(7) *Evidence* (4026-4035).
(8) *Marks of Resistance* (4032).
(9) *Abetment of Rape* (4036).
(10) *Attempt and Indecent Assault* (4037).

4013. Analogous Law.—This section merely prescribes the punishment for the offence defined under the last section. As observed thereunder the punishment for this offence has greatly varied in different times. The punishment now admissible under English Law is penal servitude for life.[10]

The offences allied to rape are indecent assault (s. 354), attempted rape (s. 511), adultery (s. 497), and seduction of a married woman (s. 498). Failing to be a rape, an offence may still amount to any of these in which case the offender may be punished for that offence if the other formalities of law have been duly complied with.

4014. Procedure and Practice.—The procedure applicable to this offence varies according as the offender is or is not the husband of the woman raped. If he is the husband the offence is non-cognizable, and summons should ordinarily issue in the first instance, and it is moreover, bailable but not compoundable, and is exclusively triable by the Court of Session.

4015. If the accused is not so related, the offence is cognizable and warrant should ordinarily issue in the first instance, and it is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

4016. The special provisions in favour of the husband were enacted for the first time by the Indian Criminal Law Amendment Act, 1891,[11] which raised the age of consent from ten to twelve years. This age was again raised to thirteen by the Indian Penal Code (Amendment) Act, 1925.[12] This was no less because the husband having sexual intercourse with his wife in the exercise of his marital rights could not be treated as ordinary ravisher than because it was a fitting response to the objections raised to the raising of the age of consent on the ground that it would involve the unwelcome intrusion of the police into the domestic sanctity of the Hindu households, and to safeguard against its misapplication, the Select Committee introduced two safeguards,[13] the first of which relates to the offence being made non-cognizable and bailable, and the second of which is now section 561 of the Procedure Code, which runs as follows:—

Special provisions with respect to offence of rape by a husband.

"561. (1) Notwithstanding anything in this Code no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

"(*a*) take cognizance of the offence of rape where the sexual intercourse was by man with his wife, or

"(*b*) commit the man for trial for the offence.

(10) 4 & 5 Vict., c. 100, s. 48.
(11) Act X of 1891, s. 1.
(12) Act XXIV of 1925.
(13) Sir Andrew Scoble's speech in Council *see* Gazette of India, Pt., VI, dated 28th March, 1891, p. 46.

"(2) And notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a Police officer with respect to such an offence as is referred to in sub-section (1), no Police officer of a rank below that of Police Inspector shall be employed either to make or to take part in the investigation."

4017. It was also pointed out by the Law Member that under section 352 of the Procedure Code, the Magistrate had an absolute discretion to exclude the public from his Court, if he thought fit, which would ensure the trial of such cases *in camera*. The Judges trying for this offence often feel delicate about eliciting facts which are the very essence of the crime, but it has been pointed out that the Judges should postpone all feelings of delicacy to a sense of justice and of their duty, and on no account to refrain from minute inquiry whenever they have to try this charge.(14)

4018. As regards the proof of this offence, it is almost a legal platitude that no charge is easier to concoct and more difficult to refute than a charge of rape,(15) and consequently, the Court seldom convicts upon the uncorroborated testimony of the woman.(16) In a case of this kind it is only due to the accused that all available evidence against him should be recorded, and if possible on the same day, so that witnesses may not be able to secure a chance for comparing notes and explain away each other's discrepancies. The offence of rape is, again, one which should almost invariably show some signs of struggle or marks of violence and which it is the duty of the prosecution to bring forthwith to the notice of the Court, and which it is its duty to make a careful note of for future reference. It has been held to be improbable and physically impossible that a girl of tender age should be killed by any violence in rape, and not show any external signs of violence.(17) Some marks of struggle may be looked for in any case.(18) In proving the offence of rape the fact that shortly after the alleged rape, the woman made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant. But the fact that without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (*i*), or as corroborative evidence under section 155 of the Indian Evidence Act.(19) On the other hand, the fact that she did not complain to any one for sometime, or omitted to disclose it during the police investigation on a report made for another offence are sufficient grounds for discrediting her subsequent complaint of rape.(20)

The accused was acquitted where he denied intercourse, but the Court found intercourse with consent.(21)

(14) *Jakhoo*, 1 M. S. F. 374.
(15) 3 M. S. F. 152.
(16) *Mg. Ba Tin*, 98 I. C. 180, (1927) R. 67.
(17) *Bance Madhub*, 1 W. R. 29.
(18) *Mahla Ram*, 75 I. C. 986.
(19) Indian Evidence Act (I of 1872), s. 8, ill. (*j*).
(20) *Bela Singh*, (1916) P. L. R. 54, 34 I. C. 1004; *Abdul Rahoman*, (1916) P. W. R. 17, 33 I. C. 630.
(21) *Kyaula*, 4 Bur. L. T. 136, 12 I. C. 848.

4019. The charge of rape is exclusively triable by the Court of Session, but it is only so when what has been *prima facie* proved amounts to rape, and nothing less. On this point the Courts are both to rely upon the uncorroborated testimony of the complainant, and in the absence of any direct or circumstantial corroboration the Courts consider it safer to charge the accused under the less drastic provisions of section 354.(22) In such a case the question may arise whether what has been done amounts to an attempt. But there can be no attempt unless there is evidence "that the prisoner when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part."(23) On a failure of the charge of rape, the Court cannot of course without a complaint of the husband start prosecution for adultery.(24)

Punishment.

4020. Though the maximum punishment awardable under this section is imprisonment for ten years, it cannot be doubted but that the offence is capable of degrees. So the Law Commissioners remarked: "On the one hand, let us take the case of the chaste high caste female, who would sacrifice her life to save her honour, contaminated by the forcible embrace of a man of low caste, or of one who is below caste, say a chandala or a Pariah; on the other hand, that of the woman without character, or any pretensions to purity, who is wont to be easy of access. In the latter case, if the woman from any motive refuses to comply with the solicitation of a man and is forced by him, the offender ought to be punished; but surely the injury is infinitely less in this instance than in the former."(25)

So in England it has been held that while the fact that the woman was a common strumpet or the concubine of the ravisher is no excuse for the offence, still it is a fact which will greatly weigh with the jury in considering the question of consent.(1) But the propriety of taking into consideration, the character and position of the prosecutrix as a determining factor in apportioning the punishment was doubted by Seton-Karr, J., who said: "I cannot concur with the Judge's remarks that the social position of the party injured ought to guide a Court to the measure of punishment to be inflicted on the party committing the injury. The measure of punishment should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal, and to the defenceless and unprotected state of the injured female, whether that female were a low native or a high European."(2) But the fact that driven by her shame the woman raped had committed suicide should not be taken into account in measuring the severity of punishment, since it is not the natural, ordinary or probable consequence of the accused's act.(3) Nor is a severe sentence justifiable where the prosecutrix is shown to have been lax in morality.(4)

(22) *Shankar*, 5 B. 403.
(23) *Lloyd*, 7 C. & P. 318; followed in *Shankar*, 5 B. 403.
(24) *Nga Po Thare*, (1912) U. B. R. 4th Qr., 155, 19 I. C. 716.
(25) First Rep. s 449.

(1) 1 Hale P. C. 729.
(2) *Jhantala Noshyo*, 6 W. R. 59; *Pyare Lal*, 52 I. C. (N.) 423.
(3) *Nga San Pu*, 43 I. C. (R.) 443, 19 Cr. L. J. 155.
(4) *Ibrahim*, 100 I. C. (L.) 128.

4021. Reading this section with sections 57 and 511 of the Code, a sentence of ten years' transportation or of five years' rigorous imprisonment may be passed for the offence of attempt to commit rape; but a sentence of seven years' rigorous imprisonment commutable under section 59 of the Penal Code to seven years' transportation is illegal.(5)

4022. This is one of those offences in which on a second or subsequent conviction the accused may be additionally sentenced to whipping.(6)

4023. Proof.—The points requiring proof are:—

(1) That the accused had sexual intercourse with a woman.

(2) That such intercourse was had without her consent, or with or without her consent if she was then under fourteen years of age.

(3) That if the woman was not under thirteen years of age, the accused was not her husband.

(4) That there was penetration.

4024. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) *as follows*:—

"That on or about the——day of——at——you committed rape on A B (*the woman raped*) and thereby committed an offence punishable under section 376 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

4025. Principle.—The simplest definition of rape is the having sexual intercourse with a woman without her consent. Taking the legal aspect of "consent" as presented, the first four clauses are unnecessary, for they repeat once more what is clearly included in that section. The phrase "against her will" in the first clause is taken from the definition of Lord Hale(7) and is probably intended to exclude *subsequent* consent which was by a later Statute held to be a sufficient answer.

4026. Evidence of Rape.—The general characteristics of this offence have been already discussed, (§§ 4000-4011), and it is not intended to traverse the same ground over again. But a short summary necessary for the discussion to follow, appears to be called for. The offence of rape as defined in the last section may be committed by any man upon any woman below thirteen years of age if the ravisher be the woman's husband, and fourteen if he is not, and whether she did or did not consent to the act. In such cases merely having sexual intercourse

(5) *Joseph Merian*, 10 W. R. 10.
(6) Whipping Act (VI of 1864), s. 4, cl. (6).
(7) 1 Hale P. C. 628. To the same effect, 3 Inst. 60; 1 Hawk. P. C. C. 41, s. 2.

with a female below this age is rape, provided only that there was penetration. In such case the only two questions that arise are: (*i*) Was the girl then below 13 (or 14) years of age, and (*ii*) was there penetration? But if the girl be of the age of thirteen (or fourteen) years or more, then other considerations supervene.

Law regards sexual intercourse as the normal exercise of physical function. It cannot and does not repress or discourage it. It is, indeed, necessary for the weal and continuance of society. It therefore presents no obstacle to such an intercourse whether the woman be or be not related to the man; and if related, whatever may be the relationship to him, whether as daughter, sister or wife. Social ethics condemns incestuous intercourse within the prohibited degree of relationship, but the Code does not. Whatever social obloquy may then attach to incest, it is not an offence under the criminal law of this country, unless it is committed without the consent of the woman, in which case the offence is rape—not because the woman bore any relationship to the man, but because he had connection with her without her consent. To this rule law allows only one exception—and that in the case of the wife. His marriage to her is a contract by which she consents to continued cohabitation with him, to which he acquires a right *ex jure maritii* and independent of her subsequent consent. But in laying this down the Code is an improvement on and supersedes any personal law to the contrary. For instance, marriage is, under Mahomedan law, a civil contract—in reality a sale—in which the husband purchases the amours of his wife for a price called *maher*, which may be prompt or exigible, in which case the wife may refuse to enter the conjugal domicile until her dower is paid. In this case the husband really acquires no right to have a sexual intercourse with her till the *conditio sine qua non* is fulfilled. But nevertheless he would commit no crime under the Code if he forcibly ravishes her as soon as the formal marriage takes place.

4027. Excepting the husband, all other persons are liable for having sexual intercourse with a woman without her consent. The last section enlarges on the circumstances under which the ravisher may secure her apparent consent, but this is no consent at all. It prevents only two cases illustrative of the two qualifications which vitiate a consent as laid down in section 90. Clause 3 is an example of consent given by fear, while the next clause deals with consent obtained by fraud or under a misconception of facts. Consent being the only essential ingredient of the crime, all evidence must be directed to showing that an act complained of had not been consented to by the woman. This leads to the inquiry, what is consent. The Code does not define it. It describes it in relation to certain legal effects, but what it is independent of those effects the Code does not define. An attempt has been, however, made before in formulating a definition of the term (§ 849) and it must be taken to have been used here in that sense.

4028. Consent is sometimes spoken of as real or apparent, previous or subsequent. The consent here referred to is that which is both real and previous—that is to say, it is both a free consent as well as a consent taken or given or implied to the doing of the act before it

commenced or finished. The offence takes on the one hand, no note of a consent subsequent to the act. If it did, the woman ravished could as well compound the offence with her ravisher, but this she is not permitted to do. Her subsequent consent, therefore, cannot condone an accomplished crime, but it is not consequently wholly valueless. For it may be a material piece of evidence as bearing on the probability of her previous consent which is a fact in issue and which may be alleged by the defence. But subsequent consent is not a self-sufficient defence to this offence. The consent required is a previous or concurrent consent—and it must be free. Now in order to be free, the consent must have been given without fear or misconception of facts. If it is wrung out of the woman by menaces and threats of injury it is not a free consent sufficient to exculpate the crime. Again, if it is given, under a misconception of facts, such as, for example, that the man anxious for her embrace was her husband or the like, it is similarly vitiated -for consent obtained by fraud or in ignorance of facts is no consent for the purpose of this offence, and it cannot be availed of by the person who knows that it is not a free consent. It will be observed that in this respect the Code follows a wider rule, which prevents a man from taking advantage of his own turpitude.

4029. But the rule that fraud vitiates consent must not be carried too far in an offence of this nature. For example, suppose A were to say to B, "I am your long lost husband come back to you," and B were thereupon to allow him to have sexual intercourse with her, A is declared to be guilty of rape under the fourth clause of section 375. But is the case different if A were to say to B, "I will positively marry you, but you must let me have your body," and B believing in A's promise, let it be assumed a wholly false promise, consents to his ravishing her? Is A liable for the same offence, and if not why not? That he is not liable is apparent, but the reason why he is not liable is that B's consent to the intercourse in such a case was not given under a misconception of *fact*, for a false promise is not a fact within the meaning of the Code. The case is, indeed, the same as those in which a man seduces a woman making promises of many kinds, which however he has no intention to fulfil. These are all cases of fraud, and consent obtained by fraud; but they are cases in which fraud as a criminal factor shades away into a fraud which ceases to be criminal and which may even be regarded as immaterial. All cases of consent in which fraud enters in how littlesoever a degree do not make for rape. Nor are they all cases of fear sufficient to vitiate consent in which the woman consents, because she is afraid of displeasing the man by her refusal. Such a case may be easily conceived of a servant yielding to the improper solicitations of her master fearing her illegal dismissal in case of refusal, in which case it could not be suggested that the consent given was given under fear of injury within the meaning of section 90. The question of fear and fraud is thus a question of degree, and it is for the jury in each case to say whether an act had or had not been consented to.

4030. But consent is necessarily a mental act, and the nature of the offence precludes the possibility of direct evidence being available. How is it then to be proved? The fact that it cannot be proved directly does not make its proof impossible. For, indeed, the element of mentality which is the foundation of all criminal responsibility is not

exceptional to this offence, though the circumstances by which consent in this case may be established are necessarily different.

4031. The first and foremost circumstance that may be looked for in this case is the evidence of resistance, unless non-resistance is otherwise accounted for. Such may be the case where the woman is suddenly overpowered by superior force against which resistance is useless, or where she is dumbfounded with fear and threats of injury, or where she is deceived into a belief which takes her thoughts away from her sexual pollution, or where she is lulled into silence by the administration of drugs. So Patterson, J., said addressing the prisoner who had committed rape by intoxicating the woman with liquor given to excite her sensuality: "The prosecutrix shewed by her words and conduct, up to the latest moment at which she had sense or power to express her will, that it was against her will that such intercourse should take place; and it was by your illegal act alone, that of administering liquor to her to excite her to consent to your unlawful desires, that she was deprived of the power of continuing to express such want of consent.... Your case falls within the description of these cases in which force and violence constitute the crime, but in which fraud is held to supply the want of both."(8)

Marks of Resistance.

4032. Leaving alone such cases in which non-resistance is natural and accounted for, some resistance would be naturally expected from a woman unwilling to yield to a sexual intercourse forced upon her. Such resistance may lead to the tearing of clothes, the infliction of personal injuries and even injuries on her private parts. If she resisted, she must have also shouted for aid, unless she was gagged, and if she shouted, could not others have gone up to her rescue? A question has often been raised, but it cannot be categorically answered, if it is possible for a man to rape a woman unassisted. If the man was not far superior to her in strength, it is improbable. But if he was, it is possible.

4033. The question of resistance raises another question of considerable importance in the medico-legal question involved in the offence. Was the woman a *virgo intacta* before the rape? For if so, she must possess an inexpugnable mark of violence on her body evidencing the crime, namely, the rupture of her hymen. There are cases, no doubt, in which it has been held that the rupture of the hymen is not a necessary result of rape, since it does not result from a mere partial penetration(9); but though the rupture is not legally necessary, it is a question whether there could have been sufficient vulval penetration when what was so near the surface has escaped intact. Of course the fact that the hymen had been previously ruptured is no certain index of human intercourse, for such laceration may take place from the introduction of foreign bodies other than the male organ.

4034. Again, if the man was suffering from a specific disease, such as syphilis or gonorrhœa, it would of necessity be communicated to the woman, and it would then be a circumstance supporting the evidence of the offence.

(8) *Camplin*, 1 Cox, 220.

(9) *Mehraj Din*, 100 I. C. 116, (1927) L. 222.

4035. The evidence afforded by the staining of cloth or person with blood or seminal discharge is another corroborative circumstance.

4036. Abetment of Rape.—Though the husband has the right to the person of his wife, he has no right to invite others to ravish her. And if he so instigates others, he may be as much liable for abetment as any other person. This was settled as far back as 1631 in a case in which Lord Audley was convicted for abetment of this offence, it being proved against him that he had held her down by force while one of his menials ravished her. As he was also at the same time convicted of sodomy, which was then a capital crime, he was in due course executed.(10)

4037. Attempt and Indecent Assault.—The principal characteristics of the offences of attempted rape and indecent assault have been set out under the last section. It may be added that though a boy of 12 is physically incapable of committing the offence of rape, he can nevertheless be held guilty of an attempt to commit it.(11)

Of Unnatural Offences.

Session. Cognizable. Warrant. Not bail. Not comp. Pres. Mag. or Mag. of 1st class.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Unnatural offences.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

[*Man*—s. 10. *Woman*—s. 10. *Voluntarily*—s. 39. *Animal*—s. 47.]

Synopsis.

(1) *Analogous Law* (4038-4040).
(2) *Procedure and Practice* (4041).
(3) *Proof* (4042).
(4) *Form of Charge* (4043).
(5) *Principle* (4044-4045).
(6) *Unnatural Offence* (4046-4048).
(7) *Habitual Sodomite* (4049).
(8) *Other Offences Against the Person* (4050).

4038. Analogous Law.—This is the one section dealing with the offences of sodomy, buggery and beastiality for which the offenders were at one time liable to be burnt.(12) Much recondite learning on the subject will be found imbedded in the pages of the State Trials where the ancient history of this loathsome offence will be found minutely examined.(13) The offence appears to have been regarded as

(10) *Lord Audley*, 3 St. Tr. 401, (418).
(11) *Nga Tun Kaing*, 11 Bur. L. T. 135, 42 I. C. 175, 18 Cr. L. J. 943.
(12) Britton, c. 9; Coke, 3 Inst., c. 10 In Leviticus, ch. 20, vv. 13, 15, the offence is expressly declared to be capital.
(13) St. Tr., 402, note.

a felony till the Statute of 1533,[14] which again, restored the penalty of death. This Act was replaced by another Statute passed in 1828[15] but both of them have since been repealed and replaced by the present Statute enacted in 1861,[16] which contains the following provision against the offence:—

Sodomy and Beastiality.

"S. 61. Whosoever shall be convicted of the abominable crime of buggery committed either with mankind or with any animal shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than ten years."

4039. This section as enacted is taken from Lord Hale's statement of law who describes the offence as consisting in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast.[17]

In this offence the other person is necessarily an accomplice and an abettor of the crime. As such, he may be dealt with as an abettor, and he being an accomplice, his testimony requires corroboration.[18]

4040. Under English Law, since a person under fourteen years of age is incapable of committing this crime it follows that if the patient be below that age he is not liable either as a principal or an accessory to this offence, but, otherwise, both would be equally liable.[19] There is no artificial rule, however, in this country, beyond those enacted in sections 82 and 83.

4041. **Procedure and Practice.**—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first class. It should be noted that the other party to the offence in this case, if a rational being, would naturally be an abettor, and according to the well-established practice of the Courts, his testimony should not be acted upon, unless it is corroborated in material particulars. So in a case where the accused had committed an unnatural offence upon his wife, Patterson, J., said: "There was a case of this kind which I had the misfortune to try, and it there appeared that the wife consented. If that had been so here, the prisoner must have been acquitted; for although consent or non-consent is not material to the offence, yet as the wife, if she consented, would be an accomplice, she would require confirmation; and so it would be with a party consenting to an offence of this kind whether man or woman."[20]

4042. **Proof.**—The points requiring proof are:—

(1) That the accused had carnal intercourse with man, woman or animal.

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(14) 25 Hen. VIII, c. 6.
(15) 9 Geo., IV, c. 31.
(16) 24 & 25 Vict., c. 100, s. 61.
(17) 1 Hale, P. C. 669; 1 Hawk, P. C. C. 4; 3 Black. 215; 1 East P. C. 480.
(18) *Ganpat* (1918) P. L. R. 73; 47 I. C. 670; 19 Cr. L. J. 946. But in *Sardar Ahmad*, (1915) P. L. R. 185; 28 I. C. 154, conviction on uncorroborated testimony held justified.
(19) 1 Hale, P. C. 670; *Henry Allen* 3 Cox, 270.
(20) *Jellyman*, 8 C. & P. 604; Indian Evidence Act (I of 1872), s. 114, ill (*b*)

(2) That it was against the order of nature.

(3) That it was done voluntarily.

(4) That there was penetration.

4043. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you had carnal intercourse against the order of nature with——(*specify the object—whether man, woman or animal*) and thereby committed an offence punishable under section 377 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court.)

"And I hereby direct that you be tried (by the said Court) on the said charge."

4044. Principle.—This section punishes what is an *unnatural* carnal intercourse, and which is accounted a great crime since the destruction of Sodom and Gomorrah. But in spite of the high penalties to which it is justly subject, it is a crime which seldom comes to light, though it is notoriously widespread even in high society, and it is certainly not confined to any age or nationality, though it is a crime often detected amongst school boys and prisoners.

4045. This crime differs from the last in that the consent is here wholly immaterial, and the party consenting is, therefore equally liable as an abettor. Penetration is, however, essential in this offence as in the other case of rape.

4046. Unnatural Offence.—This offence when committed upon a human being must consist in penetration *per anum*. It probably does not punish the act of having connection with a woman in the mouth.(21) So where the defendant forced open a child's mouth, and put in his private parts, and proceeded to the completion of his lust, the Judges were of opinion that this did not constitute the offence of sodomy.(22)

4047. The question whether the same rule would hold good if the patient be an animal has not arisen, but it appears that it will not.(23) Emission was at one time considered to be a pre-requisite for both of the offence of rape as well as sodomy, but this is now no longer necessary, the only essential of law now being penetration, which must, however, be proved(24); indeed, as Blackstone observed, "strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made

(21) *Jacobs*, R. & R. 231; followed in *Govindarajulu*, (1886) 1 Weir 382 (383), in which, however, the *dictum* was *obiter; contra* in *Khanu*, 87 I. C. 97, (1925) S. 286.

(22) *Jacobs*, R. & R. 331; this will now be punishable as a gross indecency under 48 & 49 Vict., c. 69, s. 11.

(23) 1 Hale, 669; 1 Hawk, P. C. C. 4.

(24) *Reckspear*, 1 Mood. 342.

out; for, if false, it deserves a punishment inferior only to that of the crime itself."[25]

4048. Though this crime is, ordinarily, committed upon boys and eunuchs called *Hijras* who form a class by themselves and who dress in women's clothes and dance and sing and ape the manner and vices of nautch girls, still cases have occurred when the offenders had misconducted themselves with animals such as cows and buffaloes, mares and fowls. As to the last there can be no question in this country that having regard to the definition of "animal" in section 47 they are comprised in that term, and the same view has now become established in England[1] since the decision given by eight Judges in a case in which the prisoner had been found guilty of attempting an unnatural offence on domestic fowls which he confessed to, and in consequence of which several of the fowls had died on previous occasions and others suffered from bleeding, apparently from the effect of attempted penetration—and when on a case reserved as to whether a "fowl" was an animal, it was so held, all cases holding the contrary being overruled.[2]

4049. Habitual Sodomite.—Of course, the mere fact that the accused has the reputation of being a confirmed sodomite, is not sufficient for his conviction under this section, for which there must be distinct evidence of the time when, the place where, and the person (known or unknown) with whom he committed the offence. If these facts cannot be proved, the accused cannot be convicted under this section, though there may be unimpugnable evidence of the fact that the accused was a habitual sodomite. As such, the accused was prosecuted for being a sodomite, and it was proved by the evidence of the civil surgeon that he had the characteristic mark of a habitual catamite—the distortion of the orifice of the *anus* into the shape of a trumpet, which was affected with *syphilis* in a manner which distinctly pointed to unnatural intercourse within the last few months. He habitually wore women's clothes. Upon these facts the Court found that the accused did indulge in sodomy, but it at the same time found itself unable to convict him under this section, because this section punishes duly a specific act committed within the jurisdiction of the Court, and not for a general habit of sodomy in which the specific acts may or may not have been committed within the jurisdiction of the Court.[3]

Indeed, in a trial under this section, evidence of general repute, or even the accused's admission that he has committed an infamous crime at any other time with another person, and had a tendency to such practices, is wholly irrelevant, and ought not to be admitted.[4] And even when a specific charge is laid against the accused, "it is very desirable," said Straight, J., "that there should be some medical evidence on the record, if it is possible to get it, as to the condition of the *anus* of the person on whom the act of sodomy is said to have been

(25) 4 Black. 215.

(1) *Brown*, 24 Q. B. D. 357.

(2) *Per* Coleridge, C. J., in *Brown*, 24 Q. B. D. 357; overruling *Dodd*, unrep. referred to in *Brown*, ib., p. 359; *Colins*, L. R. 1 C. C. R. 54.

(3) *Per* Straight, J., *Khairiti*, 6 A. 204.

(4) *Cole*, 1 Phil. Ed. (7th Ed.), 181; Arch. Cr. P. C. (22nd Ed.), p. 281.

perpetrated, or, at any rate, some proof as to the appearance of that part of his body shortly after the alleged act of unnatural intercourse, from which penetration may properly be inferred....Witnesses, as in this case, may depose to having seen what they honestly believe to be a completed act of sodomy, but at best statements of such a kind are not to be accepted unhesitatingly, for it may easily happen that what they speak of as a completed act is nothing more than an attempt.(5) It becomes necessary to add that this section is not confined only to offences committed by man against the order of nature, but it is wide enough to extend to carnal intercourse had by women with animals, which would be equally an unnatural offence within the definition, and in such cases penetration need not be *per anum*. But carnal knowledge, whether by man or woman, with an inanimate object would not be within the rule, for the section is enacted to punish an unnatural offence and not masturbation, which, however reprehensible, is not punishable.

4050. Other Offences against the Person.—This section is the last of the Chapter dealing with "offences against the human body." The next chapter comprises offences against the property, which are also the subject of Chapters XVIII and XIX. The Code then reverts to personal offences in the three subsequent chapters (Chapters XX-XXII) which should have more appropriately found place next after this chapter, the last chapter relating to attempts being relegated to the general part, being assigned a place after "Abetment."

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(5) *Ghasita*, (1884) A. W. N. 25.

CHAPTER XVII.

OF OFFENCES AGAINST PROPERTY.

Of Theft.

4051. Topical Introduction.—Offences against property are naturally enacted to conserve and preserve private rights in property against adverse attacks upon it. As such, they belong to that branch of jurisprudence which protects persons against violations of their right in property. But cases of aggravated violations of such rights have always been regarded as fit for speedy and deterrent action. This accounts for the evolution of a system which discriminates between civil and criminal remedies, and for which a division between civil and criminal law becomes necessary. Such a division could not possibly be made by a sharp line, and howmuchsoever may be the care taken to define the province of the two branches of law there must always remain cases on the frontier in which it is difficult to decide as to whether they legitimately appertain to the domain of civil or of criminal law. Indeed, this is really the battle-ground of the different system, and upon which the laws of various countries are likely to differ. But they all agree in the central thought which prevades all systems, and of which the principle is to make the protection of property a concern of the state. But how far it should go and when the state should withdraw leaving the person aggrieved to his civil remedy is a question upon which there is not likely to be any uniformity or consensus of opinion amongst jurists, though with the growth of international communication and diffusion of learning there is its possibility.

4052. The long dissertation with which the draftsmen and Law Commissioners had prefaced this chapter are chiefly confined to vindication of the departure which they felt justified to make from the prevailing English rules, in the light of which the Code was to be revised. The rest of the discussions were intended to pass in review the emendations suggested and which were either made or rejected, but which have now ceased to have any practical value. Indeed, this is a chapter in which the sections, as originally drafted, have perhaps suffered more minor changes than in any other part of the Code. But at the same time they still bear the hall-mark of their original draftsmen. The arrangement remains the same, and the ten forms of the violations of the rights of property which they proposed to make punishable by this chapter form the sub-heads of this chapter. They are:—

(1) Theft (ss. 378-382).

(2) Extortion (ss. 383-389).

(3) Robbery and Dacoity (ss. 390-402).

(4) Criminal Misappropriation of Property (ss. 403, 404).

(5) Criminal Breach of Trust (ss. 405-409).

(6) Receiving Stolen Property (ss. 410-414).

(7) Cheating (ss. 415-420).

(8) Fraudulent Deeds and Disposition of Property (ss. 421-424).

(9) Mischief (ss. 425-440).

(10) Criminal Trespass (ss. 441-462).

4053. All these naturally refer to direct acts of violations. But there are other chapters (Ch. XVIII, for example) which also deal with the same subject, but in which the violation of right is somewhat remote. Eliminating these from the present discussion, the ten principal modes of violations constitute the ten principal offences which the Code punishes, and for which the several sections prescribe various punishments apportioned to the degree of the transgressions, and the malignity which actuated them. It is, however, evident that these ten forms of principal delicts being all intended to subserve the same purpose, must possess something in common. It is also evident that they would not have been distinct offences had there not been much to distinguish them. In one respect, all these offences along with the rest which compose the Code, naturally resemble. They are not intended to protect the rights in property against any future attack upon it, but are intended to punish actual transgression. In short, their object is punitive, but not preventive.

4054. This is not, however, the common element of all these offences. As offences enacted against attacks on private rights of property they naturally possess one common element, and which is that they have some tendency, directly or indirectly, to cause some party not to have such a dominion over property as that party is entitled to have by law. But this assumes that the rights of property are certain and easily ascertainable. But all property is the creature of the law. It is evident, therefore, that if the substantive civil law touching this right be imperfect or obscure, the penal law which is auxiliary to that substantive law and of which the object is to add a sanction to that substantive law must partake of the imperfection or obscurity. It is impossible for us to be certain that we have made proper penal provisions for violations of civil rights till we have a complete knowledge of all civil rights; and this we cannot have while the law respecting those rights is either obscure or unsettled. As the present state of the civil law causes perplexity to the legislator in framing the Penal Code, so it will occasionally cause perplexity to the Judges in administering that Code. If it be a matter of doubt what things are the subjects of a certain right, in whom that right resides, and to what that right extends, it must also be matter of doubt whether that right has or has not been violated.

For example, A, without Z's permission, shoots snipes on Z's ground, and carries them away. Here, if the law of civil rights grants the property in such birds to any person who can catch them, A has

not, by killing them and carrying them away, invaded Z's right of property. If, on the other hand, the law of civil right declares such birds the property of the person on whose lands they are, A has invaded Z's right of property. If it be matter of doubt what the state of the civil law on the subject actually is, it must also be matter of doubt whether A has wronged or not. By the English Law,[6] pigeons, while they frequent a dovecote are the property of the owner of the dovecote. By the Roman law,[7] they were not so. By the French law,[8] they are his property at one time of the year, and not his property at another. Here it is evident that the taking of such a pigeon, which would in England be a violation of the right of property, would be none in a country governed by the Roman law, and that, in France, it would depend on the time of the year whether it were so or not. As the substantive law varies, the penal law, which is added as a guard to the substantive civil law, must vary also. And while many important questions of civil rights remain undetermined, the Courts must occasionally feel doubtful, whether the provisions of the Penal Code do or do not apply to a particular case.[9] The Commissioners then added "that they have in framing their illustrations eschewed such questions upon which the civil law was uncertain. Moreover, they have provided punishments for the infraction of rights, without determining in whom those rights vest, or to what those rights extend." This necessitated in places a departure from the rules of English Law, as for example, in the definition of theft. Other deviations noticed in their proper places were dictated by the same policy.

Theft Distinguished from other Cognate Offences.

4055. As regards the principle underlying the sub-divisions, the Commissioners wrote: "All these offences resemble each other in this, that they cause, or have some tendency, directly or indirectly, to cause some party not to have such a dominion over property as that party is entitled by law to have. The first great line which divides these offences may be easily traced. Some of them merely prevent or disturb the enjoyment of property to one who has no right to it. Some merely cause injury to the sufferer. Others, by means of wrongful loss to the sufferer cause wrongful gain to some other party. The latter class of offences are designated in this Code as fraudulent.[10] Theft, the criminal misappropriation of property not in possession and criminal breach of trust are in the great majority of cases easily distinguishable. But the distinction becomes fainter and fainter as we approach the line of demarcation, and at length the offences fade imperceptibly into each other."[11] It will be noticed that one great distinguishing feature of these offences from the corresponding rules of English Common Law is the substitution of possession for ownership as the subject of protection. This necessitates a clear conception of the term "possession" which gains an added importance, though it is otherwise also the nine points of the law.

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(6) 2 Black, p. 392.
(7) Inst., Bk. II, tit. 1.
(8) Paillet, *Manuel de Droit-Francais.*
(9) Note N, pp. 157, 158.
(10) The Commissioners meant to use the term "fraudulently" in the sense in which the term "dishonestly" was afterwards substituted; *see* s. 24.
(11) Note N, p. 159.

4056. The Code does not attempt to define possession, but it leaves it to be understood by the ordinary rules of common-sense. And this was done on purpose, for the draftsman wrote: "We believe it to be impossible to mark with precision by any words, the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists, and about which the language of the lawyers and of the multitude would be the same. It will hardly be doubted, for example, that a gentleman's watch lying on a table in his room is in his possession, though it is not in his hand, and though he may not know whether it is on his writing-table or on his dressing-table. As little will it be doubted that a watch which a gentleman lost a year ago on journey, and which he has never heard of since, is not in his possession. It will not be doubted that when a person gives a dinner, his silver forks, while in the hands of his guests, are still in his possession; and it will be as little doubted that his silver forks are not in his possession when he has deposited them with a pawn-broker as a pledge. But between these extreme cases lie many cases in which it is difficult to pronounce with confidence, either that property is or that it is not in a person's possession."(12) They then referred to the English conception of possession, which is as arbitrary as it is conventional, and apprehending that the difficulty, sufficiently great in itself, would be increased by a definition which should pronounce that in a set of cases arbitrarily selected from the mass, "property is in the possession of some party in whose possession, according to the understanding of all mankind, it is not."(13)

"For the purpose of preventing any difference of opinion from arising in cases likely to occur very often, we have laid down a few rules,(14) which we believe to be in accordance with the general sense of mankind(15) as to what shall be held to constitute possession. But, in general, we leave it to the tribunals, without any direction, to determine whether particular property is at a particular time in the possession of a particular person or not."(16) It was admitted that this state of the law was to create much uncertainty, but the provisions of section 72 were commended to be brought into requisition in such cases. "The effect of that clause will be to prevent the Judges from wasting their time and ingenuity in devising nice distinctions. If a case which is plainly of theft comes, before them, the offender will be punished as a thief. If a case which is plainly breach of trust comes before them, the offender will be punished as guilty of breach of trust. If they have to try a case which lies on the frontier, one of those thefts which are hardly distinguishable from breaches of trust, or one of those breaches of trust which are hardly distinguishable from theft, they will not trouble themselves with subtle distinctions, but, leaving it undetermined by which name the offence should be called, will proceed to determine

(12) Note N, p. 160.
(13) *Ib.*
(14) S. 27.
(15) Apparently they were not, for the authors' sections were modified and one of them, at any rate, eliminated. This was s. 19 which denied a juridical person (*e.g.*, Government of India) the right of possession as such.
(16) Note M.

what is infinitely of greater importance, what shall be the punishment.[17] We have thus then a state of law in which the object to be protected is not invariably certain, and even the possession of which is incapable of an exact definition. These are the necessary limitations of the chapter, subject to which it must be understood and applied."

Distinction Based on the Mode of Dispossession.

4057. Assuming however, some knowledge of possession (§§ 265-270), it affords a convenient dividing line between the offences against property. It will be observed that out of the ten principal offences, here dealt with, at least six relate to acts of dispossession of property in one's possession, while the rest relate to the wrongful conversion of property of which a person in relation to whom the offence is considered was already out of possession. The offences of theft, extortion, robbery, cheating, mischief and criminal trespass are instances of the first, while criminal misappropriation and breach of trust and receiving stolen property are instances of the latter. The remaining offence, fraudulent deeds and dispositions has no relation to possession, though, if at all, it should probably be placed in the first class of offences.

Possession being then the one common element in these offences, the only distinguishing features they possess is in the intention and act and the manner of its execution. Essentially there is no difference between them. For instance, take the case of theft, extortion, and cheating. These are three offences which have the same purpose in view, but the *modus operandi* is, in each case, different. In theft the deprivation of property takes place by its concealment, in extortion, by forcible acquisition, and by guile in cheating. But these are merely plans of attack, which may be used singly or in combination.[18] For instance, theft may be accompanied by the use of force, in which case law regards the mental malignity as additionally dangerous, and it, therefore, punishes such acts as a distinct offence, which it calls robbery. So again, theft may be committed by cheating, but in which case, law regards the thief as less desperate than a robber, and he is, therefore exposed to no greater penalty. Again, the less the danger of permanent deprivation of property, the more considerate is law to those who offend against it. This accounts for the comparatively light punishment to which criminal trespassers are exposed, and it accounts for the gradation of penalties apportioned to the value of property destroyed by mischief. The offences against fraudulent deeds and documents border upon cases in which the measure of criminality is determined by the degree of "dishonesty and fraud"—terms which are not absent from civil wrongs, but which only become criminal when they transcend that undefinable limit which divides the civil from criminal liability.

(17) Note M.

(18) It is probably for this reason that, in English Law, all these offences are only classed as larceny.

Theft.

378. Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft, but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations.

(*a*) *A* cuts down a tree on *Z*'s ground, with the intention of dishonestly taking the tree out of *Z*'s possession without *Z*'s consent. Here, as soon as *A* has severed the trees in order to such taking, he has committed theft.

(*b*) *A* puts a bait for dogs in his pocket, and thus induces *Z*'s dog to follow it. Here, if *A*'s intention be dishonestly to take the dog out of *Z*'s possession without *Z*'s consent, *A* has committed theft as soon as *Z*'s dog has begun to follow *A*.

(*c*) *A* meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, *A* has committed theft of the treasure.

(*d*) *A* being *Z*'s servant, and entrusted by *Z* with the care of *Z*'s plate, dishonestly runs away with the plate, without *Z*'s consent. *A* has committed theft.

(*e*) *Z*, going on a journey, entrusts his plate to *A*, the keeper of a warehouse, till *Z* shall return. *A* carries the plate to a goldsmith and sells it. Here the plate was not in *Z*'s possession. It could not therefore be taken out of *Z*'s possession, and *A* has not committed theft, though he may have committed criminal breach of trust.

(*f*) *A* finds a ring belonging to *Z* on a table in the house which *Z* occupies. Here the ring is in *Z*'s possession, and if *A* dishonestly removes it, *A* commits theft.

(*g*) *A* finds a ring lying on the high-road, not in the possession of any person. *A*, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(*h*) *A* sees a ring belonging to *Z* lying on a table in *Z*'s house. Not venturing to misappropriate the ring immediately for fear of search and detection, *A* hides the ring in a place where it is highly improbable that it will ever be found by *Z*, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here *A*, at the time of first moving the ring, commits theft.

(*i*) *A* delivers his watch to *Z*, a jeweller, to be regulated. *Z* carries it to his shop. *A*, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of *Z*'s hand, and carries it away. Here *A*, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(*j*) If *A* owes money to *Z* for repairing the watch, and if *Z* retains the watch lawfully as a security for the debt, and *A* takes the watch out of *Z*'s possession, with the intention of depriving *Z* of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(*k*) Again, if *A*, having pawned his watch to *Z*, takes it out of *Z*'s possession, without *Z*'s consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(*l*) *A* takes an article belonging to *Z* out of *Z*'s possession without *Z*'s consent, with the intention of keeping it until he obtains money from *Z* as a reward for its restoration. Here *A* takes dishonestly; *A* has therefore committed theft.

(*m*) *A*, being on friendly terms with *Z*, goes into *Z*'s library in *Z*'s absence, and takes a book without *Z*'s express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that *A* may have conceived that he had *Z*'s implied consent to use *Z*'s book. If this was *A*'s impression, *A* has not committed theft.

(*n*) *A* asks charity from *Z*'s wife. She gives *A* money, food and clothes which *A* knows to belong to *Z*, her husband. Here it is probable that *A* may conceive that *Z*'s wife is authorised to give away alms. If this was *A*'s impression, *A* has not committed theft.

(*o*) *A* is the paramour of *Z*'s wife. She gives a valuable property, which *A* knows to belong to her husband *Z*, and to be such property as she has not authority from *Z* to give. If *A* takes the property dishonestly, he commits theft.

(*p*) *A*, in good faith, believing property belonging to *Z* to be *A*'s own property takes that property out of *Z*'s possession. Here, as *A* does not take dishonestly, he does not commit theft.

Synopsis.

(1) *Analogous Law* (4058-4060).
(2) *What is Theft* (4061-4065).
(3) *Primary and Secondary Intention* (4064).
(4) *Moveable Property* (4066-4069).
(5) *Earth* (4067).
(6) *Water* (4068).
(7) *Gas and Electricity* (4069).
(8) *Animals Ferae Naturae* (4070-4073).
(9) *Property If Dead, Tame or Confined* (4071).
(10) *Fish* (4072-4073).
(11) *Oysters* (4074).
(12) *Chanks* (4075).
(13) *Domestic Animals* (4076)
(14) *No Property* (4077-4078).
(15) *Human Body* (4077).
(16) *Caracass* (4078).
(17) *Abandoned Property* (4079-4082).
(18) *Property may be Valueless* (4081-4082).
(19) *Property must have Some Value* (4083).
(20) *Property must be In Possession* (4084-4085).
(21) *Bona Fide Claim* (4086-4088).
(22) *Right to Crops* (4089).
(23) *Mistaken Right* (4090).

(24) *Taking from Joint Possession* (4091-4093).
(25) *Theft by Husband and Wife* (4094-4096).
(26) *Hindu Law* (4095).
(27) *Mahomedan Law* (4096).
(28) *Theft by Owner of his Own Property* (4097-4098).
(29) *Possession of Another Necessary* (4101-4102).
(30) *Taking must be Without Consent* (4103-4105).
(31) *Consent by Agent* (4106-4107).
(32) *Moving Necessary* (4108-4114).

4058. Analogous Law.—There is nothing in English Law corresponding to the offence of theft as here defined. There is no doubt the offence of "larceny," but text writers on criminal law confess to the confusion into which that subject has been thrown by the cases decided on the subject.[19] As it is, larceny will bear some comparison with the offence of theft, but it necessarily possesses some characteristic differences which dictate extreme caution in drawing upon the English precedents even for the purpose of illustration. Larceny is said to be the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with felonious intent to convert them to the taker's use and make them his own property without the consent of the owner.[20]

4059. As to this definition it will be observed that it only contemplates theft from the owner. In other words under the English Law of theft there can be no theft of property unless it is property with an owner. Under this definition it is not necessary that the property should necessarily have an owner: it will suffice if it is in some one's possession.

Secondly, under English Law larceny is taking a thing out of the possession (actual or constructive) of the owner; but in the case of theft there need be no owner, and if an owner, no possession; the act constituting the offence being complete no sooner a person in possession is dispossessed.

Thirdly, under English Law, larceny could only be committed in respect of *personal goods*, and it rigidly excludes anything that savours of the reality, and was at the time it was taken a part of the freehold. Consequently, as title-deeds are regarded as sinews of the land to which they relate there can be no larceny in respect of them, [21] though, of course, in this respect this definition is less technical and more general, since anything severed from the earth is here regarded as moveable property and, as such, it may be the subject of theft.[22]

Fourthly, it is of the essence of larceny that the property must have been taken with a view to permanent appropriation, but theft regards even temporary dispossession as sufficient, even though the thief may have intended to restore the thing stolen eventually to the owner.[23]

(19) 2 Russ. Cr., Ch. X, Note (*a*).
(20) 2 East, P. C. 553.
(21) 1 Hale, P. C. 510; 1 Hawk, P. C. c. 33, s. 38.
(22) S. 378, Expl. 2.
(23) *Trebilock*, 27 J. M. C. 103; *Hollowar*, 1 Den. 370; *Nagappa*, 15 B. 344.

Fifthly, larceny is not complete merely on *moving* the thing out of its place: to complete it the thief must have, though even for a moment, the entire and absolute possession of it[24]; but theft under the Code is complete merely with the moving called *asportation*.[25]

Lastly, larceny takes account of a claim of right, so that the mere removal of goods without the owner's consent is not larceny unless it was without any colour of right, but it will in the same circumstance be theft, which is a removal without consent independently of a claim of right.

4060. It will thus appear that larceny is a much narrower crime than theft for which there is no exact counterpart in English Law. But while the two offences of larceny and theft possess many points of difference, they also possess, as indeed they must, many common elements. For instance, dishonest intention (*animo furandi*), non-consent, and the exclusion of immoveable property from the domain of theft are points upon which the two systems are coincident. Then again, while under English Law a mere colour of right would exculpate the offender, the same right if *bona fide* asserted, would equally suffice to exonerate the accused under the Code. Really speaking the difference between the two offences is one of degree.

4061. What is Theft?—As in the generality of offences punishable under the Code, this section subordinates the accused's act to his intention, which it regards as the sole criterion for determining his criminal responsibility. Intentionality must, again, be confined to a particular purpose, and that must to take "dishonestly any moveable property out of the possession of any person without that person's consent." The intention of the man must be to take "dishonestly"—a term which the Code defines as doing anything with the intention of causing wrongful gain to one person, or wrongful loss to another person.[1] Now, as wrongful gain and loss refer to gain and loss of property by unlawful means,[2] it follows that dishonesty is nothing more than the adoption of *unlawful* means for the acquisition of property to which one is not legally entitled.[3] Legality is thus the test of dishonesty. If the act was legal, it is honest whatever may be its moral turpitude. But the mere illegality of the act and means does not make the actor a thief. For if it were so, theft would cease to be a crime to which a considerable amount of social indignity necessarily attaches. Its chief ingredient, consequently, lies in the intention to adopt an unlawful means to secure an illegal gain. The intention of wrongful appropriation called the *animus furandi* is not then necessary for theft under the Code, nor need the taking be "*lucri causa*" or for the purpose of gain.

4062. All that the Code requires is, that there must be the intention to take by unlawful means, and in pursuance of that intention the property must be moved. Such intention must necessarily accompany

(24) *Cherry's case*, 1 Leach, 236, Note (*a*).

(25) Lat. *abs*, from, and *porto*, to carry—a carrying away.

(1) S. 24.

(2) S. 23.

(3) *Ib.*

the moving, otherwise there can be no theft. This is not expressly laid down in this section, but it is necessarily implied by the words "intending to take," and it is otherwise obvious.(4) If the taker did not originally possess such intention, but acquired it afterwards, he could not be convicted of theft though he may be guilty of misappropriation. Of course, it is sufficient for the crime that the offender moves the property to "take it." It may not be to appropriate it permanently, nor indeed, to take it for himself, or for the purpose of gain, *lucri causa*, as it is termed in English Law, for, as has been remarked, before the dishonest taking may be as much for wrongful gain to one, as for causing wrongful loss to another, in which case the taker may not retain the property for a single instant.

Such was the case of a landlord who made over his tenant's cows to a pressing creditor of the latter, whereupon the tenant prosecuted the landlord for the removal of her cows and delivery of them to the creditor, whereupon it was held by Sir Barnes Peacock that the act amounted to theft in point of law, adding: "Could it be said that a servant would not be guilty of theft if he were to deliver over his master's plate to a pressing tailor, and tell him to pay himself?"(5) The same view was taken in another case which exercised a Full Bench of the Calcutta High Court. In that case the creditor's servants had forcibly removed his debtor's cattle to use a pressure upon him to pay up his debt, and the question was whether the act amounted to theft. Now, it will be observed, that the only five essential ingredients of this offence as defined in this section are: (*i*) An intention to take some moveable property, (*ii*) the taking intended must be dishonest, (*iii*) it must be from the possession of another, (*iv*) without his consent, and (*v*) in pursuance of the said intention the property must be moved.

Animus Furandi Lucri Causa.

4063. All these five elements will be found to be present in the above cases, and the act was, consequently, held to amount to theft.(6) But in a latter case this case was distinguished on the ground that there the creditor had himself seized the goods. Where, therefore, the accused, a ticket checker in the service of a Steamer Company found a passenger travelling without a ticket. Whereupon he took possession of his umbrella to compel him to pay up the fare the Court acquitted him of theft holding that his conduct might be overzealous but it was not thievish in that he had no intention to appropriate the umbrella to his own use.(7) This view was confirmed in another case in which the servant had removed his master's goods in order to coerce him to pay up his overdue wages.(8) But, it is submitted, there is really no difference in principle between the two classes of cases. In this respect the

(4) *See* ill, (*h*).

(5) *Madaree Chaukidar*, 3 W. R. 2 To the same effect Erskine, J., in *White*, 9 C. & P. 344.

(6) *Sri Churn Chungo*, 22 C. 1017, F. B.; overruling *contra* in *Prosonno Kummar Patra* v. *Udoy Sant*, 22 C. 669; following *Madaree*, 3 W. R. 2; *Preo Nath Banerji*, 5 W. R. 68; *Trainee Prosaud Banerjee*, 18 W. R. 8; *Nagappa* 15 B. 344; *Anon.*, 1 Weir (3rd Ed.), 233; *Agha Muhammad Yusuf*, 18 A. 88; *Shromeshur Rai* (1888) A. W. N. 97; *Naushe Ali Khan*, 34 A. 89 (citing overruled case *Prosunno Kumar*, 22 C. 669).

(7) *Matabhar Shekh*, 14 C. W. N. (936), 7 I. C. 257.

(8) *Mata Prasad*, 8 L. R. (A.) 77.

Code presents a wide departure from the accepted rules of English Law, under which *animus furandi* or *lucri causa* is the gist of the crime. These two terms are interchangeably used in English Law,[9] but their exact meaning is still the subject of much discussion, though it is said that what is implied by them is this, that the goods must be taken into the possession of the thief with the intention of depriving the owner of his ownership in them.[10]

As understood in this sense there may be room for *animus furandi* even in the definition of theft in this country, but it is a phrase of uncertain import, and had better be left alone. At the same time the definition of theft must be confined within reasonable limits—for otherwise it is comprehensive enough to embrace within its purview even cases which will make the definition look absurd. For example, suppose the case of a watchman kept against poachers, who finding them in his master's fisheries seizes their nets, refusing to deliver them up to the poachers or the police without his master's permission. Could he be convicted of theft? In one sense he is guilty of that offence, for his act also presents all the five essential elements necessary for that offence. He was, however, acquitted on the ground that he had acted *bona fide* in the interest of his employers.[11] But so may have the creditor's servants in the last case. The only ground upon which the finding might be justified is that stated by the draftsmen, who wrote: "By one of the general exceptions[12] which we have proposed it is provided, that nothing shall be an offence by reason of any harm which it may cause, or be intended to cause, or be known to be likely to cause, if the whole of that harm is so slight that no person of ordinary sense and temper would complain of such harm. This provision will prevent the law of theft from being abused for the purpose of punishing those venial violations of the rights of property which the commonsense of mankind readily distinguishes from crimes, such as the act of the traveller who tears a twig from the hedge, of a boy who takes stones from another person's ground to throw at birds, of a servant who dips his pen in his master's ink"[13] (§§ 4086-4088).

Primary and Secondary Intention.

4064. Evidently, section 99 will have to be more liberally construed to avoid this section from being reduced to bathos. Take for example another case. The appellant had been wrongly accused by his master of the theft of a box. He thereupon removed it and left it concealed in a cowshed to give his master a lesson. The Sessions Judge told the jury: "If you find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner, then the act is theft." The jury found that the taking was with the intention of putting the owner to trouble. The Sessions Judge convicted him, but on appeal the conviction was set aside by Banerjee and Wilkins. JJ., who justified his finding by reference to section 23 which defines "wrongful loss," adding: "Of

(9) 4 Black. 232; 2 East, 685; *Per* Eyre, C. B. in *Pear*, 2 East, 685.
(10) Roscoe Cr. Ed. 554.
(11) *Nobin Chunder Haldar*, 6 W. R. 79.
(12) S. 95.
(13) Note N, p. 162.

course, when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily, not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the intention amounts to causing wrongful loss in any sense."[14] But, it is submitted that this reasoning is not sound. In the first place it assumes intention and motive to be the same which of course, they are not. And if this reasoning be sound, why should not the creditor who seized his debtor's cattle, be held equally exempt from punishment, since the same reasoning would exactly fit his case also.

Of course, in England such a case would present no difficulty, for there, since *animus furandi* or an intention to appropriate permanently[15] being the gist of the crime its temporary deprivation is no theft whether because the taker takes them under colour of right,[16] or, as a creditor, to put the screw on the debtor so as to make him pay up his debt.[17] Let us suppose another case. The accused maliciously seize the complainant's cattle while grazing on fallow land and instead of taking them to the nearest pound drive them to a pound in the next district some 12 or 14 miles distant. Are they guilty of theft? All the five elements before set out will be found to be present in their case. But it was held that they were not guilty because the wrongful loss of the animals was only temporary, and the other heavier loss of money paid in fine was not within the comprehension of section 23 which refers to the loss of a thing to which the loser was legally entitled.[18] But it is submitted that the Code does not exempt otherwise than under section 95 the temporary loss of one's property,[19] and the case does not appear to be otherwise distinguishable Indeed, even actual taking is not necessary to constitute the offence. Merely "moving" the property of another is sufficient.

4065. Again, since the intention to take one's property illegally by unlawful means constitutes the furtive intention necessary to constitute theft, secrecy is by no means its necessary ingredient though secrecy is usually associated with theft. The taking must, however, be of "moveable property" and it must be "out of the possession of any person." Moreover, the intention must be dishonest at the time it is moved,[20] and not at any time afterwards. In the latter case, the accused, would not be necessarily innocent, though he could not be convicted of theft.

4066. Moveable Property.—The term "moveable property" is defined in section 22 as *including* corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth. It is further explained in this section that a thing so long as it is attached to the earth, not being move-

(14) *Nabi Baksh*, 25 C. 416.
(15) 1 Hale 509; *Thurburn*, 2 C. & K 831; *Guernsey*, 1 F. & F. 394.
(16) 1 Hale, 509.
(17) *Wade*, 11 Cox, 549.
(18) *Aradhun* v. *Myan Khan*, 24 W. R. 7.
(19) *Sri Churn Chungo*, 22 C. 1017, F. B.; *Nagappa*, 15 B. 344.
(20) *Rup Lal* v. *Durga Prasad*, 1 Pat. L. W. 416.

able property, is not the subject of theft, but it becomes capable of being the subject of theft as soon as it is severed from the earth. Of course, from the fact that moving is necessary to constitute and complete theft, it follows that the offence must be necessarily confined to moveable property. So in England the offence can only be committed in respect of personal chattels, though in this respect the English rule is much narrower, as it excludes anything savouring of realty.

So at one time there could be no larceny of title-deeds relating to land which were regarded as a part of it,(21) so much so that even the box in which they were contained could not be made the subject of theft.(22) But in this respect the rule has now been altered by Statute,(23) which has also enlarged the rule so as to make mere *choses in action*, such as bonds, bills and the like capable of larceny,(24) though they were also at common law not the subject of theft, for they were said to be of no intrinsic value.(25) But though these are now classed as moveable property, there still remain things which are not the subject of larceny in England, though they are moveable property for the purpose of this section: such are crops, grass, trees, minerals and other things attached to the earth for which the wrong-doer is in England still only civilly liable, though he would be here liable for theft for their removal. Even in England it is said that if the owner or stranger sever them, or even the thief sever them at one time and at another time come and take them away, it is a larceny,(1) provided that in the latter case the severance and the removal were not effected with the same intention.(2)

(1) Earth.

4067. Eliminating this artificial rule, the English and Indian rules are in this respect virtually identical. But all the same this subject has to be considered dissociated from its English analogue. So while the earth cannot be the subject of theft, earth, that is, soil removed from the earth, and all component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached is moveable property capable of being the subject of theft, so that whoever dishonestly removes such earth from the earth, commits theft.(3) The accused had dishonestly carried away a hundred cart-loads of earth from the complainant's land. It was held that he was guilty of theft. As Parsons, J., said: "By severance things that are immoveable become moveable; and it is, in my opinion, perfectly correct to call those things attached which can be severed; and undoubtedly it is possible to sever earth from the earth, and attach it again thereto. In places where earth is scarce, it is a common article of purchase and sale. A cart or donkey load of earth may be bought any day in the bazar. This earth is certainly moveable property, and it has become so by reason of its having been severed from the earth to which it was once attached, and to which it will again become attached when deposited thereon. Under the Penal Code, it does not matter by whom the severance is effected, and "a

(21) 1 Hale 510; 1 Hawk, c. 33, s. 35; *Westbeer*, 1 Leach 12; *Walker*, 1 Mood. C. C. 155.
(22) 1 Hale 510; 3 Co. Inst. 109.
(23) 24 & 25 Vict., c. 96, s. 28.
(24) *Ib.*, ss. 69, 70.
(25) *Calye's case*, 8 Co. Rep. 33.

(1) 3 Co. Inst. 109; 1 Hale 510; *Lee* v. *Risdon*, 17 R. R. 484 (486); *Foley*, 17 Cox. 142.
(2) *Townby*, 40 L. J. M. C. 144.
(3) *Shivram*, 15 B. 702; followed in *Suri Venkatappaya Sastri* v. *Madula Venkanna*, 27 M. 531, F. B., overruling *contra* in *Kotayya*, 10 M. 255.

person is said to cause a thing to move by separating it from any other thing while 'a moving' effected by the same act which effects the severance may be theft."(4)

A swamp, the property of Government, was surrounded with police guards by Government to prevent the salt being removed. It was held that the taking against the will of Government and with the intention of obtaining an unlawful gain of salt, which had been spontaneously produced on the swamp was theft.(5) So the Court remarked: "We cannot distinguish this case from theft of wood in a reserved forest, except that salt is actually a part of the soil while trees are not; yet things immoveable become moveable by severance, and this would apply to severed parts of the soil, *e.g.*, stone quarried, minerals, iron or salt collected, as well as to timber which has grown, or edifices which have been raised on the land."(6)

But, of course, the case was held different where the accused had removed earth worth two pice from a channel bed belonging to Government, unless the removal was shown to be dishonest which could not be assumed.(7)

(2) Water.

4068. So water, whether stagnant or running may be the subject of ownership, and therefore of theft, provided that it is reduced into possession, as by being confined into definite channels or in pipes.(8) So the appellants who supplied water to consumers conveyed by means of pipes prosecuted the respondent of larceny for having taken their water from one of their taps without having agreed to pay for the same, it was held that water under the circumstances and in the condition described in the case could be the subject of larceny.(9) But where the water ran freely through a channel from the river and flowed into some *jhil* from where it was diverted for irrigation, it was held that so long as it flew through the channel, it could not be made the subject of theft, and the accused who cut the embankment of the channel diverting the stream for the purpose of irrigating their own fields could not be convicted of theft.(10) Presumably, in this case the channel was natural and did not belong to the complainant: if so, there was no case of theft, but could it be a case of mischief? It was held by Geidt, J., with whom Woodroffe, J., reluctantly concurred that it was a case of mischief under section 430. The question will have to be considered under that section. Property, otherwise moveable, does not cease to be moveable because it is used for residence, as for example, a house or boat.(11) Indeed, though a house as such cannot be the subject of theft, there may be a theft of its materials if removed with the intent necessary to constitute theft.(12)

(3) Gas and Electricity.

4069. So there may be the theft of luminants, such as gas or electricity.(13) The prisoner was a consumer of gas supplied by the prosecuting company. The latter sold their gas to consumers to be paid for as indicated

(4) *Per* Parsons, J., in *Shivram*, 15 B. 702.
(5) *Tamma Ghantaya*, 4 M. 228.
(6) *Ib.* To the same effect, *Mansany Bhava Sang*, 10 B. H. C. R. 74.
(7) *Tandra*, 39 I. C. (M.) 1000, 18 Cr. L. J. 632.
(8) *Ferens* v. *O'Brien*, 11 Q. B. D. 21; *Mahadeo Prasad*, 45 A. 680.
(9) *Ib.*, p. 22; *Chockalingam*, (1912) M. W. N. 119, 13 I. C. 819.
(10) *Sheikh Arif*, 35 C. 437.
(11) *Mehar Dowalia*, 16 W. R. 63.
(12) *Nawtara Singh*, (1904) 10 Bur. L. R. 356.
(13) S. 39, Indian Electricity Act (III of 1903).

by a metre which they attached to the pipe conveying the gas to the prisoner's residence. The prisoner had without the knowledge of the company caused to be inserted another pipe from his pipe before it reached the metre, and through which he used to divert a quantity of gas before it could reach the metre. He was indicted for larceny and Martin, B., told the jury that if the entrance pipe was used by the company for the conveyance of their gas by the permission of the prisoner, but that he had not by his contract any interest in the gas or right of control over it until it passed the metre, his property in the pipe was no answer to the charge; that there was nothing in the nature of gas to prevent it being the subject of larceny; and that the stop-cock on the connecting pipe being opened by the prisoner, and a portion of the gas being propelled through it by the necessary action of the atmosphere, and consumed at the burners, there was a sufficient severance of that portion from the volume of gas in the centre pipe to constitute an asportavit, and that if the gas was so abstracted with a fraudulent intent, the prisoner was guilty of larceny, and upon which the jury convicted him.(14) In such a case the fact that the property stolen was gas would make no difference in the offence, for the offence depends upon the removal of a thing without the consent of the person in possession, and the question is the same whether the thing removed be wine from a barrel or gas from the pipe. As Martin, B., put it "If there was a spout in a stable to get corn from a bin, and the ostler by boring a hole higher up got the corn out and took it away for himself would not that be larceny?"(15) The same principle governs the case of electricity which is energy and as such property capable of possession. If, therefore, a person were to tap its current and divert it for his own use without the consent of the owner, he would be guilty of theft within the meaning of this section.

(4) Property If dead, Tame or Confined.

4070. Animals Feræ Naturæ.—A thing may, however, be moveable property, and still not in possession of any person, in which case its appropriation would not constitute theft. Such things may be those which had never an owner, or those of which the ownership has been abandoned. To the former class belong animals *feræ naturæ* in their wild state and when they cannot be the subject of larceny, even though the forest of which they are the denizens may be the subject of private ownership. So also wild animals, such as hares or deer, though not ferocious, are still *res nullius* so long as they remain in their native haunts, and have not been trained or confined, in which case all wild animals become private property and are then capable of theft. So tame hawks,(16) pigeons (17) and pheasants(18) are the subjects of private ownership and may be the subject of theft.

And so in England bees which are reared in private farms may be the subject of theft. So Blackstone observed: "Occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived

(14) *White*, 22 L. J. M. C. 123. To the same effect, *Firth*, 38 L. J. M. C. 54.
(15) *Ib.*
(16) 1 Hale, 511.
(17) *Brooke*, 4 C. & P. 131.
(18) *Head*, 1 F. & F. 350; *Cory*, 10 Cox, 23; *Garnham*, 8 Cox. 451.

them, than I have in the birds which make their nests thereon and, therefore, if another hives them, he shall be their proprietor, but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight and have power to pursue them; and in these circumstances no one else is entitled to take them."[19]

The question in the case of wild animals is not whether they are wild and unreclaimed, but whether they have been reduced into possession, or were under the owner's control.[20] So, as a rule, theft cannot be committed of deer, hares, or conies in a forest chase, or warren; of fish in an open river or pond; of wild fowls when at their natural liberty; of old pigeons, out of the dove-house,[21] or even of swans, though marked, if they range out of the royalty, because it cannot be known that they belong to any person.[22] So in the case of animals *ferae naturae* it is said that property in them can only be acquired if they are dead, tame or confined, otherwise they are presumed to be in their original state.[23] Property in them cannot however, be acquired by a sportsman by merely killing them, so as to confer on him a right to proceed against a person who stealthily removes the carcass before it is picked up by him.[24] But evidently the case would be otherwise if the sportsman, after killing the animal, set a watch upon it, and the thief stole in and removed the carcass.

4071. As regards the young ones of such animals, the rule appears to be that property in them vests in the owner of their dams so long as they derive nourishment from them and remain with them. So it has been held that young pheasants hatched by a hen, and under the care of the hen in a coop, although the coop is in a field at a distance from the dwelling-house, and although the pheasants are designed ultimately to be turned loose,[25] and partridges about three weeks old and able to fly a little, which have been hatched and reared under a common hen, and afterwards remain about the prosecutor's premises with the hen as her brood and sleep under her wings at night, although neither the hen nor the partridges are in a coop or otherwise confined[1] and pigeons which, though they have free access to the open air, are tame and reclaimed, and return to their roost[2] may be all the subject of theft. So a peacock, though a *ferœ nature*, may become the subject of ownership by being tamed, if it remained in the owner's village and did not consort with other wild peacocks of the neighbourhood.[3]

(5) Fish.

4072. As regards fish, though they are *ferœ naturæ*, still they may be made the subject of private ownership under circumstances peculiar to them. As a rule fish in the open sea, or navigable creeks or rivers, or indeed any public river or lake cannot be made the subject of private ownership, so long as they are not stored or bred there, or confined within an enclosed

(19) 2 Black. 393.
(20) *Per* Bovill, C. J., in Roe, 11 Cox. 554.
(21) 3 Inst. 109, 110; 1 Hale, 510; 1 Hawk, c. 33, ss. 39, 40.
(22) 1 Hale, 511.
(23) *Lonsdale*, 4 F. & F. 56; *Rough's case*, 2 East 607.
(24) *Roe*, 11 Cox. 554.
(25) *Gory*, 10 Cox. 23.
(1) *Shickle*, L. R. 1 C. C. R. 158.
(2) *Howell*, 2 Den. 362, *note; Brooks*, 4 C. and P. 131; *Cheafor*, 21 L. J. M. C. 43.
(3) *Naubo Khan*, (1897) A. W. N. 41.

space, and are therefore free to go wherever they please.(4) Such would be the case where they are bred in a tank or reservoir and there is evidence to show that they had been restrained of their natural liberty, and were liable to be taken according to the pleasure of the owner, or, in other words, if they had been in the power and dominion of the owner of the tank.(5) The test in such a case is whether the fish could have escaped. If the fish are so confined as to be unable to escape, they become the subject of theft.(6) So whether fish in a tank may or may not be the subject of theft would depend upon the depth of water therein. If it runs so low that the fish cannot escape they become the subject of ownership. But if the water is sufficient to enable them to escape from a circumscribed area then they become *ferae naturae* and cannot be the subject of theft.(7) But where the tank though private is not enclosed from all sides, and the fish were not reared and preserved therein, but found their way there through the overflow of the neighbouring channel, which was connected with other flowing streams, and at the time of inundation fish were at liberty to escape from the tank, they could not be held to be reduced into possession so as to cease to be *ferae naturae*, and as such be the subject of theft.(8) In such cases the fact that the creek (9) or the tank(10) itself was the subject of private ownership, or that the owner had been accustomed to lease out the fishing rights therein—a fact which may be known to the accused—would not make the removal of fish theft, though it will undoubtedly be a wrong civilly actionable.(11)

4073. The rule that fish in the sea or open creeks or public rivers cannot be the subject of theft only implies that the act of taking them from there is not theft : it does not mean that such fish cannot be stolen after it has been reduced into possession by catching or confining them to prevent their escape. The prisoner was employed by the prosecutor as the master of fishing-smack engaged in catching fish in the North Sea, and which was brought to and sold at Grimsby. He was in full charge and control of the smack. The fish caught used to be deposited in the hold of the vessel, which remained under the sole direction of the prisoner till his arrival at his destination. On the occasion in question he put into the harbour of an intermediate port for the purpose of having a new trawl-net mounted, and whilst there a boat came from the shore and the prisoner ordered some of the fish to be taken out of the hold and put into the boat which then returned ashore where

(4) *Kashi Chunder* v. *Hurkishore*, 19 W. R. 47; *Khetter Nath* v. *Indro Jalia*, 16 W. R. 78; *Bhusun* v. *Dinonath*, 20 W. R. 15; *Charu Nuyaib*, 2 C. 354; *Bhagiram Dome* v. *Abar Dome*, 15 C. 388; *Madhab Hari*, 15 C. 388, *note*; *contra* in *Modhoo Mundle* v. *Umesh Parni*, *ib.*; *Revu Pothadu*, 5 M. 390; *Subba Reddi* v. *Munshoor Ali*, 24 M. 81, dissented from in *Subbiah*, 36 M. 472; *Changel* v. *Basermal*, 5 S. L. R. 122, 13 I. C. 214.

(5) *Mayaram* v. *Nichala*, 15 C. 402; *Shaikh Adam*, 10 B. 193; *Shickle*, L. R. 1 C. C. R. 158; *Subbiah*, 36 M. 472.

(6) *Manchu Paidu*, (1914) M. W. N. 168; 22 I. C. 429.

(7) *Subbiah*, 36 M. 472; following *Shaik Adam*, 15 C. 402.

(8) *Mayaram* v. *Nichala*, 15 C. 402, following *Revu Pothadu*, 5 M. 390; *Carradice*, R. & R. C. C. 205.

(9) *Revu Pothadu*, 5 M. 390.

(10) (1878) 5 M. 390, *note*.

(11) *Ib.*

the prisoner was shown to have sold the fish and appropriated the proceeds. It was held that the fish had been reduced into possession of the prosecutor as soon as they were deposited in the hold, and that the prisoner was rightly convicted of larceny.[12]

(6) Oysters.

4074. The question whether pearl and edible oysters are capable of individual ownership has been considered in America where it was said: "It is objected that oysters being animals *ferae naturae* there can be no property in them unless they be dead or reclaimed, or tamed, or in the actual power or possession of the claimant and that the want of such an averment is a fatal defect in the indictment. The principle as applied to animals *ferae naturae* is not questioned. But oysters though usually included in that description of animals do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals they continue perpetually in his occupation and will not stray from his house or person. Unlike animals *ferae naturae* they do not require to be reclaimed, or made tame by art, industry or education, nor to be confined in order to be within the immediate power of the owner. If at liberty they have neither the inclination nor the power to escape. For the purpose of the present inquiry they are obviously more nearly assimilated to tame animals than to wild ones and perhaps more nearly to inanimate objects than to animals of either description."[13] But this only shows that oysters may be made the subject of ownership, but it does not imply that they are naturally or ordinarily so. So Green, C. J., in the same case told the jury "that if the oysters which were planted by Hildreth (the complainant) were unlawfully taken by the defendant with the intent to steal them; if the oysters so planted could be easily distinguishable from other oysters that grew in the sound; if they were planted in a place where oysters did not naturally grow; if the place where they were planted was marked and identified, so that the defendant and others going into the sound for clams and oysters naturally growing there could readily know that these oysters were planted and held as private property and were not natural oysters, then the oysters were the subject of larceny and the defendant might be convicted."[14]

(7) Chanks.

4075. The question whether the same rule should apply to chanks, which are popularly included among shell-fish but are in reality large molluses found residing in shells, found buried in a certain kind of sand-bed or in the sandy crevices of the coral reefs on the Ramnad littoral shores, was much considered by the Madras Court in a case in which the Rajah of Ramnad had leased these beds situate five miles off the coast of his zemindari to the complainant who charged the accused of theft for having removed them from his monopoly. The defence was that the chanks had been taken from beds in the open sea and that, therefore, they were *ferae naturae* and not the subject of theft. It was conceded that the complainant's lessor had been from a time immemorial exercising the right

(12) *Mallison*, 20 Cox. 204.
(13) *Taylor*, 72 Am. Dec. 347.
(14) *Taylor*, 72 Am. Dec. 347; *Dowling*, 11 Cox. 580.

of leasing the chank beds out to other persons. Chank shells were used in religious services and in making various articles of jewellery such as bracelets.

It was held that there was nothing in chanks to discriminate them from oysters, that chanks might as much as oysters be the subject of theft: "The fact that fish in a river or in an open and unenclosed tank have been held by the Courts in India not to be the subject of theft is irrelevant, because they are so held by reason of their power to escape up or down the river or out of the tank and cannot, therefore, be regarded as in the possession of the owner of the tank. But even fish if in an enclosed tank, so as to be under the control of the owner of the tank, are capable of being the subject of theft;[15] and even the young of wild birds such as hawks or herons if found on a man's land may be the subject of larceny *propter impotentiam*[16] owing to their inability to escape capture, or to pass from the possession of the owner of the land, though the old birds may not be the subject of larceny.[17] Even if chanks are in a certain sense *ferae naturae* we think that they should still be regarded as in possession of the owner of the chank bed *propter impotentiam* and, therefore, capable of being the subject of larceny. The Indian Penal Code, however, in dealing with theft has no special provisions regarding animals *ferae* or *domitae naturae*.

The question in each case is whether the animal is the property of another and was dishonestly taken out of his possession. It seems to us that there is nothing in the nature of a chank, whether it be a dead shell or the living mollusc, which prevents it from being the subject of property, and that when it lies in its sand-bed under the sea, it is as much as in the possession of the owner of the sand-bed as the coal that lies buried in the ground; and the snail that crawls on the dry land and the worm that burrows in the earth in possession of the owner of the land where they are found."[18] This case, however, refer, only to the beds within the ordinary territorial jurisdiction of the Courts. It does not refer to beds in the open sea, where the property whether in chanks or oysters cannot be claimed by any one person to the exclusion of the rest.

(8) Domestic Animals.

4076. There can of course, be no question about property in animals *domitae naturae* such as horses and cattle, and all animals whether *ferae or domitae naturae* which serve for food as sheep, swine, poultry and turkeys.[19] In England, it was a rule of common law that property could only be claimed in domestic animals which are either useful or used as food. It could not be claimed in others such as dogs, ferrets and others, which though tame and saleable were held to have been kept only for whim or pleasure,[20] but this defect in the law has since

(15) *Shaik Adam*, 10 B. 193.
(16) Lit. "By reason of their impotency."—By reason of their dependence.
(17) 2 Step. comm. (13th Ed.), p. 6.
(18) *Annakumaru* v. *Muthupayal*, 27 M. 551.
(19) *Roberts* v. *Willians*, 12 *East*. 33, 34; *Carleton* v. *Brightwell*, 1 P. Wms. 462.
(20) 1 Hale, 512; *Searing*, R. & R. 250; *Robinson Bell*, 28 L. J. M. C. 58

been made good by Statute.[21] Needless to add, such animals, whether kept for food or service or pleasure would be classed as property under the Code.

(9) Human Body.

4077. No Property.—But though the word "moveable property" is large, it is not large enough to include such a thing as the body of a human being, dead or alive. Indeed, seeing that the property here spoken of must be in the possession of another person, a human being is necessarily excluded, as he cannot be in the possession of another person. And as regards the human corpse, the rule in England is that it cannot be the subject of larceny,[22] and Burkitt, J., held the same rule to be applicable to this country in a case in which the accused had assaulted the deceased from the effects of which he is said to have died, and whereupon to prevent the body being taken for autopsy to ascertain whether the deceased had died in consequence of the injuries inflicted on him by the accused, the latter stole it while it was lying outside the house of the mother of the deceased and threw it into the river. The accused was thereupon convicted of theft but on appeal the conviction was set aside on the ground that the corpse was not property within the meaning of this section.[23]

It was, however, conceded that though this was ordinarily the case property might be created in corpses, preserved as mummies or the like in museums or scientific institutions. In England corpses are deemed to be no property, because property there must have some value, at least a farthing. But there appears to be no such rule in this country and one fails to see why the English rule should apply to this country. At any rate, it is a misdemeanour in England to remove without lawful authority a corpse from a grave [24] to prevent a coroner's inquest[25] or to dispose it of without lawful authority for the purpose of dissection and for gain and profit.[1] Consequently, the fact that the body cannot be made the subject of larceny is a merest technicality which occasions there no failure of justice, and it would be awkward if the theft of a corpse could not be punished under the Code, and is not otherwise punishable.

(10) Carcass.

4078. Even in England, though there is no property in a corpse there is property in a carcass of a deceased animal, so that if the owner buries it and another disinter it and sell, he could be indicted for theft.[2] But on this point the Indian rule would appear to be divergent, for in a case in which the owner had buried his bullock which he suspected to have been poisoned it was held to amount to abandonment of property therein, so that there could be no theft if another disinterred it for the sake of its hide.[3]

(21) 24 & 25 Vict., c. 96, ss. 21, 22.
(22) *Haynes*, 12 Co. Rep. 113; 2 East. 652.
(23) *Ramadhin*, 25 A. 129.
(24) *Sharpe*, 7 Cox. 214; *Tristram*, [1896] 2 Q. B. 371.
(25) *Stephenson*, 13 Q. B. D. 331.
(1) *Lynn*, 1 R. R. 607; *Gilles*, R. & R. 366; *Ceendick*, Dowl. & Ry. 13; *Duffin*, R. & R. 365; *Feist*, 8 Cox. 18.
(2) *Edwards*, 13 Cox . 384.
(3) M. H. C. R. (App.) 30.

4079. Abandoned Property.—But there can be, obviously, no property in goods or things abandoned. So there can be no property in a bull set at large in accordance with the religious precepts of the Hindus enjoining the liberation of a bull at the performance of a *shradha* ceremony, though the former owner may continue to feed it. As Straight. J. referring to such bull, said: "It was not only not the subject of ownership by any person but the original owner had surrendered all his rights as its proprietor, and had given it its freedom to go whithersoever it chose; it was, therefore, *nullius proprietas*, and as incapable of larceny being committed in respect of it as if it had been *ferae naturae*."(4) Such was held to be the case where a bullock followed a cow and disappeared and the owner gave him up for lost. The bullock was afterwards found with the accused, who though acquitted of theft were nevertheless convicted of dishonest misappropriation under s. 403.(5)

Of course the question in such a case is one of fact which the Court has to determine having regard to the circumstances of each case, for because a bull has been set at large, it does not follow that the owner has relinquished his *proprietas* therein, and that it is, therefore, a fair game for any one to kill. The mere fact that it was allowed to be at large does not signify its abandonment, though it is certainly a material element to consider in judging of the question of possession, which has nevertheless to be decided upon other consideration, such as the persons who fed it and otherwise made themselves responsible for its up-keep and protection.(6) In one case four of the complainant's bullocks followed a cow and were lost in the jungle. The owner searched for them but they could not be found. But they were afterwards recovered from the accused's possession. He was convicted of theft, but on appeal his conviction was altered to one for dishonest misappropriation under s. 403 on the ground that the accused had not moved them from the possession of the owner.(7) But if some time had elapsed beween the loss and possession of the accused then he could not have been convicted even of criminal misappropriation.(8)

4080. The question whether a thing has been so absolutely abandoned as to have left in the owner no right depends upon his intention. The owner may, for instance, jettison valuable goods, to lighten his ship in an emergency, in which case he parts with their possession but not their ownership which still vests in him. So a wreck may be abandoned but not disowned. And the question in each case is, did the owner abandon absolutely or was it merely an abandonment from necessity with the intention of repossessing it as soon as a chance offered. In England, there is evidently presumption in favour of the

(4) *Bandhu*, 8 A. 51; *Nihal*, 9 A. 348; *Hiru Mondul*, 17 C. 852; *contra* in *Nalla*, 11 M. 145.

(5) *Nga Shwe Zan*, 10 Bur. L. T. 261, 38 I. C. 332; following *Nga Shwe Le*, 1 L. B. R. 123.

(6) *Nalla*, 11 M. 145. This is all that appears to have been decided in this case which is otherwise in no conflict with the other cases on the subject.

(7) *Nga Shwe Zan*, 38 I. C. (Bur.) 332; *Nga Shwe* Le, 1 L. B. R. 123.

(8) *R.* v. *Cooper*, 3 C. & K. 318 (six months), followed in *Mongaya Shah*, (1916) P. L. R. 62, 32 I. C. 660; *Tabu*, (1891) P. R. No. 15.

continued ownership, for theft from a wreck is punishable by the Larceny Act, 1861.(9)

Of other things, in which no person has any determinate property, such as treasure trove, waifs, etc., till seized, theft cannot be committed.(10)

4081. The eggs of tame birds may be the subject of theft if they were laid on the property of the owner, otherwise being incapable of identification they cannot be made the subject of theft. So it has been held that though there may be property in swans, there can be none in their eggs.(11) And since edible birds' nests are not in the possession of any body until they are collected a person who collects them without a license could not be convicted of theft, though his act without a license may be illegal.(12)

Property may be Valueless.

4082. The section only speaks of "moveable property" but not that it should be property of any value. This is the present English rule since the passing of the Larceny Act, 1861, which enacts:—

"S. 17. The term 'property' shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include, not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."(13)

4083. But though the property stolen need not be of any appreciable value, still it must have at least some value, otherwise it can scarcely be called property so as to be the subject of a civil right.(14) To such violations of civil right apply the maxim *mimine non curat lex*. The draftsmen intended such things to be exempted from the operation of this section by the application of section 95 "which will prevent the law of theft from being abused for the purpose of punishing those venial violations of the right of property which the commonsense of mankind readily distinguishes from crimes, such as the act of a traveller who tears a twig from a hedge, of a boy who takes stones from another's ground to throw at birds, of a servant who dips his pen in his master's ink."(15) But why only a servant? Any one committing these venial transgressions would be exempt from punishment, and nothing but the malice and vindictiveness of another could ever think of considering these acts otherwise than as done on sufferance. But, of course, the harm done thereby must be inconsiderable. It would not, for example, exempt the wanton and reckless damage done to one's property.(16)

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(9) 24 & 25 Vict., c. 96, s. 64, re-enacted from 7 & 8 Geo. IV, c. 29, s. 18; and 7 Will. IV & 1 Vict., c. 87, s. 8.

(10) 1 Hall, 510; 1 Hawk, c. 33, s. 24.

(11) 2 Russ (6th Ed.) 247.

(12) *Aw Su*, (1908), 4 L. B. R. 275.

(13) 20 & 21 Vict, c. 54, s. 17. This Statute also abolishes (by s. 2) the old distinction between grand and petty larceny, the latter being theft of property not exceeding the value of one shilling, theft of property in excess of that sum being termed grand larceny.

(14) *Morris*, 9 C. & P. 349; *Edwards*, 13 Cox. 384.

(15) Note *N*.

(16) *Moti*, 83 I. C. 893, (1925) S. 21; *Mahomed Khan*, 8 C. P. L. R. 15.

4084. Property must be in Possession.—But the fact that the property was moveable and of some value is only one element in the crime of theft. Its taking is not necessarily a theft unless it was taken "out of the possession of any person" which means another person.(17) This is an element of the crime in which this section presents a noticeable contrast with English Law. For while under that system the taking must be from the owner, or the owner's possession, the offence here is complete if it is taken out of the possession of any person. The term "person" here includes not only a natural person, that is a human being, but also an artificial person, such as a corporation. Such person must be in possession of the property at the time it is taken from him. Now what constitutes "possession" has been advisedly left undefined. But at the same time it is evident that the Legislature intended it to be used in its ordinary normal sense as denoting such lawful custody or control over a thing as entitles him to exercise some rights over it to the exclusion of others. Sir James Stephen, however, defines it thus: A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such, that he may be presumed to intend to do so in case of need."(18) But this is not the definition of possession but of ownership, and even as a definition of ownership it is defective.(19)

4085. Illustrations (*j*) and (*k*) show that the concept possession is here used in its largest sense, as implying any legal custody or control which a person may lawfully exercise over property. That such control must be lawful is self-evident, for the section does not protect the possession of a wrong-doer against whom the rightful owner has the right of private defence. Possession, to be entitled to protection must at least be of one who has an apparent title or even a colour of right,(20) but nothing less. In short, in order to make a person liable for theft, there must be evidence that the possession of another was not wholly illegal. This may be presumed in the case of a person who has been in open actual possession of his property for a length of time, which alone clothes him with a right against forcible eviction by one with no better title to it.

The prosecutor had cultivated some land belonging to Government contrary to the departmental rules of Government. He was, therefore, as against the Government a trespasser, but that alone did not entitle the accused who laid no claim to the land or its crops to forcibly remove the crops raised by the complainant, and such act being done dishonestly, was held to amount to the offence of theft.(21) It would seem that the possession necessary for this offence need not be actual. It will suffice if it is

(17) *Arfan Ali*, 44 C. 66: *Imam Bux*, 5 S. L. R. 130, 12 I. C. 987; *Annamalai*, (1914) M. W. N. 106, 22 I. C. 762.

(18) Dig. Cr. L., Art. 306.

(19) The reasons for this view will be found stated in the Author's Law of Transfer (5th Ed), Vol. I, Introduction, §§ 1-3.

(20) *Gangatam*, 9 B. 135; following *Virjivandas* v. *Mahomed Ali Khan*, 5 B., at p. 215; *Cape* v. *Scotts*, L. R. 9 Q. B. 269 (277), which was a case of one commoner distraining the cattle of another commoner and Archbald, J., on the page cited, held (following *Hall* v. *Harding*, 4 Burr. 2426), that "where there is a colour of right, a person believing himself aggrieved shall not take the law into his own hands." To the same effect, *Nga Chitu*, (1893) 1 U. B R. 232.

(21) *Bullava Gowd*, (1897) 1 Weir 420.

even symbolical. Where therefore certain buffaloes belonging to the accused had been attached but the accused was allowed to retain their custody, they were held guilty of theft for dishonestly transferring them to another.(22) But the case would, of course, be different, if after seizure it is released on the objection of the accused who forcibly removes it from its custodian.(23)

4086. Bona Fide Claim.—One thief cannot rob another, for though they may be both without rights, one has at least actual possession which the other has not, which entitles him to defend it against the hostile attack of another with no superior title to his own. Indeed, in a case of disputed claims, criminal law prefers one with actual physical possession, if there is no other case for preference. Two zemindars had a longstanding dispute about certain plots of land situate on the boundary line of the two zemindaris. It was found as a fact that the complainant had grown the crops which the accused cut, claiming the plots in an assertion of a *bona fide* claim to the land. And the question was whether the act of the accused amounted to theft, Stanley, J., held that there being a *bona fide* dispute as to the title to the land upon which the paddy was grown by the complainant and cut by the accused, the latter could not be convicted of theft, but as this view was not concurred in by Prinsep, J., the case was referred to a third Judge (Stevens, J.) who agreeing with Prinsep, J., held that there could be no *bona fide* belief that the accused was entitled to the crops which the complainant had sown upon land in his physical possession, and that his act, therefore, amounted to theft.(24) In this case it will be observed, two facts were clearly in favour of the complainant:—(*a*) that the land was in his actual possession, and (*b*) that he had raised the crops. His title was, no doubt, disputed by the accused, but his possession was not. If, for instance, the accused's case had been that he was as much in possession of the land as the complainant, and that he has as much sown the land as the former, then he could not have been convicted. Such a case arose in which the accused cut the crops found to have been raised by the complainant, but he was acquitted of theft because he pleaded that it had been raised by his uncle, and there were facts making his belief plausible.(25) It is in fact illustration (*p*):—

"(*p*) A, in good faith believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft."

4087. Such a case would be, moreover, covered by section 79. The question in cases of disputed titles then is not whether the accused took away the property under colour of a right, but whether it was taken under a *bona fide* claim of right even a mistaken notion of law.(1) This is a question of fact, and not of law, and in which the Court will be naturally guided in their findings by the circumstances of each case.(2) The fact

Claim must be Bona Fide.

(22) *Lallu Waghji*, 43 B. 550; *Chunnu*, 8 A. L. J. 656, 11 I. C. 142, 12 Cr. L. J. 374.

(23) *Lakshminarayana* 42 M. I. J. 490, (1922) A. I. R. (M.) 405.

(24) *Pandita* v. *Rahimulla*, 27 C. 501, following *Gangaram*, 9 B. 135; Bhagwat *Saran*, 14 A. L. J. 399, 35 I. C. 167.

(25) *Abdul Biswas* v. *Khater Mondul*, 4 C. W. N. 190.

(1) *Hamid Ali*, 52 C. 1015.

(2) *Farnborough*, (1895) 2 Q. B. 484; the question is one for the jury; *Srinivasalu*, 44 M. L. J. 138, 71 I. C. 798.

that the accused merely asserted his possession and pleaded having sown the crops would not be sufficient. There must be something more to make the claim *bona fide*.(3) It is sometimes said that where property is removed in the assertion of a contested claim of right, however ill-founded that claim may be, the removal does not constitute theft.(4) But this is the English Law which requires proof of felonious intent to constitute theft;(5) it is not the Indian law, and even as an English rule it rejects a mere pretension unless it was *bona fide;* and presumably there can be no *bona fide* claim if it was wholly ill-founded.(6) Such a claim might be asserted by anybody, even a thief. But it will confer on him no immunity, nor could law punish the owner for seizing goods of which he was found in possession. A *bona fide* claim may be altogether indefensible in law, but it is a claim which may, nevertheless, be honestly made by persons ignorant of their real rights.(7) So it was held that inability to prove prescriptive right to fish within certain limits free from payment of rent was quite distinct from the want of right of any kind to fish therein, rendering a person so fishing liable to be brought up for the theft of fish taken by him.(8)

4088. The assertion of a claim of right must be sufficient not merely to create a doubt, but a reasonable doubt that the property which is the subject of theft may not belong to or be in the possession of the complainant.(9) The fact that the accused had repeatedly and for a length of time asserted his claim to the property would be some evidence of *bona fides,* for it will then connect the taking with that claim. But the mere fact that a claim was boldly asserted and persisted in after it has received *quietus* from the Civil Court would not make it *bona fide.* On the other hand, such assertion would be evidence of defiance of the legal adjudication and a persistency which would be a circumstance of aggravation. A zemindar had a dispute with his tenant *A* about an orchard which was fought out and in which the accused was worsted. He then sued *B* for the same orchard and obtained a collusive decree in execution of which he obtained possession on the eve of the Civil Court holidays, and when the Civil Court was closed he sent his servants to cut down the trees. On these Pargiter, J., was for the conviction of the accused, while Woodroffe, J., was for acquittal. The case being then referred to the Chief Justice (Maclean, C.J.) the latter agreed with Woodroffe, J., that as *B* was the registered tenant, the zemindar was entitled to sue for his ejectment, and that in any case the servants did not participate in the dishonesty of

(3) *Nasib Chowdry* v. *Nannoo Chowdry,* 15 W. R. 47; *Rienno Singh* v. *Kali Churn Misser,* 16 W. R. 18; *Huris Chunder Das* v. *Bolai Audhicary,* 19 W. R. 75; *Madhu Hari,* 15 C. 300*n*; *Jagat Chandra Roy* v. *Rakhal Chandra Roy,* 4 C. W. N. 10; *Hari Bhuimali,* 6 C. W. N. 97; *Chaitan Charan* v. *Kalachand,* 10 C. W. N. 233*n*; *Dhirendra Mohan,* 14 C. W. N. 408; *Arfan Ali,* 44 C. 66; *Sadasiv Singh,* 1 Pat. L. W. 135, 39 I. C. 475; *Imam,* 38 I. C. 318; *Lakanaw,* (1916), 2 U. B. R. 124, 38 I. C. 739; *Udai Narain* v. *Ramanath,* 40 I. C. (C.) 732; *Bhagwat Saran,* 14 A. L. J. 399; *Lunidomal,* 9 S. L. R. 75, 30 I. C. 1003; *Hari Bapuji,* (1897) B. U. C. 920; *Algarasawmi,* 28 M. 304.

(4) *Bhicajee,* (1859) B. U. C. 22.

(5) *Thurborn,* 18 L. J. M. C. 140; *Guernsey,* 1 F. & F. 394.

(6) *Dhirendra Mohan,* 14 C. W. N. 408, 5 I. C. 794.

(7) *Arfan Ali,* 44 C. 66; *Lakanow,* 10 Bur L. T. 166, 381. C. 739.

(8) *Khetter Nath Dutt* v. *Indro Jalia,* 16 W. R. 78.

(9) *Nasib Chowdry* v. *Nannoo Chowdry,* 15 W. R. 47.

their master in carrying out his orders which they had no reason to believe to be illegal[10] (§ 4063).

4089. Right to Crops.—It is not theft for a person to cut down and appropriate the crops raised by him, though the title to them may have validly passed away to another. So where the complainant had been given possession of land with the standing crops, and the accused who had raised them cut and removed them in the *bona fide* belief that he was entitled to them. He was acquitted by the Magistrate who held that the accused had grown the crops prior to the delivery of possession, but the High Court naturally condemned this view holding that when in a title suit possesion of land is given the growing crops pass with the land. It then ordered a retrial with a direction that the accused should not be convicted of theft should it be found that though he may have made a mistake as to his rights under the law he was yet acting in the exercise of a *bona fide* claim of right.[11]

In another case the tenant's crops had been attached in execution of a money decree. They were afterwards distrained by the landlord for arrears of rent in consequence of which the tenant cut and removed the crops. The decree-holder prosecuted him for theft complaining that the distraint was collusive and made with intent to defeat his claim. The Court acquitted the tenant holding that if he cut the crops in the belief that they had been legally distrained he could not be convicted of theft, though the distraint may not have been legal and it had the effect of defeating the execution creditor.[12] Of course, the accused who has grown the crops, but against whom there is merely a decree for possession,[13] or an order is made under s. 145 of the Code of Criminal Procedure stands on much stronger ground.[14] So it is no theft where the tenant cuts down trees standing on his own holding *bona fide* believing that he is entitled to them though as a matter they might belong to the Zemindar.[15] So it is no theft to cut down one's crops where they are ordered to be delivered to another on payment of compensation which the latter failed to pay.[16] Of course, where trees are cut down out of spite merely to annoy the owner and with no thought of appropriating them, the offence might be mischief, but it is not theft.[17]

Mistaken Right.

4090. So a mistake of fact, as distinct from a mistake of law, is a good defence to this charge.[18] The accused was the brother of a ferry-contractor of a certain river. He seized a boat belonging to the complainant who ran a rival ferry with the intention of increasing his brother's income. He was convicted of theft, and his conviction was affirmed on the ground that he did not allege that the complainant had no right to ply the rival ferry, or that believing that he had no such right he had seized it.[19] Such, however, was the

(10) *Hari Bhuimal*, 9 C. W. N. 974; *Imam*, 38 I. C. (C.) 318.
(11) *Udai Narain* v. *Ramanath*, 40 I. C. (C.) 732; *Abinash Chandra*, 23 C. W. N. 385, 48 I. C. 678; *Vayalappya* 29 I. C. (M.) 90.
(12) *Ram Dyal*, 38 A. 40.
(13) *Kota Appadu*, 32 I. C. (M.). 673.
(14) *Sarju*, 32 I. C. (A.) 667.
(15) *Dori Lal*, 8 Cr. L. R. (A.) 275.
(16) *Jodha Singh*, 11 A. L. J. 270. 14 I. C. 752.
(17) *Kuttiah Odayotte*, 29 I. C. (M.) 672.
(18) S. 79.
(19) *Nagappa*, 15 B. 344.

case of the servants who being set on watch to catch poachers caught the complainant poaching on his master's fisheries, and upon which he seized his fishing net which he refused to deliver up either to the complainant or the police without his master's order.[20]

4091. Taking from Joint Possession.—The case would again, be different where the taker was in joint possession of the property he has removed. In that case, he could not be said to have moved it out of the possession of another person, for it lay as much in his possession as in the possession of another. But it must be joint possession, and not merely joint title. And even where there is joint possession, a conversion of joint possession into exclusive possession would be theft.[21] The accused held a cart jointly with his brother, which he sold off appropriating the sale proceeds to his own use. He was held to have committed theft and not criminal misappropriation.[22] So a co-parcener converting his co-parcenary possession of his interest in the family property into separate possession would be guilty of theft.[23] In this respect the law of this country is not different to the English Law under which there may be criminal conversion of partnership property so as to amount to theft. On this subject the English rule is now thus enacted:—

"S. 1. If any person, being a member of any co-partnerships, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities or other property, shall steal or embezzle any such money, goods or effects, bills, notes, securities or other property, of or belonging to any such co-partnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership or one of such beneficial owners."[24]

4092. The fact that the accused was jointly entitled to the property is then no defence to an accusation of theft, if he was not in exclusive possession thereof. In other words, the offence takes no note of the owner of a thing but protects its present possession. So in the Madras Presidency there prevails a tenure called *varam*, in which the tenants are given land on condition that they pay a share of the crops to the landlord in lieu of rent. Where, therefore, in such a tenure the tenant cut and harvested the crops reserving nothing for payment to the zeminder, they may be guilty of an offence under section 424, if their removal was dishonest or fraudulent, but they could not be convicted of theft because the crops being in their own possession one element of this offence was lacking.[25] In such a case, the result would have been, of course, different, if instead of a claim to the crops the lessor had been in joint possession of them.

The cash box of a friendly society containing about fifty pounds was left in charge of the landlord of the house where the society met. The prisoner, who was one of the members, broke into the landlord's house in the

(20) *Nabin Chunder Halder*, 1 W. R. 79.

(21) (1880) 1 Weir 408; *Ponurangam*, 10 M. 186.

(22) (1880) 1 Weir 408; *Ponurangam*, 10 M. 186.

(23) *Ponurangam*, 10 M. 186; *Kaka*, (1889) P. R. No. 12; *Debi Das*, (1881) A. W. N. 115; *contra* in *Phul Singh*, 10 A. L. J. 527.

(24) 31 & 32 Vict., c. 116, s. 1. Before this Statute joint tenants or tenants in common of a chattel could not be guilty of stealing such chattel from each other. —1 Hall, 616; 2 East, 558; *Willis*, R. & M. C. C. R. 375.

(25) *Subudhi Rantho* v. *Balarama*, 26 M. 481.

night time and stole the box. He was, jointly with the other members entitled to the money, but it was held that he was nevertheless guilty of burglary and theft because he removed it from the custody of the landlord who was answerable for it.[1] The same view was taken in another case in which the prisoner who was a member of a co-operative society was jointly interested in the money deposited with the prosecutor, by name Holt, in a shop in which the prisoner was at the time of the offence an assistant. He was indicted for larceny, and it was objected for him that as he was a joint owner of the money, he could not be convicted of theft but upon a case reserved it was held that as Holt was the sole manager, and was answerable for the safety of all the property and money coming into his possession in the course of such management, he was *quoad hoc* the owner of the property in question, and that the conviction was therefore right.[2]

4093. The prisoner was one of the managing members of the Committee appointed to manage the affairs of a co-operative store, which was in the direct charge of one Bancropt, a boy aged thirteen, who sold the goods, and each evening a treasurer, called to take the account of which Bancroft gave a duplicate. In consequence of suspicions against the prisoner, a member went with him and marked some money in the till of the store out of which the prisoner was proved to have abstracted some, and whereupon he was convicted for larceny, but it was objected for him that as he was in possession of the money he could not be convicted of theft but on a case reserved it was held that as Bancroft was in charge of the till, he was sufficiently possessed of the money to sustain the count.[3]

These cases would be similarly decided in this country, though to avoid any technical difficulty about possession, the Code contains provision for the conviction of the accused in the alternative.[4] In view of that provision such a case as the following would present no difficulty here. The prisoner was a member and Secretary of two sick clubs called, the Ram and Industry, which held their meetings at a tavern kept by Webster and to which the members contributed small sums entitling them to a small allowance during illness. Webster was a member and treasurer of both. He handed over to the prisoner two sums of money received on account of the two clubs for payment into the bank. The prisoner took the money and absconded, and it was held that as Webster had parted with possession of the money absolutely, the prisoner could not be convicted of larceny.[5] Of course, this was a clear case of criminal breach of trust, and would be so dealt with under the Code. And even in England, the anomaly has now been removed since the passing of the Statute of 1867.[6]

4094. Theft by Husband and Wife.—So there was still another anomaly of common law swept away by the Married Women's Property Act, 1882,[7] which carried the unity of the husband and wife to the extent that one could not be guilty of larceny for stealing goods from the possession of the other, because, it was said, that if the wife took goods of which the husband was the sole

(1) English Law.

(1) *Bramley*, R. & R. 478; *Wymer* 4 C. & P. 391.
(2) *Webster*, L. & C. C. C. 77.
(3) *Burgess*, 9 Cox. 302.
(4) S. 72.
(5) *Per* Keating J., in *Marsh*, 3 F. & F., 523.
(6) 31 & 32 Vict., c. 116, s. 1, cited *ante*.
(7) 45 & 46 Vict., c 75, s. 12.

or joint owner, the taking was not larceny, because they were in law one person, and the wife had a kind of interest in the goods.(8) And this doctrine often led to absurd results. For if the wife of a member of a friendly society stole money belonging to the society, lodged in a box in her husband's custody under the lock of the stewards of the society, the Judges held it not to be larceny, because of the property being laid in the husband.(9) Still worse were cases in which a stranger and the wife jointly stole the husband's property. So if the stranger carry away both his goods as well as his wife, the latter could not be convicted of theft nor the former of receiving stolen property because the husband and the wife were one person in the eye of the law.(10) But this was probably too palpable an absurdity to which the common law doctrine inevitably led, and the Judges were, therefore, in several cases constrained to convict the stranger if he had carried off not only the goods but the wife as well, but the reasons assigned for the view would not bear close scrutiny.(11)

The Act of 1882 has somewhat corrected the vagaries of this common law by enabling the husband to prosecute his wife for any offence against his property if she is living apart; but if they are living together he can only prosecute her if she wrongfully takes any of his property when leaving or deserting or about to leave or desert him(12) and the husband's liability in respect of the goods of his wife is also similar. As to the possession of the wife being that of the husband *see* s. 27. It will be seen that that section postulates that the wife is in possession *on account* of the husband. Where the two were living apart her possession could not be deemed to be on his account.(13) But where the accused's sister was found wearing certain jewels 12 days after the theft, and the accused and his sister were living in the same house, the Court on appeal declined to disturb the verdict of the jury on the accused for theft.(14)

(2) Hindu Law.

4095. In this respect the Indian law has been always divergent. For though the wife is regarded by the Hindu scriptures as the better half of man, law never acceded to the doctrine that the husband and wife were one person for all purposes. Consequently there was no obstacle to the conviction of the husband or the wife for committing theft of the property of the other(15) their liability being in each case determined by reference to the general law. The only questions that may present some difficulty in such a case then are whether the property removed by the husband or the wife was in the possession of the other and whether it was removed dishonestly. The Hindu wife in India, apart from any legislative enactment, has always been qualified to acquire and possess her own separate property called *stridhan*, and which she is at liberty to take with her without incurring the risk of being con-

(8) 1 Hawk., c. 33, s. 19.
(9) *Willis*, 1 Moo. C. C. 375.
(10) *Kenny*, 2 Q. B. D. 307.
(11) In *Featherstone*, 23 L. J. M. C. 127; the reason given was that the wife had removed the property without the authority of her husband; *Taylor*, 12 Cox. 627, because the male prisoner had taken an active part in the stealing. Other cases to the same effect are: *Clerk*, 1 Moo. C. C. 379-n; *Tolfree*, 1 Moondy, C. C. 243; *Thompson*, 1 Den. C. C. 549; *Tollett*, C. & Moo. 112; *Mutters*, 34 L. J. M. C. 54; *Fitch*, 26 L. J. M. C. 169; *Prince*, 11 Cox. 145.
(12) 45 & 46 Vict., c. 75, ss. 12, 16.
(13) *Dustoo Gulam*, 10 M. L. T. 237, 12 I. C. 525, 12 Cr. L. J. 549.
(14) *Lal Singh*, 9 M. L. T. 291, 9 I. C. 288, 12 Cr. L. J. 48.
(15) *Buchi*, 17 M. 401.

demned for theft.[16] The proposition that everything acquired by the wife during coverture becomes the property of her husband has no foundation in Hindu Law.[17]

(3) Muhammadan Law.

4096. And the same rule applies equally to Mahomedans; so the wife may be convicted of theft or abetment of theft in respect of the property of her husband,[18] or *vice versa.*

4097. Theft by Owner of his Own Property.—Again, paradoxical though it may appear, there is nothing in law against the owner being held guilty of theft in respect of his own goods. This will be manifest if regard is had to the fact that as theft is an offence against possession, ownership of the property is no defence to it. And so even in England where regard is had only to ownership, possession is defended on the ground of " special property " supposed to be in the possessor against which the owner cannot assert the right of dispossession. This will be evident from the wording of the section which punishes one who dishonestly removes goods *out of the possession* of another, so that a person in possession may justly charge the owner with theft of property, if it was removed by him dishonestly and without his consent. As Lord Hale put it: "A delivers goods to B to keep for him, and then steals them, with intent to charge B with the value of them; this would be felony in A. So if A having delivered money to his servant to carry to some distant place, disguises himself and robs the servant on the road, with intent to charge him, this, I doubt not, would be robbery in A."[19] For in these cases the money and goods were taken from those who had a special property in them with a wicked fraudulent intention; which is the ancient known definition of larceny: *Fraudulenta obstrectatio rei alienae invite domino.*[20]

In England *nux vomica* carried for exportation was exempt from duty, which is otherwise dutiable at two shillings and sixpence per pound. The accused had a quantity of it and which he wanted to retain duty-free. He, therefore, booked it for exportation, and the shippers gave a bond to the Crown for its exportation, after which it was being sent by their lighter to the ship and while being so taken the accused abstracted it, substituting in its place cinders and rubbish. He was charged for larceny of his *nux vomica* from the possession of the shippers, and on a case reserved seven Judges held it to be larceny on the ground that the shippers had the right to possession until the goods reached the ship, and had an interest in that possession, and that the intent to deprive them of that possession wrongfully and against their will, was a felonious intent as against them; because it exposed them to a suit upon their bond, and that even if there had been no intent against them, the intent to cheat the Crown was in the opinion of most of the majority of Judges sufficient to make it a larceny.[21] This view was, however, not acceded to by the minority of four Judges who held that the prisoner could not be indicted for larceny as he had no intention to cheat the shippers, but to cheat the Crown. In India the accused would be liable in either case.

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(16) *Natha Kalyan,* 8 B. H. C. R. 11
(17) *Ramasami* v. *Virasami,* 3 M. H. C. R. 272.
(18) *Khatabai,* 6 B. H. C. R. 9.
(19) 1 Hale, 513; Stanf., 26 *A;* 3 Inst 110.
(20) *McDaniel,* 19 St Tr. 746 (800).
(21) *Wilkinson,* R. & R. 470.

4098. The fact that a person may be guilty of the theft of his own property is recognized in illustrations (*j*) and (*k*) of this section. They are, however, only two out of the many cases by which the same rule may be illustrated. But they all depend upon the principle, that though the goods belong to the accused they were at the time of taking in lawful possession of another. Such possession may arise, either under contract, express or implied, or the obligation of law, or partly under one and partly under the other. If, for instance, the owner pawns his goods to another, he undertakes that the pawnee shall have possession of them until they are redeemed. His dishonest removal of them from his possession would then be theft, and it is no defence that the goods still with the pledgee were sufficient to cover his loan.(22) So if a person's property be attached and taken possession of by the bailiff, his removal of it from his possession or from that of another to whom it has been entrusted for safe custody would be theft or robbery if the necessary violence is used.(23) So a person may lose temporary possession of his property, as by its seizure by the police. The latter then acquire possession of it, so that the owner's removal of it from their custody may constitute theft, if it was done dishonestly.(24) So a person may remove his own goods from the station yard retaining their receipt with intent to claim them or their value.(25)

This term has been already explained (§§ 4061-4062). Its meaning in the Code is at variance with its popular significance. But upon its exact application depends the one element of criminality which suffices to convert an innocent act into a crime. This term requires that the act should be done with the intention of causing wrongful gain to one person or wrongful loss to another person,(1) and nothing is wrongful which is not done by unlawful means, so that "dishonestly" implies: (*a*) the adoption of the unlawful means, (*b*) to cause gain or loss to which a person is not legally entitled, and (*c*) the intention of adopting those means and of causing such gain or loss. The fact that an act is illegal does not make it necessarily dishonest unless it was associated with a certain gain or loss and the necessary intention. In cases of joint possession, and of recovery of possession by the owner, these points have to be specially emphasised, for in them the act of the accused would be more readily construed to be inspired by the intention of the recovery of property which the accused believes to be his own rather than that the intentional adoption of unlawful means to secure gain to which the person is not legally entitled.

4099. Of course, there can be no theft if the possession of the person from whom the owner took the property was not legal. The taking of possession by the owner would be then in the exercise of the right of recapture(2) Such was the case of the accused who forcibly seized his kettle which he had given to the complainant for repairs who declined to deliver it to him till his charges were paid. It was held that since the complainant had no lien over the kettle under s. 120 of the Contract Act, the accused was right in seizing his property wrongly detained by the com-

(22) *Kartikeshwar*, 76 I. C. (C) 654; (1923) A. I. R. Cal. 594.
(23) (1880) 1 Weir 419; *Lal Behari*, 86 I. C. 669; (1925) C. 464.
(24) *Sheikh Husan*, (1887) B. U. C. 343; the definition of "dishonesty" given in this case is obviously incorrect.
(25) *Abdul Karim*, 14 A. L. J. 417, 36 I. C. 148.
(1) S. 24.
(2) S. 105, Comm.

plainant.[3] So where the accused's cattle were illegally distrained, he could not be convicted of theft for retaking them.[4] So again, even if the seizure of the accused's property be lawful, it does not necessarily follow that the accused's act in retaking it is necessarily unlawful. It all depends upon circumstances. The crops of the accused were attached for arrears of revenue; when they became ripe the accused reaped them and stocked them on a threshing floor forming part of the same land. He was prosecuted for theft, but in view of the fact that the crops had been stacked on the holding the Court accepted the statement of the accused that they had been cut to prevent damage and he was consequently acquitted.[5] In this case it was taken for granted that the attachment necessarily vested possession in the attaching officer.

4100. In another case the Court even expressly so held.[6] Both these were cases of attachment by distraint made by the Revenue Courts, and it may be that the law of distress has the effect of divesting the owner of legal possession in his property with the attachment. But this is certainly not the effect of an attachment by a Civil Court[7] which merely prohibits a transfer by the judgment-debtor, and the transferee from taking any benefit from such transfer or charge. Under the old Code such transfer was void as against the claim of the decree-holder arising under the attachment. The effect of the attachment now is to pass no interest whatever to the transferee, instead of the qualified interest which passed under the old Code, but nevertheless it does not divest the owner of his property or possession, and so long as there is merely attachment, he commits no theft by doing in respect of acts incidental to ownership, save only those covered by the stop-order. And even if he transfers his property in spite of the order, it may be that he conveys no title to the transferee, but he does not then commit theft, though, in that case, he may possibly be guilty of an offence under section 424 of the Code. But for this it must be shown that the person transferring is the person against whom the attachment was made. For an attachment, or indeed any order or decree of the Court cannot affect persons not parties nor prives to it, and they could not, therefore, be proceeded against for acts done in defiance of the Court's precept. So if the Court passed a possessory decree against A and delivered symbolical possession to the decree-holder, and A's brother B who was in actual possession cut the crops which he had raised on the field, he could not be convicted of theft for disturbing the decree-holder whose symbolical possession could bind only the party to the suit.[8]

4101. Possession of Another Necessary.—This emphasises the necessity of establishing possession. Now the term "possession does not necessarily mean actual physical custody or control; since a person is as much in possession of goods which he has under his lock and key as those which are within his sight and hearing. And as has been elsewhere explained when property is in the possession of a person's wife, clerk or servant, casual or permanent, on account of that person, it is in that person's possession within the meaning of the

(3) *Judah*, 29 C. W. N. 1011, 90 I. C. 289.
(4) *Yagamwithi*, (1882) 1 Weir 422 (423).
(5) *Periyannan*, (1883) 1 Weir 423
(6) *Dadala*, (1881) 1 Weir 426.
(7) Or. XXI, 54, C. P. C.; Gour's Law of Transfer (5th Ed.), Vol. I, §§ 933-936; *Obayya*, 22 M. 151.
(8) *Sheikh Husan*, (1896) B. U. C. 866.

Code.[9] So where the owner turns out his animals to graze in the open, they do not cease to be his property, and the removal of them is consequently theft and not criminal misappropriation.[10] But if in such a case some of the animals go astray and are lost, then the finder misappropriating them would be guilty of criminal misappropriation and not theft.[11] But the mere fact that the cattle are let loose with a view to their going to drink water at a river,[12] or for browsing, and no one is in charge does not make them any the less in his possession, because they happen to be out of his immediate control. The complainant washed a carpet at the village tank and hung it up there to dry, whereupon the accused took it away dishonestly. His offence was held to be theft and not criminal misappropriation.[13]

4102. Possession may then be actual or constructive, and so may be the taking. For instance, suppose a person personating a railway passenger orders the porter to bring to him certain property from a carriage which he does, the taking of it by the porter would be taking by him and for which he alone would be liable, supposing that the porter was innocent: *Qui facit per alium fact per se.* But it cannot be generally predicated of all taking that he who orders another to take is invariably guilty of taking, for it depends upon the degree of his complicity in the crime. A person may employ another to do an obviously illegal act, as to forcibly seize the property of a person, in which case both would be liable, but whether they are both liable as principals, or whether one is liable as a principal and the other as an abettor depends upon the degree of their respective contribution to the crime. So where it was found that theft was actually committed by certain members of an unlawful assembly, but it was not found that the accused himself committed it by removing any property, or that he had made any preparation for committing it, or aiding any one in the commission of it, it was held that he could not be convicted of theft under section 379 read with section 114.[14] So while the mere illegal seizure of cattle and taking them to the pound is not theft,[15] still, where the accused loosed the complainant's cattle at night from a cattle-pen and drove them to the cattle-pound with the object of sharing with the pound-keeper the pound-fee, the act was held to be theft.[16] The only reason why the offence was not theft in the one case while it was theft in the other case is that the mode of possession in the two cases was different, though the intention in both cases may be similar.

4103. Taking must be Without Consent.—Another ingredient of this offence is that the intention to take dishonestly must be without the consent of the person in possession. Now consent like possession may be express or implied, and either is sufficient for the present purpose. But there must be consent, though it may have been obtained by fraud. But a consent given by a person under twelve years of age, or by one

(9) S. 27.
(10) *Karsan Babu*, 4 Bom. L. R. 626.
(11) *Lakshmya*, (1878) B. U. C. 136.
(12) *Ib.*
(13) *Mathi*, (1886) B. U. C. 314.
(14) *Hansa Pathak* v. *Banshilal Das*, 8 C. W. N. 519.
(15) *Jhuman Lal*, 10 C. W. N. 228 (*n*).
(16) *Paryag Rai* v. *Arju Mian*, 22 C. 139.

under fear or a misconception of fact, or who is unable to understand its nature and consequence by reason of his intoxication or unsoundness of mind is no consent at all.[17] But except these cases elsewhere considered consent to a removal is a sufficient defence to this offence, though it does not negative all criminality. In England, where larceny embraces other crimes here dealt with as cheating, criminal misappropriation or criminal breach of trust, the fact of consent exculpates the accused to an extent which it is not possible under the Code. For instance, where the defendant bought a horse at a fair, of the owner to whom he was known, and having mounted the horse, said to the owner that he would return immediately and pay him, to which the latter said "very well," and rode the horse away and never returned, it was held to be no larceny, because both the property as well as the possession had been parted with.[18] The defendant sent a messenger for a hat from a hatter in the name of one of his customers, and the hatter delivered it to the messenger believing him to have come from his customer, it was held that there was no larceny as the hatter had willingly parted with the goods.[19] Other cases of goods and money obtained in the name of another have been similarly decided.[20] So it has even been held that where the prosecutor was inveigled by a set of sharpers to bet with them, and, by a preconcerted trick, one of them won from him the money in question, which he paid, imagining it to have been won fairly, it was held to be no larceny because the money had been parted with willingly.[21]

4104. The same view would be undoubtedly taken of these cases under the old Code, but then the offenders would not escape without punishment, for the offence of cheating exactly meet their case. There is then this difference between cheating and theft, that while property is taken in the one case without consent, it is taken in the other with consent, but which is obtained by imposition and fraud. Offences in which there is this form of consent will, therefore, have to be dealt with under the head of cheating. Eliminating them from the present discussion, there then remain cases in which there is either no consent or the consent given is no consent in law (§§ 859-868). Adverting first to the former, consent may be either express or implied, and may be either given by the person himself or by some one on his behalf. This is fifth explanation, and it is illustrated by examples (*m*) and (*n*). In England larceny is said to be the taking *invito domino*, or without the will or approbation of the owner. The owner, as such, has no recognized status in the offence of theft under the Code. It is the party in possession who takes his place, and it is with reference to him that the offence may be committed, and is defined. The possessor may be the owner, in which case his consent would naturally convey a title which cannot afterwards be attacked; but if he is not the owner, consent of the person in possession suffices to negative criminality under this section. So where A sought the assistance of B for the purpose of rob-

(17) S. 90.
(18) *Harvey*, 1 Leach 467.
(19) *Adams*, R. & R. 225.
(20) *Coleman*, 2 East P. C. 672; *Atkinson*, 2 East P. C. 673; *Thomas*, 9 C. & P. 741.
(21) *Nicholson*, 2 Leach, 610.

bing B's master C, and B assisted A with the consent of C in order to apprehend and bring A to justice, it was held that the removal of C's property with the consent of B and concurrence of C took the act out of the category of this crime.(22) The principle of this has been already examined.

4105. Where the owner is in possession and gives consent, the question presents no difficulties, for it is then a question of fact whether what he did had or had not the effect of consent, and for which purpose the question will have to be decided in the light of the principle enunciated in section 90. That section speaks of consent given under a misconception of fact (§§ 859-861). But that phrase should not be understood to comprise cases where a person consents through an error of judgment or misconception of facts arising from an ignorance of law. The accused was the creditor of the prosecutor who delivered him certain property in discharge of the debt. He afterwards discovered that the debt had then become time barred, whereupon he prosecuted the creditor for theft and he was even convicted, but on revision the Court quashed his conviction, holding that, as the consent was full and free to the delivery of the property, the subsequent knowledge of the debtor that he could have evaded the settlement would not convert a free consent into one given under a misconception of facts.(23) Really speaking, this was no case of a misconception of fact at all Limitation bars the remedy but the debt remains, and the fact that the debtor chose to pay it in ignorance of the law could not be construed to be payment under a misconception of fact (§ 860).

4106. Consent by Agent.—The question of consent presents some difficulty if it is a consent given by another, in which case the question is not merely, as stated in the fifth explanation, that it should have been given by the person in possession, but whether it was within the scope of his authority. This is assumed in illustration (*o*), which has been evidently framed in view of the numerous similar cases decided in England. The consent must then be one not only by a person in possession, but by one who is also duly authorized to give it. Suppose, for example, the master leaves his house in charge of a caretaker, who is unquestionably in possession of it during the absence of his master. Could he let in thieves to steal his master's property? The question of authority is therefore paramount.(24) If the property was in charge of the servant, say cattle in charge of the agister, the consent of the latter to their taking would not suffice to neutralize the offence.(25) If, however, the servant had authority, express or implied, to part with the goods, his consent would be sufficient to take the offence out of this section. The accused went to a pawnbroker to exchange his pawned goods, and delivered to his servant, who had a general authority to act for his master in the business, a parcel which the prisoner assured him contained diamonds. He deli-

Explanation 5.

(22) *Troylukho Nath Chowdhry*, 4 C. 366; following *Dolan*, 1 Cox. 449; *Hancock*, 14 Cox. 119, cited in the reference.

(23) *Piari Dulaiya*, 1 A. L. J. R. 508.

(24) See *per Blackburn*, J., in *Prince*, L. R. 1 C. C. 155.

(25) *Troyluckho Nath Chowdhry*, 4 C. 366; *contra* in *Egginton*, 2 Leach, 913, 5 R. R. 689.

vered the goods first pledged, but the parcel delivered was found to contain stones of no value. It was held that the accused could not be convicted of larceny.(1) And so he could not be here, though he would undoubtedly be of cheating.

4107. But the fact that the consent of the servant suffices to counteract criminality is because such consent carries with it the presumption of consent by the master. If, therefore, the servant having authority to consent uses it to defraud his master, such consent would not avail the other if he was aware of the purpose for which it was given. In other words, where the servant has plenary powers, his consent would exculpate the accused not only because he took the property with consent, but also because that consent carried with it the implied authority of the owner; but if he took it with due consent, well knowing that the consenting party was intent on defrauding his master, he renders himself a privy to the fraud, and his taking them is not with such consent as will exonerate him from his liability. The accused, a timber contractor, had removed a quantity of Government timber with the consent of the Forest Inspector who was in possession of it for Government and who was authorized to permit its removal on payment of a fee. It was held that inasmuch as the accused had conspired with the Inspector to defraud Government, the removal of the wood was theft.(2) But no reasons are given for this view which may be supported on the short ground that the Inspector had only limited authority to permit removal on payment of a fee, and that his permission to removal without such payment by the accused was a consent wholly beyond the Inspector's authority, and therefore it was no consent at all.

4108. Moving Necessary.—Another essential ingredient of the offence is " moving " or asportation which is necessary both under this section as well as under English Law. But for moving the property, the offence of theft is not completed, though it may still be an attempt. Such a case may be supposed of a person putting his hand into another's pocket intending to rob him, but the pocket is empty. In such case it was at one time held that there could be no larceny, or an attempt, as there was and could be no asportation.(3) But this view has since been overruled, the Court holding that in such a case the accused might be convicted of an attempt, even when, if no interruption had taken place, he could not have committed the complete offence.(4)

Explanations 2, 3, 4.

4109. Now as regards moving, the section does not require that the thing stolen should be moved to any place or to any extent, or indeed that it should have been permanently displaced. In this respect the rule would then be the same as in England where the bare removing of the thing taken from the place where it was before suffices to cons-

(1) *Jackson*, 1 Mood. 119; *Barnes*, 20 L. J. M. C. 34; *Essex*, 27 L. J. M. C. 73.
(2) *Hanmanta*, 1 B. 610.
(3) *Collins*, L. R. 1 C. C. 54; overruled in *Brown*, 24 Q. B. D. 357.
(4) *Brown*, 24 Q. B. D. 357; *Ring*, 6 L. J. M. C. 116; cf. *Duckworth*, (1892) 2 Q. B. 83 (attempt to discharge an empty revolver); *Williams*, (1893) Q. B. 320 (case of attempted rape, where rape could not be committed); *see*, as to what is sufficient to constitute an attempt, s. 511, *post*.

titute asportation, though it be not carried away.(5) So Blackstone wrote: "There must not only be a taking, but a *carrying away*: *Cepit et asportavit* was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the act; or if a guest, stealing goods out of an inn, has removed them from his chamber downstairs; these have been adjudged sufficient carrying away to constitute larceny. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it: this is larceny."(6)

And so if the thief remove the goods even an inch from the place where they lay, the offence would be complete though he may then leave them alone.(7) Such was held to be the case of the accused who had cut the strings which joined the ends of a *hasli* and forced the ends thereof slightly apart which was held to constitute sufficient "moving" within the meaning of this section.(8) But the moving must be of the property intended to be stolen. If other property is moved to make way to get it, it will not be asportation of the property, which alone is necessary. So where the prisoner had cut open a package within which were the linen sheets he intended to steal, but which he did not touch, it was held to be insufficient to sustain a conviction for larceny.(9) But this case was evidently decided on the view that the party accused must not only move the goods, but must for the instant at least, have the entire and absolute possession of them. But this is not required under this section. And it is apprehended that the ripping open of the package in the last case would probably be considered sufficient to constitute "moving" in view of Explanation 3.(10)

4110. But since there must be "moving," evidence of it must be formally tendered, and it must be clear and cogent. This is all the more necessary in view of the fact that the Code comprises a large number of cases which would be excluded from the offence in England as savouring of the reality. For instance, while there may be theft of almost anything that can be moved in this country, whether it be a house, a tree or growing crops, still there must be evidence of detachment which is essential to the crime. So while a person may sell trees to another and the sale may be dishonest, but neither the seller nor the purchaser can be convicted of theft if the trees sold were not cut down.(11) This is explanation 1. So while standing crops remain on the land and are not severed thereform, a hostile act of the accused by which the person in possession is prevented from approaching them is not theft whatever other offence it might be. But as soon as a single blade is detached from the ground, the offence is converted into theft, for there is then the "moving" required to complete it. In fact the mere cutting of the crop is moving it, and as soon as it is severed from the ground, it is not only

(5) 3 Inst. 108; 1 Hawk, P. C. C. 33, s. 25; 2 East, P. C. 555; *Bisakhi*, (1917) P. R. No. 29, 41 I. C. 987.
(6) 1 Hawk P. C. 93.
(7) *Costlet's case*, 1 Leach, 236.
(8) *Bisarkhi*, (1917) P. R. No. 29.
(9) *Cherry's case*, 2 East, P. C. 556.
(10) *Nga Po Hle*, (1886) S. J. L. B. 399.
(11) *Balos*, (1882) 1 Weir, 419.

cut but also moved, though it may be left in the place where it was cut. This is Explanation 2,[12] from which it is clear that the mere fact of moving suffices to complete the offence, even though the offender may intend to replace it.[13]

4111. But since the moving must be with intent to take it dishonestly, the fact of moving must be connected with that intention: otherwise there may be moving but no theft. If suppose a person were, under a mistake that the field was his, to cut down the crops standing thereon, and then discovering his mistake leave them alone, and afterwards he were to form dishonest intention of stealing them, his previous asportation would not suffice to convert his subsequent dishonesty into theft.

Explanation 3.

4112. The third explanation refers to a case where an animal is secured by opening the stable door or unfastening its tether. So a thing may be separated from any other thing and not actually moved, but still it would be moving it for the present purpose such, for example, was the case of the postal sorter who secreted two bearing letters with the intention of handing them to the delivery peon so as to misappropriate the bearing charges due there on. He was held guilty of theft and fraudulent misappropriation.[14]

Explanation 4.

4113. Explanation 4 furnishes another instance of moving a thing without touching it, and of which illustration (*b*) is an example. Illustration (*c*) presents another case of *moving* the thing intended to be stolen by moving the animal upon which it is carried. Both the illustration as well as the explanation would not, however, apply to the moving of anything other than an animal. For instance suppose that a railway waggon is intended to be robbed of certain of its contents. It is then shunted off to a siding for that purpose. Would that be moving of the contents intended to be stolen? and if so would the offence be complete as soon as the waggon is set in motion? The case is scarcely covered by any of the explanations, and it cannot be included in the description of moving in the section.

Explanation 5.

4114. See *ante*, §§ 4106, 4107.

Any Mag. Cognizable. Warrant. Not bail. Not Comp. Summary if property not exceeding Rs. 50.

379. Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for theft.

[*Theft*—s. 378.]

Synopsis.

(1) *Analogous Law* (4115).
(2) *Procedure and Practice* (4116-4125).
(3) *Punishment* (4121).
(4) *Restoration of Stolen Property* (4122-4124).

(12) 5 M. H. C. R. (App.) 36; *Samsuddin*, 2 Bom. L. R. 752.

(13) *Vallabhram*, 27 Bom. L. R. 1391; *Radha Kishen*, 86 I. C. 671, (1925) L. 327.

(14) *Venkatasami*, 14 M. 229.

(5) *Fine Optional* (4125).
(6) *Proof* (4126-4127).
(7) *Charge* (4128-4129).
(8) *Evidence of Theft* (4130.)
(9) *Intention to Take Dishonestly* (4131).
(10) *Civil Dispute* (4132).
(11) *Land Lord and Tenant* (4133).
(12) *Legal Presumption from Possession* (4134-4144).
(13) *Proof of Previous Theft* (4135).
(14) *Identification* (4136).
(15) *Possession must be Recent* (4137-4138).
(16) *Adverse Presumption from Unsatisfactory Explanation* (4139-4141).
(17) *Possession must be Exclusive* (4142-4143).
(18) *Other Circumstantial Evidence* (4144).
(19) *Theft to earn Reward for Discovery* (4145).
(20) *Theft and Mischief* (4146).

4115. Analogous Law.—This section merely provides punishment for the offence defined in the last section. It provides punishment for what may be called simple theft, that is to say, when the offence is theft, and it is not aggravated by the presence of other circumstances, for which the Code has provided other penalties. Thus the next three sections deal with the same offence committed under what law regards circumstances of aggravation. Other offences such as robbery and dacoity are also species of theft but they are offences *sui generis* on account of their own peculiar gravity.

4116. Procedure and Practice.—This offence is cognizable, and warrant, should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable by any Magistrate, and summarily if the property stolen does not exceed Rs. 50 in value.(15)

4117. There are several points of practice calling for notice under this section. In the first place though the offence is in certain cases triable summarily, that procedure should never be adopted unless the property to which the offence relates was admittedly or clearly in the possession of the prosecutor. Cases involving the trial of complicated issues should never be disposed of summarily—indeed, summary trial was only intended to shorten the procedure where the ordinary procedure would be only waste of time. But it would be clearly, an abuse of procedure to apply it to offences of a technical character, or where the accused is a man of respectability or claims the property as his own or where there is any contest as to the essential ingredients which constitute the offence.

Joint Trial.

4118. The joint trial of two or more persons concerned in the commission of the same offence, or of one person committing two or more offences, depends upon the provisions of the Procedure Code, which enacts that if "more persons than one are accused of the same offence, or of different offences committed in the same transaction, or when one person is accused of committing any offence and another of abetment of, or attempt to, com-

(15) S. 260 (*d*), Cr. P. C.

mit such offence, they may be charged and tried together or separately, as the Court thinks fit."[16] So if "A and B are both charged with a theft, and B is charged with two other thefts committed by him in the course of the same transaction, A and B may both be tried together on a charge, charging both with the one theft, and B alone with the two other thefts."[17] But if A commit theft and make over the stolen property to B, could the thief and the receiver be jointly tried? The answer depends upon the meaning to be assigned to the phrase "different offences committed in the same transaction."

Now it cannot be said that the disposal of stolen goods is necessarily a part of the same transaction as theft, and if there is evidence of a community of purpose or a pre-arrangement, the receiver is then an abettor of theft, and not merely a receiver of stolen property. He may then be jointly tried for abetment, but he could not be punished for receiving stolen property.[18] It has accordingly been held that the receiver and the thief cannot be jointly tried,[19] and their joint trial is not merely an irregularity but an illegality sufficient to vitiate the whole trial. But in Calcutta the joint trial of the two though held to be improper, has been held to be a mere irregularity.[20] But it is submitted that it is more than an irregularity, as it materially prejudices the accused. For one thing, the joint trial starts with a prejudice against the receiver that he was concerned in the same transaction with the thief.

4119. As regards the legality of the trial of one person for two or more offences the question must be answered with reference to the provisions of section 235 which enables the Court to try an accused for no more than three such offences[21] committed in one series of acts so connected together as to form the same transaction.[22] A charge in the alternative is not a trial for two or more offences, so that a person may, for the same act, be charged of theft, cheating or criminal breach of trust, or he may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or indeed, any other possible offences, irrespective of their number,[23] and he may be convicted for one or more of them in the alternative as the case may be.[24]

4120. A person cannot be tried for as many thefts as the articles he has stolen, or the persons he has robbed. If a thief break into a house, and carry off goods belonging to several persons, he could not be said to have committed as many thefts as there are the owners of the property he has stolen.[25] The correct rule in such cases appears to be

(16) S. 239, Cr. P. C.
(17) *Ib.*, ill. (*c*).
(18) *Sita Ram Rai*, 3 A. 181.
(19) *Bishnu Banvar*, 1 C. W. N. 35; *Nathalal Bapuji*, 4 Bom. L. R. 433: *Wasanji Dayal* 6 Bom. L. R. 725. But in *Balabhai*, 6 Bom. L. R. 517, it was stated to be the practice to try the two offenders together, *ib.* 518. The change of practice was there admitted to be due to the case of *Subrahmania*, 25 M. 61 P. C., in which their lordships made some caustic reference to a Calcutta case in which an illegality was held to be a condonable irregularity. It was a case of multifariousness.
(20) *Abdur Rahman*, 27 C. 839 (F. B.); *Kali Prosad Mahisal*, 27 C. 7; *Karukalal* v. *Ram Charan Pal*, 28 C. 10.
(21) S. 234, Cr. P. C.
(22) *Ib.*, s. 235.
(23) *Ib.*, s. 236.
(24) *Ib.*, s. 237.
(25) *Sheikh Moneea*, 11 W. R. 38; *Krishna Shaji*, (1897) B. U. C. 927; *Har Dial*, (1805) P. L. R. 503.

that if the property, which it was the thief's intention (as shown by the circumstances, or by his admission) to take consisted of a number of contiguous articles, which were reached by one and the same act of trespass, or which were the subject of a single enterprise, the moving of each article, in the course of removal of the whole bulk of property cannot ordinarily be considered to be a distinct theft. The thieving project in such a case was single, although it may have been achieved in detail; and the fact that the spoil taken consisted of several things, whether belonging to the same or to different owners, does not necessarily break up the unity of the transaction. If, on the other hand, the property taken consisted of a number of articles so distinctly or diversely situated as to require a dishonest act of trespass or a distinct enterprise for the removal of each, the transaction must, ordinarily, be held to have been not single but complex, and its achievement to have involved the commission of more than one separate theft. The following examples will make the distinction clear:—

(*a*) A thief enters a house and removes one by one all the articles of value which he finds there. As all the property is got at by one and the same act of trespass, the theft is single, although some of the articles may have belonged to friends of the owner of the house, or the house broken into is a railway godown in which he knows that the articles have necessarily different owners.

(*b*) A thief goes to a threshing floor, where the grain of four cultivators is stored, and steals a little from every heap. Here the act being single the offence is also one, unless it is shown that his plan included stealing goods of the several owners, in which case the offences will be different.

(*c*) A cattle-lifter drives off a herd of six heads belonging to several owners in charge of the same cowherd. Here the act being single, the offence is one, though he has despoiled six owners.

(*d*) A picks the pockets of three persons in a bazaar. Each offence is distinct, as it is the result of a distinct enterprise.[1]

Punishment.

4121. To the punishment here prescribed the Whipping Act provides the sentence of whipping which may be inflicted in lieu of the other sentence, but not in addition thereto.[2] The measure of sentence is not only the offence committed, but the property in respect of which, and the mode and manner in which, it is committed. Where cattle-lifting is common in a locality, condign punishment would be its only deterrent.[3] So thefts from the train and waiting rooms, or from the person of travellers who are comparatively helpless, are fittingly visited with exemplary punishment. It is, however, no ground for inflicting a higher sentence because the thief has by his act rendered the recovery of the stolen property impossible.[4] This is one of those offences referred to in section 75 on a second or subsequent conviction of which the offender may be awarded

(1) C. P. Cr. C., No. 20.
(2) S. 2, Whipping Act (VI of 1864).
(3) *Seda*, 103 I. C. (L.) 107.
(4) *Nga Aung So*, (1899) P. J. L. B. 633.

the enhanced punishment therein specified. On the other hand, the first offender may be fittingly dealt with under the provisions of section 562 of the Procedure Code which applies to this offence. The measure of punishment for this offence must vary with the nature and atrocity of the crime. It is an offence which stamps the offender with lifelong ignominy and while in technical cases the Court should be slow to convict, there occur cases in which no punishment is too severe. Such is a theft from a railway train,(5) a waiting room, Hotel, Hospital or other places of public resort, where the owner of property needs special protection.

It should be added that this is not an offence "involving a breach of the peace" within the meaning of section 106 of the Procedure Code, so that the accused could not be, upon his conviction, bound over under that section.(6)

Restoration of Stolen Property.

4122. On a conviction for theft it is competent to the Court to restore the stolen property to the person from whose possession it was stolen.(7) It cannot be returned to the *bona fide* purchaser though it may have been taken out of his possession. The rule of law in this respect is that no title can be conveyed to a purchaser in respect of stolen property, and that in a competition between the innocent loser and the innocent purchaser the balance of equity is in favour of the previous owner, and not in favour of the purchaser who has taken the property tainted with theft and who derives his title through the thief. He is, however, entitled to be reimbursed its price from any money that may be found on the accused.(8) To this rule there are only two exceptions in favour of a bank-note and a negotiable instrument. In the case of a bank-note which is in legal view money,(9) being a part of the currency of the country, property therein passes by mere delivery, and in the interest of commerce and the security of human dealing, nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon the rule.(10) But in the case of a negotiable instrument the person from whom it was stolen has a good title to it, not only as against the thief, but as against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he obtained it *bona fide* for value without notice of the theft.(11)

4123. As regards other property the rule is that if it was in existence at the time of the theft, it is restored to the owner thereof, but it must have been then in existence. A's cow having been stolen, was innocently purchased by B, six months after the theft. The thief was convicted after a lapse of eighteen months. In the meantime the cow while in B's possession had a calf. On the thief's conviction the

(5) *Ananda Laxman*, 14 Bom. L. R. 504, 15 I. C. 803.
(6) *Morali*, (1908) 4 L. B. R. 277.
(7) S. 517, Cr. P. C.
(8) S. 519, Cr. P. C.
(9) *Collector of Salem*, 7 M. H. C. R. 233; following *Foster* v. *Green*, 7 H. & N. 881; *Goodman* v. *Harvey*, 4 Ad. & El. 870.
(10) *Michell* v. *Jogesur Mochi*, 3 C. 379.
(11) *Raphael* v. *Bank of England*, 17 C. B. 161; *Miller* v. *Race*, 1 S. L. C. (7th Ed.) 516, followed in *Bank of Bengal* v. *Mendes*, 5 C. 654 (665, 666).

Magistrate delivered both the cow as well as the calf to A. But it was held that not being even in embryonic existence at the time of the theft, the Magistrate could make no order for its delivery to A. The calf was then held to belong to B.[12] But what if the calf had been too young to live without A's cow?

4124. On the acquittal of the accused the property would naturally go back to the person from whose possession it was brought into Court,[13] and the property if seized by the police as suspected to have been stolen, should be disposed of as directed by a Magistrate to whom the circumstances attending its seizure should be reported. The Magistrate is empowered to order its delivery to the owner, or to the person from whose possession it was seized by the police.[14]

The order passed by the Criminal Court as to the delivery of property is only summary, and it is open to any one aggrieved thereby to question its legality by a regular suit, by a proceeding against the holder of the property, for damages, or for a conversion.[15]

Fine Optional.

4125. This section allows the mere sentence of fine without the sentence of imprisonment, and of imprisonment without the addition of fine.[16] And if fine is the only sentence passed, the alternative sentence may be that of imprisonment, but not *vice versa*.[17]

4126. Proof.—The points requiring proof are:—

(1) That the subject-matter of theft is moveable property.

(2) That it was in possession of any person.

(3) That the accused moved it.

(4) That he did so without the consent of the person in possession.

(5) That he did so intending to take it out of his possession.

(6) That he did so dishonestly.

4127. If the conclusion does not follow from the evidence of theft, the High Court will set aside the verdict of the jury.[18] The fact that the accused pointed out the place where some of the articles stolen were found, was held to be insufficient to support a conviction under S. 411[19]; *a fortiori*, it could not support a charge of theft, robbery[20] or of dacoity.[21] In cases of theft and allied offences it is not ordinarily

(12) *Vernede*, 10 M. 25.
(13) *Ratanlal*, 17 B. 748.
(14) S. 523, Cr. P. C.; *Ratanlal Rangilal*, 17 B. 748.
(15) *Tribhovan*, 9 B. 131; following *Bullock* v. *Dunlop*, 2 Ex. D. 43; *Dover* v. *Child*, 1 Ex. D. 172.
(16) *Savi*, (1897) B. U. C. 893.
(17) *Sheik Dullo* v. *Zainab Bebee*, 16 W. R. 17.
(18) *Irula Sadayan*, 29 I. C. (M.) 72 F. B.; but see *Pramatha Nath*, 30 C. L. J. 603, 55 I. C. 282, 21 Cr. L. J. 266.
(19) *Gobinda*, 17 A. 576; *Paimullah*, 16 C. W. N. 238, 13 I. C. 783, 13 Cr. L. J. 127.
(20) *Paimullah*, 16 C. W. N. 238, 13 I. C. 783, 13 Cr. L. J. 127. 603; 55 I. C. 282; 21 Cr. L. J. 266.
(21) *Surat Singh*, 10 L. J. 74, 23 I. C. 1004, 15 Cr. L. J. 404.

safe to rely upon the evidence of identification unless the offender was well known to the identifying witnesses.[22]

4128. Charge.—The charge should be thus.—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

That on or about the——day of——at——you intending to take dishonestly a certain moveable property, to wit——out of the possession of——(*name the person in possession*) without his consent moved it in order to such taking,[23] and thereby committed the offence of theft punishable under section 379 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried for the said offence."

4129. It is not open to the appellate Court to alter a conviction for theft into one for abetment of theft, for which he was not charged.[24]

A person charged of theft cannot be convicted of extortion,[25] or dishonest misappropriation under s. 403 or under s. 424.[1] A person cannot be convicted of abetment upon the mere proof that he was found standing by the side of the thief.[2] But one who stands and orders a theft is guilty of theft and not merely its abetment.[3] A thief and a Receiver may now be jointly tried.[4] A person entering the complainant's land to steal his cattle cannot be convicted of theft or of an attempt if he was apprehended as soon as he entered upon the land. His act was but a preparation; but he could be convicted of criminal trespass.[5]

Where the accused steals a bullock and kills it presumably for food, he could not be convicted both of theft and mischief.[6] But where the accused stole from the house of the complainant a forged bond and when the latter gave him a chase he tore it to pieces he was held guilty of theft as well as of an offence under ss. 201 and 511.[7] The accused a member of a criminal tribe with two previous convictions for dacoity finding the door of a house open entered it and as he was removing goods from a room he was apprehended he was held guilty only of theft and not of lurking house trespass or house breaking by night, nor could he be sentenced for transportation for life under s. 23 of the Criminal Tribes Act.[8]

(22) *Din Dayal*, 10 O. L. J. 347, 40 L. J. 83, 39 I. C. 296, 18 Cr. L. J. 456.

(23) 5 M. H. C. R. (App.) 37.

(24) *Varayal Krishnan Nair*, 14 I. C. (M.) 319; *Darbari*, 60 I. C. (Pat.) 999.

(25) *Amanullah*, 16 I. C. (C.) 165.

(1) *Thoppulan* v. *Sankaranarayana*. (1914) M. W. N. 483, 24 I. C. 176, 15 Cr. L. J. 440.

(2) *Govind Mahton*, 64 I. C. (Pat.) 510.

(3) *Bhawani* v. *Prem Mashi*, 43 I. C. (Pat.) 404, 19 Cr. L. J. 116.

(4) S. 239, Cr. P. C., overruling *contra* in *Sunder Singh*, (1905) P. R. No. 3, 2 Cr. L. J. 37; *Govind Rajulu*, (1914) M. W. N. 352, 23 I. C. 208.

(5) *Naurangu*, 71 I. C. 792; *Hazura*, 5 L. L. J. 52, (1923) A. I. R. (L.) 161; but see *Ghasita*, (1919) P. R. No. 13, 51 I. C. 476, 20 Cr. L. J. 492, in which the accused convicted for attempt.

(6) *Jairo*, 9 S. L. R. 204, 34 I. C. 655, 17 Cr. L. J. 239.

(7) *Sheonandan*, 31 I. C. (A.) 647, 16 Cr. L. J. 791.

(8) *Bhagwana*, 18 A. L. J. 383, 45 I. C. 513, 19 Cr. L. J. 609.

4130. Evidence of Theft.—The essential ingredients of this offence have been already set out in and under the last section, and to which reference must be made for information on the subject. It is here proposed only to set out the salient features of that offence, and the evidence by which it is to be proved, and the defences which are possible. The gist of the crime is the dishonest removal of goods from the possession of another. As such, the offence extends no consideration to the title or claim of the accused. He may be the owner of the property or may fancy possessing a lien thereon. But law cannot condone his crime for his mistakes of law. The principle is clearly enunciated in the last section that a person in possession is protected in his possession, and anyone invading that possession runs the risk of bringing himself within the grasp of law. But at the same time between such acts and acts of a thief properly so called there is a world of difference. The one commits, if at all, merely a technical crime, by enforcing a legal demand in an illegal manner, the other is a constant menace to the peace of society. The one violates the form of law: the other violates its very foundation. But though these are the two extremes of the offence, they must both possess the same elements in common, namely: (*i*) intention to take dishonestly, (*ii*) without the consent of the person in possession, (*iii*) a moveable property, which they must, for that purpose, (*iv*) move.

4131. Intention to Take Dishonestly.—The first essential of the crime is its intentionality of dishonest acquisition. Now the word "dishonestly" is the very reverse of honesty—a term allied to honour, and conveys the sense of what is right, just and true. In this sense the term "dishonestly" would be somewhat vague in its sense appealing as it would to a standard which is ever varying and variable. That is, however, the common notion of dishonesty, but it is not the sense in which it has been used in the Code. It is rather a term of art used in a special sense as meaning an acquisition by unlawful means of a thing to which a person is not entitled. The fact that a person gains a thing to which he is not entitled does not necessarily make the means he has adopted unlawful. He may for instance, obtain a decree by means of perjured evidence, and in execution of which he may obtain property to which he is not really entitled. But in such a case the means employed would not be unlawful, and the act of acquisition would not be theft. The term will be found more fully discussed before (§§ 243-254). The intention must be dishonest in that sense, added to which there must be the moving of property (§§ 4066-4088) without the consent (§§ 4106-4107) of the person in possession (§§ 4106-4111) All these elements are the essential ingredients of the crime. They must all be present at the same time, though not necessarily in the same degree.

4132 Civil Dispute.—Litigants in this country as everywhere else are always eager to cut the gordian knot of a protracted litigation by launching out a prosecution under this and cognate sections. But the Courts should be slow to move where there is a *bona fide* claim of right or where the subject-matter savours of a civil dispute. Such was the case of the complainant who complained of the accused's having cut grass from his field, but the title to which was disputed by the

accused who held adjoining land. The Court held it to be a civil dispute into which the criminal Court was not competent to take action.(9) So where the tenant complained that his landlord had forcibly removed his crops and the evidence showed that the two had jointly cultivated the land, the Court held the case to be one of a civil nature in which the landlord could not be punished for theft.(10) In another case, previously referred to, the accused had cut and carried away the crops under a defective order for distraint, when their act was challenged to be both fraudulent and dishonest; but the Court acquitted them of dishonesty, whatever may have been their civil liability for fraud.(11)

4133. Landlord and Tenant.—The conflict between the rights of the landlord and tenant has resulted in several cases, the decision of which illustrates the leading principles already discussed under the last section (§ 4089). If there is a *bona fide* claim of right the criminal Court stays its hand whatever may be the civil rights of parties. It may be that the title to the land has passed to the landlord; but if the tenant has raised the crops he is held free from criminal liability for gathering what he has grown. If the tenant was in juridical possession of his land and grows crops thereon, he is not a thief if he removes them.(12) So also, if the landlord receives an order for distraining them and the tenant hearing of it removes them.(13) If the landlord and tenant had jointly cultivated the land, each is part owner of the crops and their removal by one is not theft of the property of another.(14)

A tenant was ejected from his holding by the landlord who received possession but failed to tender the price of the standing crops raised by the tenant who cut and removed them. He was acquitted of theft.(15) Certain trees in a village fell down in a storm. The tenants removed them pleading a customary right. The Court convicted them of theft without deciding on the plea of custom.(16) It was said that the tenants' action had caused wrongful loss to the landlord, which (it is submitted) was an assumption in the absence of decision on their claim of right. Even a more startling decision was that in which it was held that the person who grows the crops has the right to reap them and that it was not of the least consequence whether he had or had not good title to the cultivation of the land,(17) which means that a trespasser is more honest than the owner. It would have been otherwise if it were found to be a case of disputed possession.(18) The case of the accused was more correctly decided where the Court refused to convict them of theft for having cut wood from a forest without a pass, which they had

(9) *Shib Das*, (1913) P. L. R. 335, 21 I. C. 899.

(10) *Phul Singh*, 10 A. L. J. 527, 18 I. C. 146; *Thoppulan v. Sankaranarayana*, (1914) M. W. N. 483, 24 I. C. 176.

(11) *Ram Dayal*, 38 A. 40.

(12) *Sarju*, 32 I. C. (A,) 667.

(13) *Ram Dayal*, 38 A. 40; *Molai*, 59 I. C. (A.) 411.

(14) *Phul Singh*, 10 A. L. J. 527, 18 I. C. 146; *Imam*, 38 I. C. (C.) 318, 18 Cr. L. J. 286.

(15) *Jodha Singh*, 11 A. L. J. 270, 14 I. C. 762.

(16) *Dunyapat*, 42 A. 53.

(17) *Mhd. Alla*, 19 A. L. J. 961, 67 I. C. 498; see *contra* in *Ramjankhan*, 41 C. 433; *Lundomal*, 9 S. L. R. 75, 30 I. C. 1003, 16 Cr. L. J. 715.

(18) *Budh Kishen*, 4 Pat. L. J. 603, 72 I. C. 614, 24 Cr. L. J. 454. *Kota Appadu*, 32 I. C. (M.) 673, 17 Cr. L. J. 81.

purchased before, when there was no finding that they were not entitled to take wood from the forest.[19]

In another case the facts were these. The tenant held land under a *kabuliat* which provided that if he cut down any trees upon the demised land, he would pay compensation to the landlord at Rs. 10 per tree. The tenant assigned his interest to the accused who cut down some valuable trees. The landlord prosecuted and the accused were convicted of theft and it is submitted wrongly, since the Court did not consider the fact of dishonesty.[20] The offence might conceivably have been one of mischief. There was no theft where the tenant was ordered to be ejected in a decree passed against the landlord; but he removed the crops which he had raised as he believed that the ejectment did not affect his crops.[21] The case would be different where the landlord uses force to eject the tenant and seizes his crop.[22]

4134. Legal Presumption from Possession.—Ordinarily, they must be all established by evidence. But in certain cases law dispenses with the proof of dishonesty and infers it from the fact of recent possession. So it is provided by the Indian Evidence Act, that the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.[23] This clause, obviously, assumes a previous theft, and, as such, it has no application to a case where possession is defended on a claim of right. In that case the theft cannot be assumed, and must be proved. The clause is intended to meet a case where a theft takes place, and another person is found in possession of the property stolen, in which case law dispenses with the proof of intermediate steps, considering them as proved, from the fact of possession. But the presumption is only permissible and not necessary, and must depend upon all the circumstances of the case.

Moreover, since it is a presumption which depends upon the likelihood of its being in conformity with the common course of natural events and human conduct, there must be at all times that likelihood to support it. In short, the presumption must be both natural and reasonable. For instance, suppose a person is found in possession of a common article of household utility, say a brass pot of common make, which people in the station of the accused are wont to use, could there be any presumption that it was the proceeds of a theft taken place, and that the accused was in conscious possession of it as such? On the other hand, where the property found in the possession of the accused is of such a rare or unusual nature that the accused could not have been ordinarily found to be in possession of it, such a presumption would be natural and irresistible, and it is only in that case that law considers it unnecessary to complete the chain of evidence by formal proof of each link. Even in such a case there must be formal proof of (*i*) an an-

(19) *Ramjan Khan*, 41 C. 433.
(20) *Abdul Ali* v. *Net Ali*, 27 C. L. J. 228, 44 I. C. 350, 19 Cr. L. J. 334.
(21) (1924) R. 72.
(22) *Tukaram*, 77 I. C. (N.) 237, 25 Cr. L. J. 349.
(23) S. 114 (*a*), Indian Evidence Act (I. of 1872).

tecedent theft, (*ii*) an identification of the property as belonging to the prosecutor, and lastly (*iii*) that the theft was recent.[24]

(1) Proof of Previous Theft.

4135. The proof of a previous theft is necessary, because there can be no presumption that a person is a thief or a receiver from a thief unless there was a theft, and a theft previously to his possession. Evidence of such theft does not, however, require that it should establish the guilt of the accused, for if this be done, there would then be no necessity of the presumption, which is intended to meet cases in which that evidence is wanting. The evidence of theft may then be confined to this, that a certain article was missing under circumstances which make it probable that it had been stolen. Ordinarily, the evidence of the owner or the person in possession, or of one who is cognizant with those facts, should be sufficient for this purpose. The accused may, of course, show that there was no theft at all, in which case the fact, if unrebutted, would cut at the very root of the prosecution. But the fact of theft may he established by the production of a report made to the police, or of a complaint made to the neighbours, but which, however, in such cases must be narrowly scrutinized, since it is not unusual to procure a horde of witnesses to prove such statements when they are likely to prove profitable.

(2) Identification.

4136. Again, there may have been a theft, but it does not necessarily follow that the property stolen is the property found with the accused. Here again, the wish of the owner must not be permitted to be made the father to his thought. The question that is paramount in such cases is—did the owner possess the property at the time of the theft; and is the property produced the very same property he had lost. It is, of course, wholly insufficient to prove that the property stolen was very much like that produced,[25] or that being grain it was not susceptible of identification.[1] Difficulty of identification cannot dispense with the necessity of the proof, nor would then the proof required be any the less because of the difficulty. On the other hand, the very fact of the property being incapable of identification would add to the difficulty of giving evidence sufficient to convince a legal mind that the identification sought to be established is not merely accidental sworn to by witnesses who may have been misled by the common appearance, or a belief founded upon a fallacious *data* or an imperfect memory.

A dogmatic asseveration that a certain property produced belongs to the owner is almost valueless, unless it is supported by convincing reasons—such as are sufficient to impress its individuality upon his mind. If the prosecutor had made a report of it to the police, the report should be useful in corroborating his account, but if he had not mentioned the property or gave no detailed description of it, the success of his task to establish identification must then depend upon his credibility,

(24) *Burke*, 6 A. 224; *Jwala*, 103 I. C. 62, (1927) O. 277.

(25) *Bava Chela*, (1886), B. U. C. 227; *Irula Sadyan*, 29 I. C. (M.) 72 F. B.

(1) 7 M. H. C. R. (App.) 19; *Rayappan*, (1894) 1 Weir 429; *Sini Tevan*, (1886) Weir 429.

and the credibility of his witnesses, and of those examined in defence, the circumstances of the case, the nature of the property, its value and commonness. In such cases, it is frequently the case with witnesses to seize upon some little peculiarity or mark in the article in evidence, and to parade it as the infallible mark by which they had got accustomed to identify it. Needless to add, the ordinary run of native witnesses are neither such keen observers nor possessed of so retentive a memory as to be able to be implicitly trusted on such points.

Moreover, it is unforunately a common device of a certain class of persons interested in the conviction of the accused to prime witnesses in such details which are presumed to establish their credibility, and which unfortunately with inexperienced Judges, sometimes has that result. The following is probably a typical case of this kind. The police acting upon certain information searched the house of the accused, and there they found a number of brass articles. The informer did not then claim to be the owner of these articles But two days after the search some four persons came forward and respectively identified different articles out of the lot as their own property, which they alleged had been stolen on different occasions, more or less remote. It was held that taken alone it was insufficient to raise a presumption of guilt against the prisoner.(2)

(3) Possession must be Recent.

4137. Thirdly, there can be no such presumption unless the accused's possession was recent, or which is the same thing, the theft was recent. This is necessary to connect the possession with the crime, and raise the presumption of guilty knowledge in the accused. The question what is recent possession is a question of fact,(3) but it has been held in England that the possession of stolen property three months after the theft was not recent to raise the presumption.(4) The property found in this case was an axe, a saw and a mattock, such as persons in the station of life of the accused might be expected to possess. There can be no fixed inflexible period for determining recent possession; it must depend upon the nature of the article and the facility with which goods of that character pass from hand to hand.

But time is all the same essential. As Coleridge, J., told the jury in the case of a thief found in possession of two sacks found about twenty days after they had been stolen: "If I was now to lose my watch, and in a few minutes it was found to be on the person of one of you, it would afford the strongest ground for presuming that you had stolen it; but if a month hence it were to be found in your possession, the presumption would be greatly weakened, because stolen property usually passes through many hands."(5) But as Patteson, J., said in another case: "The length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass

(2) *Poromeshur Aheer*, 23 W. R. 16.
(3) *Guzzella Hanuman*, 26 M. 467.
(4) *Per* Parke, J., in *Adams*, 3 C. & P. 600; *contra* in *Jwala*, 103 I. C. 62, (1927) O. 277 (2½ months).
(5) *Cookin's case*, 2 Lew. 235.

from hand to hand readily, two months would be a long time ....it is a question for the jury."[6] Such presumption was held justified from possession of a jewel found with the prisoner three weeks after the owner's house had been broken into.[7] In another case the accused was found in possession of a camel seven months after its theft. The Court held the interval too long, to justify the presumption.[8]

4138. Even in case of recent possession, the presumption is not that the accused committed the theft, but that he either committed the theft or was the receiver of the stolen property.[9] So Pollock, C. B., said: "If no other person is involved in the transaction, and the whole of the case against the prisoner is, that he was found in possession of the stolen property, the evidence would no doubt point to a case of stealing rather than a case of receiving; but in every case, except indeed where the possession is so recent that it is impossible for anyone else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property, stole it himself, or received it from some one else. If there is no other evidence the jury will probably consider with reason, that the prisoner stole the property; but if there is other evidence which is consistent either with his havng stolen the property or with his having received it from some one else, it will be for the jury to say which appears to them the more probable solution."[10]

Recent possession is thus a relative term and must be considered with reference to the nature of the property and the manner of using it. For instance if the prisoner is found in possession of a number of things, although common, but in a group which coincides with the thing lost, it will be a circumstance which will at once tell against the accused's innocence, for though it may be conceivable that he was in possession of one or two things of the kind, the fact of his possession of all or most of them on the same concatenation, would be sufficient to impress upon them an individuality of their own and thus facilitate their identification. The prisoner was found in possession of a knife, a candle-stick, watch, eyeglass, and muffineer, a year after the theft, whereupon Tindal, C.J., told the jury: "If there had been nothing found but the knife, as that might change hands frequently, it would be too strong to infer that the prisoner must have been the thief; a small thing that would change hands very easily would be too little after a long time; but then again it cannot be concealed that if instead of one, there are several articles that are not likely to have changed from hand to hand, and then to have come together into the custody of the same person, that takes off from the effect that would be produced by the lapse of time."[11]

(6) *Partridge*, 7 C. & P. 551; in *Promeshur Aheer*, 23 W. R. 16, no presumption was held to be possible—after a year from the theft.

(7) *Gorle Kandungadu*, (1912) M.W. N. 97, 13 I. C. 828.

(8) *Mangaya Shah*, (1916) P. L. R. 62, 32 I. C. 660; 17 Cr. L. J. 68.

(9) S. 114, ill. (*a*), Indian Evidence Act (I of 1872).

(10) *Langmead*, L. & C. 427; *Gorle Kandungadu*, (1912) M. W. N. 97, 13 I. C. 828.

(11) *Dovey*, (1844) Unrep., cited in 2 Russ. p. 278.

So while, such a thing as paddy is incapable of identification,[12] it may become identifiable by its peculiar admixture, with other grain, as where there is the mixture of canary seeds in barley which was held to facilitate its identification. So the public use of the property in the neighbourhood of the theft would counteract the presumption of guilt which might ordinarily arise. The accused was found in possession of a buffalo twelve months after the theft. It was held that apart from any explanation from the accused the possession was not sufficiently recent to raise any presumption.[13] The time in such a case was sufficiently long to have by itself neutralized the presumption. But even if on the morrow of a theft the accused had been found in the neighbourhood of the theft in possession of the buffalo and the owner had not questioned his possession, he could not be condemned on the presumption arising from his recent possession, for it was then counteracted by another presumption. So in another case the accused was found to be in possession of a stolen camel seven months after it had strayed away from possession of the owner. It was held that the interval was so long that there could be no presumption, and the accused could not therefore be called upon to account for his possession.[14]

Adverse Presumption from Unsatisfactory Explanation.

4139. Where the Court is not entitled to make any presumption against the accused from the fact of his recent possession, it is not entitled to ask him to account for his possession. As Maule, J., said: "Where a man is found in possession of a horse six or seven months after its loss, and there is no other evidence against him but that of possession, he ought not to be called upon to account for it."[15] And even when it is a case of presumption, and the accused is called upon to account for it, it does not follow that he has to make good his explanation by independent evidence.

4140. As was observed in a case: "In cases of this nature you should take it as a general principle, that, where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that the account is false, but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him."[16]

4141. It is of course not obligatory on the Court to make any presumption against the accused even from possession of a stolen article however recent. Such was the case of a deaf-mute accused found wearing a *pyjama* suit a week after its theft. The Court held that though his possession was recent, the man was incapable of offering

(12) 7 M. H. C. R. (App.) 19; *Royanpan*, (1894) 1 Weir 429; *Sini Tevan*, (1886) 1 Weir 429.

(13) *Nga Yauk*, (1885) S. J. L. B. 366.

(14) *Mangaya*, (1915) P. W. R. 41, 32 I. C. 660; *Bhami Luxuman*, (1910) 8 M. L. T. 418, 8 I. C. 145 (a vessel found in possession seven months after theft).

(15) *R.* v. *Cooper*, 3 C. & R. 318; followed in *Mangaya Shah*, (1915) P. W. R. 41, 32 I. C. 660; *Tabu*, (1898) P. R. No. 15.

(16) *R.* v. *Crowhurst*, 1 C. & K. 370; followed in *Hari Ramji*, 9 Bom. L. R. 27.

any explanation and no presumption should be made against him.[17] But though lapse of time may be the best defender of the accused, the accused may volunteer or make a statement which may put the Court upon inquiry, and which may make up for the absence of presumption. The prisoner was indicted for possession of a beetle-head stolen from the prosecutor fifteen months previously. The prisoner said that it had been with him since eight years, but which was impossible, for it was clearly proved to have been in the prosecutor's possession at the time of theft. The explanation of the accused was, therefore, clearly false, but his counsel relied upon the length of time and claimed an acquittal. But Alderson, B., said: "I would so direct the jury, but for the statement of the prisoner, who, in giving an account of how he became possessed of the article, tells a lie, if it be the property of the prosecutor. If he had rested his case upon the position you now take for him, when the property was found and claimed by the prosecutor, he would have been exempt from the charge of stealing it on the ground stated by you. He would then have admitted the beetle to be the property of the prosecutor; but he denies that by his statement; while he, at the same time, admits that he had this thing in his possession at a time immediately after its loss, and therefore there is a recent possession." And he then told the jury that "in cases where property of such insignificant value as that laid in this indictment, is shown to have been stolen so long as fifteen months before it is discovered in the possession of a stranger, that person ought not to be called on to answer for that possession, on a charge of felony, for it might reasonably be inferred that he came honestly by it in that long interval. If the prisoner had said in the first instance, 'Why, really I can't tell where or how I got this beetle.' I should have said that, that was a reasonable statement, and that he ought not to have been indicted for stealing it in that case, it being assumed that the prisoner does not deny that the article might once have been the property of the prosecutor. Where, however, the prisoner is shown to have claimed the thing so found as his property by right of a purchase made eight years ago, and a continued possession to the present time, I should say that, that was not so reasonable an account of his possesion as exempt him from the necessity of accounting for it to the satisfaction of the jury; for if it be true, the prosecutor is wrong, and the identity of the thing with that found is disputed. If the prosecutor should satisfy the jury that the beetle was his, then the statement of the prisoner, accounting for its possession of it must be false, and he must be presumed to have stolen it, though it was not found in his possession for fifteen months after the loss. The question, therefore, is simply one of identity."[18]

4142. Again, there can be no presumption from possession, unless it is *exclusively* traced to the accused.[19] If the property is found in a house occupied by several inmates capable of committing the crime, there can be no presumption from possession, unless it is clearly and exclu-

Possession must be Exclusive.

(17) *Oomayan*, (1914) 1 M. L. W. 492, 25 I. C. 330.

(18) This, referring to the prisoner's counsel.

(19) *Evans*, 2 Cox 270; *Jagjiban Ghose*, 13 C. W. N. 861, 2 I. C. 681.

sively traced to some one in particular. On suspicion of theft of certain articles from a running goods train, the brake van of the train in which four railway coolies were travelling, was searched, and hidden under garments similar to those which the four coolies might wear, were found ten pieces of new cloth abstracted from the adjoining van; whereupon all the four coolies were prosecuted for theft, but they were acquitted on revision by Blair, J., who held that their possession had not been exclusively traced to the accused.[20] In such a case, there may be a strong suspicion that some one of the accused or all were concerned in the theft, but suspicion is not evidence. It may be a good reason for pushing on with the inquiry, but it cannot take the place of evidence.

The two prisoners who were brothers, were found concealed in a corn-bin in an open gig house where there was discovered also some stolen property concealed in a loft over the gig-house, and some in a heap of rubbish near the bin. The prisoners laid no claim to the property and said that they had got in there to sleep out of the cold, whereupon Pollock, C. B., directed their acquittal, holding that though there might be grounds of suspicion, possession to the prisoners had not been traced.[21] But where a bale of cloth weighing about five maunds was found in the room of a house in the occupation of a Hindu joint family under circumstances proving that the accused, who was the managing member, knew it, the Court upheld his conviction under s. 411, presuming his possession from his knowledge of it in the house.[22]

4143. It is, moreover, a point well worthy of note whether the property was found unusually concealed, or was discovered where it would be ordinarily expected, to be found. But this is not a matter of much importance. For in a family, there are always articles of jewellery and the like hidden away for safety; and so it is quite usual to put aside pots that are not required for daily use.

Other Circumstantial Evidence.

4144. A conviction for theft, and indeed for any offence based on circumstantial evidence must be most carefully scrutinized; since such evidence being indirect, leaves room for error in the process of ratiocination. It is therefore necessary to examine each link with a view to see whether it is admissible, and whether all the links admissible exclude the possibility of guilt of any other person, and point conclusively to the complicity of the accused. Where, for instance, in a case of theft of currency notes and cash from an office, the evidence against the accused was that he was one of those who entered the office in the absence of the complainant, that a relation of his was present when two of the notes were cashed by that relation's relative and that the accused was after the theft in possession of money for which he could not satisfactorily account, it was held that the evidence was inconclusive as to the guilt of the accused.[23]

(20) *Mulhari*, 6 B. 731; *Nga Tha Dwe*, (1896) P. J. L. B. 279.
(21) *Ali Hussain*, 23 A. 806.
(22) *Budh Lal*, 29 A. 598 (601) following *Sangam Lal*, 15 A. 129 (131).
(23) *Chiraguddin*, 18 C. W. N. 1144; 23 I. C. 501, 15 Cr. L. J. 293.

4145. Theft to Earn Reward for Discovery.—The Court does not take into consideration the motive of the offender. If the thief committed theft with the object of restoring the property on securing a reward, his offence is none the less theft, though he did not intend to appropriate the property permanently. If, however, he subsequently restores it on being promised or paid a reward, he may be even convicted both for theft as well as under section 215, but in that case the application of section 71, has been commended.(24) It has been, moreover, held that where a person points out the stolen property on receipt of such reward, he may be convicted of theft upon that evidence, unless there is evidence to show that the offence had been committed by some one else.(25) Section 215 applies to his case whether he points out or fails to point out the property.(1)

Ss. 215 and 379.

4146. Theft and Mischief.—A person cannot be convicted separately of theft and mischief, where he is found to have stolen a bullock and afterwards killed it, inasmuch as the owner being already deprived of the animal by the theft, the object of its destruction was to benefit the thief, and not to injure the complainant.(2)

Any Mag. Cognizable. Warrant. Not bail. Not comp. Summary, if property does not exceed Rs. 50 in value.

380. Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Theft in dwelling house, etc.

[*Vessel*—s. 48. *Theft*—s. 378.]

Synopsis.

(1) *Analogous Law* (4147).
(2) *Procedure and Practice* (4148).
(3) *Proof* (4149).
(4) *Form of Charge* (4150).
(5) *Misjoinder of Charges* (4151).
(6) *Theft in a Building* (4152).
(7) *What is Building, Tent or Vessel* (4153-4155).
(8) *Building* (4153).
(9) *Railway Carriage* (4154).
(10) *Theft must be in a Building* (4155).
(11) *Theft from a Tent* (4156).
(12) *Vessel* (4157).
(13) *Dwelling and Custody* (4158).

4147. Analogous Law.—Theft in a building is naturally regarded as an aggravation, as it involves trespass and insecurity to the inmates against which higher punishment has been provided, both by the English Statute(3) as well as by the common law,(4) by which, however, the entry must have been made at night, and which then constitutes burg-

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(24) *Nga Nyan U*, (1914) 2 U. B. R. 43, 28 I. C. 997.
(25) *Moideen*, (1896) P. J. L. B. 229.
(1) *Nga Ok Gyi*, (1889) S. J. L. B. 449.
(2) *Jairo*, (1915) S. L. R. 204, 34 I. C. 655.
(3) Larceny Act, 1861 (24 & 25 Vict., c. 96), s. 60; re-enacting 7 & 8 Geo. IV c. 29, s. 12; *Wenmouth*, 8 Cox 348.
(4) 4 Black. 224; *Polly*, 1 C. & R. 77.

lary—an offence which more nearly corresponds to lurking house trespass at night punishable under section 457. And as the English Statute deals with theft "in a dwelling-house" and as other sections of it punish, "whoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse or counting-house with intent to commit any felony therein,"(5) there is really nothing in the English Law, Statute or Common to correspond exactly with this section.

4148. Procedure and Practice.—This section is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable by any Magistrate, and summarily, if the property to which the offence relates does not exceed Rs. 50 in value. Instead of the sentence here prescribed the sentence of whipping may be substituted under the provisions of the Whipping Act, and on a second or subsequent conviction whipping may be inflicted in addition. There is some conflict whether a previous conviction under the last section counts as a previous conviction for the purpose of whipping under this section, the Bombay Court holding that this is a distinct offence from a simple theft, as defined in section 378.(6) But this view is controverted in the Punjab.(7) In view of the recent alteration of the law(8) the conflict is now immaterial.

For other points of practice calling for notice, reference should be made to the preceding commentary.

4149. Proof.—The points requiring proof are those necessary to prove a case of simple theft (§ 4126) in addition to which prove:—

(7) That the property stolen was then in a building, tent or vessel.

(8) And that the said building, tent or vessel was then used as a human dwelling or for the custody of property.

4150. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at ——you committed theft of——(mention the property stolen) in a building (*or* tent or vessel) used as a human dwelling (*or* for the custody of property), and thereby committed an offence punishable under section 380 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

(5) Larceny Act, 1861 (24 & 25 Vict., 96), s. 57; the statement of Meres, J. C., in *Nga Pan E*, (1885) S. J. L. B. 367, that this section is nearly identical with s. 60 of the Larceny Act, in view of the text, does not seem to be correct.

(6) *Changia*, 7 B. H. C. R. 68.

(7) *Jeewun* v. *Boodha*, (1867) P. R. No. 51.

(8) Whipping Act (VII of 1909).

Misjoinder of Charges.

4151. Four accused were jointly tried, the first under this section, the second under this section and s. 411, and the third and fourth under ss. 411 and 414. All the stolen property was traced to the possession of the first accused. It was held that there was no misjoinder as the disposal of the property constituted one and the same transaction.(9) The accused who had stolen a forged promissory note from the record of a case was held guilty both under this section as well as ss. 201, 511.(10)

4152. Theft in a Building.—The aggravating circumstances enhancing the normal criminality of the offence of simple theft here present is that the property is removed from a building, tent or vessel, which is used as a human dwelling, or for the custody of property. The higher punishment here provided is intended to give greater security to property deposited in a house so as to be under its protection. The questions arising under this section would, therefore, be—(*i*) was there a theft; and (*ii*) was the theft committed in a dwelling, tent or vessel which was then used as a human dwelling, or for the custody of property. The first question presupposes proof of all the elements necessary to constitute theft, (§§ 4061-4115). The second question requires notice.

(1) Building.

4153. What is a Building, Tent or Vessel?—The gist of the crime is the commission of theft in a building, tent or vessel. These must, again, be used as a human dwelling or for the custody of property. Ordinarily, a building used for dwelling, or for the custody of property is a house or godown. A building need not be reserved exclusively for one use or the other. It may be used in part for human residence, and in part for the custody of property, or it may be used exclusively for one purpose or the other. The question what constitutes a building must depend upon what is ordinarily understood by that term. It certainly does not include the open compound around the house, such as a garden or open space attached to bungalows and villa residences. In England the concept implies a walled enclosure with a roof or covering,(11) and this is the least that is necessary, for the building must be enclosed and covered,(12) though it must necessarily have an outlet. So the Madras Court held that theft from a verandah of a building was not theft in a building, observing: "Now an ordinary verandah is no doubt part of a building,

(9) *Po Shat*, 4 Bur. L. T. 263, 13 I. C. 395.

(10) *Sheonandan*, 31 I. C. 647.

(11) *Tandi Ram*, (1876) P. R. No. 14.

(12) 7 & 8 Geo. IV, c. 29, s. 8, re-enacted 24 & 25 Vict., c. 96, s. 53. "No building, although within the same curtilage with any dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purpose of this Act unless there shall be a communication between such building and dwelling house either immediate or by means of a covered and enclosed passage leading from the one to the other." Cases proceeding on the construction of this section exclude an outer yard (*Davis*, R. & R. 322), and include an out house (*Gilbert*, 1 C. & R. 84), as a part of the dwelling house. But they proceed upon a highly technical view of the words of the Statutes and can, therefore, be of no illustrative value here; Lord Esher, M. R. defined a "building" within the meaning of the Metropolitan Building Act, 1855 (18 & 19 Vict., c. 122), s. 27, to ordinarily mean "an enclosure of brick or stone work covered in by a roof."—*Moir Williams*, (1892) 1 Q. B. 264 (270).

but a theft from the verandah which is outside the house, is not a theft in a building. It might so happen that the verandah was so enclosed as to be a substantive building used for the custody of property, but that would be a question of fact to be determined upon the evidence of each case.[13]

But it has been held in the Punjab that theft in such a case would be theft in a building, if the verandah forms part of a building which is itself used as a human dwelling or for the custody of property.[14] This view appears to be sound, for there appears to be no reason why a verandah open or closed should not be regarded as a part of the dwelling, when a tent which may be still more open is expressly so mentioned. Indeed, some of the houses of the natives of this country are scarcely anything more than a verandah and it would be unduly restraining the meaning of the word to exclude it from the protection which the section is enacted to afford. Indeed, the question, in such cases, is not whether a building is worthy of the name but whether it is used as a human dwelling. The ordinary coolie-hut made of wattle and daub is scarcely worth being called a building, though as used for human dwelling, it must be regarded as falling into that class.[15] But this is probably the limit, and its meaning must not be overstrained.

Railway Carriages.

4154. For instance, a railway carriage, [16] or a brake van, [17] though far more secure than many buildings cannot be held to fall within the category of a "building used as a human dwelling or for the custody of property." But it has been held by Blair, J., that a goods or brake van of a railway in which goods were carried was a place used for the custody of property, and none the less so, because it was used also for the transport of property.[18] But it is submitted that what the section speaks of is not a *place* but a *building*, and it would be an intolerable solecism to speak of a railway carriage as a building. This was conceded by the Bombay High Court,[19] in a case in which the accused had stolen the complainant's luggage from a railway, while it was standing at a railway station whereupon he was convicted under this section, and West and Nanabhai, JJ., confirmed the conviction holding that though the railway carriage was not a building the railway station was."[20] So it was, but did the railway carriage standing at the station become a building used as a human dwelling?" And this is what is required under the section. Probably the view taken by the Court implied that the theft from a stationary train was theft in a building in the same way as theft from a chest or almirah kept in a house, but in that case the train must be in a similar situation.

It is apprehended that the term building[21] has been used here to denote a fabric or edifice constructed as a house. It could scarcely be extended to denote a waggon, any more than a chest or almirah

(13) *Ghulam Jelani*, (1889) P. R. No. 16.
(14) (1870) 1 Weir 435.
(15) *Jabor*, (1881) P. R. No. 1.
(16) (1880) 1 Weir 436; *Sheikh Saheb*. (1886) B. U. C. 293.
(17) (1880) 1 Weir 436.
(18) *Ali Husain*, 23 A. 806.
(19) *Sheikh Saheb*, (1886) B. U. C. 293.
(20) *Ib.*
(21) From O. E. *bulden*, a house.

which are used for the custody of property, but which do not thereby assume the *status* of a building. The entrance hall, and a porch of a *balan* of a building enclosed by a wall, but with two doorways without doors have been held to be a building.(22) So even a courtyard consisting of a walled enclosure with four *kothris* or chambers opening into it, with an outer gateway has been held to answer that purpose.(23) So a cattleshed walled on four sides but the wall of one side of which having fallen down was enclosed with brambles, was held to be a building used for the custody of property, namely, cattle.(24) But a cattle-fold or pen merely enclosed with a thorn hedge round it is not a building though it be used for the custody of cattle,(25) still less is the compound or courtyard of a house surrounding a building.(1) As Scott and Jardine, JJ., said: "There is no principle or authority for including compounds within the words 'house' or 'building.'(2) The open compound surrounding the houses of Europeans in this country are in no sense a part of the building or could be treated as such. Indeed, the sections of the Code dealing with trespass on buildings, whether for the purpose of committing theft or any other offence have all the same object in view. So the framers of the Code said: "There is no sort of property which it is so desirable to guard against unlawful intrusion as the habitations in which men reside and the buildings in which they keep their goods."(3)

Theft must be in a Building.

4155. Confining the term to only buildings as so understood, the section next requires that the building should have been *used* as a human dwelling, or for the custody of property. This would exclude vacant or dilapidated houses which have fallen into disuse,(4) so that if a thief enter and steal the materials used in building them, the offender could not be convicted under this section, both because it would not be theft *in* a building, nor theft in a building *used* as a human dwelling, or for the custody of property. So it has been held in Madras that theft of property from the roof of a house is not punishable under this section, as it is not theft *in* a building. The prosecutor had spread out his *dhoti* to dry on the top of a house to which the prisoner got access by scaling the wall, and stole the cloth. It was held that as there was no entry into the house there could be no offence under this section, it being even added that "the fact that the roof was used for various domestic purposes can make no difference."(5) But if this view be correct, two consequences would inevitably follow: *first*, that a person may be guilty of house-breaking,(6) and as such punishable under section 454, though he could not be punished for theft in a building; and *secondly*, theft from the terrace of a house ordinarily used as a human dwelling, and often for the custody of valuable property is not a theft in a building. If so, by parity of reasoning, it follows that theft from the board of a ship is not theft in a vessel, for which the thief must effect his entry into

(22) *Dad* (1879) P. R. No. 10.
(23) *Shera*, (1879) P. R. No. 35.
(24) *Dulle*, 6 N. W. P. H. C. R. 307.
(25) *Sucha Singh*, (1887) P. R. No. 57; *Ram Rang*, (1905) P. R. No. 18.
(1) *Surja*, (1882) 2 A. W. N. 224; *Rama*, (1889), B. U. C. 484.
(2) *Rama* (1889), B. U. C. 484.
(3) Note N.
(4) *Surja*, (1882) 2 A. W. N. 224.
(5) (1886) 1 Weir 435.
(6) S. 445.

a cabin. It is submitted that such construction is scarcely justified by the language used, for there is no reason to suppose that the word *in* was intended to imply entry into the dwelling and was not used to include a theft from a building.

Suppose, a thief were to use a hook to draw things away from the interior of house, himself remaining outside; would not his theft be punishable under this section, because there was no entry into the house? If so, the fact that the thief gets on the building would seem to aggravate his offence. Of course, the case is clear if there was an entry. And in that case the offence would be punishable under this section, no matter whether the entry was originally lawful or unlawful. The prisoner entered the house of the prosecutor and carried off certain things with the knowledge of the owner, but not minding his remonstrance. It was held that the offence fell under this section as the aggravating circumstance under this section is the invasion of a dwelling or of a building used for the custody of property, and such invasion is not diminished in culpability by the presence of the owner of the house.(7) Indeed, the fact that the house belonged to and was in the possession of the thief himself would not reduce his crime, for the section speaks of theft in a building, which may as well belong to the thief. In this respect the English cases furnish apt illustrations. The prisoner lodged at a public house, where he invited the prosecutor to sleep in his room, and stole his watch hanging at the bed's head upon which he was convicted under the Statute(8) which punished theft to the value of forty shillings in a dwelling-house.(9) In another case, the point was reserved whether the prisoner could be convicted of theft in a building, the building being his own, and all the Judges agreed that he could be so convicted.(10) The prosecutor and the prisoner who was a prostitute rented a room for which the former paid, and they both went to sleep together, the prosecutor having put his watch in his hat which the prisoner stole while the prosecutor was asleep. It was held that the theft was in a building.(11) So theft by constables of property from the house they were employed to guard, was held to be punishable under this section, and not as a criminal breach of trust under s. 409.(12)

Theft from a Tent.

4156. A tent(13) is a temporary shed erected to afford protection to man and beast. It may be, ordinarily it is, a pavilion or portable lodge made of cloth, canvas or skins stretched and sustained by poles and used for sheltering persons from the weather. It is usually enclosed on all sides by cloth walls, but it is not necessary. A servant's *pal* is a tent, though it is open in front. The term is used to include even cloth sheds put up by shopkeepers in bazars and fairs and in which they expose their goods for sale. Theft of goods exposed outside these tents would not, however, constitute theft in a tent. A mere awning stretched to keep out the sun and glare is, however, a tent which in the ordinary acceptation of the term, must have walls and a ceiling. So the mere enclosure of a place under a

(7) *Kashinath Bhanshet*, (1871) B. U. C. 56.
(8) 7 & 8 Geo., 4, c. 29, s. 12.
(9) *Taylor*, R. & R. 418.
(10) *Bowden*, 2 M. C. C. R. 285.
(11) *Hamilton* 8 C. & P. 49.
(12) *Boidnath Singh*, 3 W. R. 26.
(13) From Lat. *tendo* to stretch

tree by bamboo *tattis* or cloth would not be a tent, though it may in a sense possess both the walls and a roof.

Vessel.

4157. The term "vessel" has been defined in s. 48. It would include everything in the nature of a boat floating on water from a man-of-war to a dug-out canoe used for the transport of men and property. A ferry-boat is a vessel though it is nothing but a moving platform used to carry people and property across water. Even a raft made of floating wood used for the transport of timber is a vessel within the meaning of this section. But a log of wood in its natural state, though serving the purpose of a vessel cannot be so called.

Dwelling and Custody.

4158. But whether the thing be building, tent or boat, the section requires that it should be used for human dwelling or the custody of property. The term "dwelling"[14] means a habitation, or place, or house in which a person lives whether permanently or temporarily. It seems to exclude the idea of using a thing merely for transport. If a person merely passes through, say an archway in a street, he could not be said to dwell there. The term must then be understood to refer to residence and nothing less. The term "custody"[15] is however, a term of wider import, for it means merely a keeping or guarding property. The keeping of property may be for ever so short a time, but it will be custody, though the term is now restricted to mean "safe keeping" or "safe custody." But there is no reason to limit its sense to that meaning.

Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp. Session. Summary, if property not over Rs. 50 in value.

Theft by clerk or servant of property in possession of master.

381. Whoever being a clerk or servant, or being employed in the capacity of a clerk or servant commits theft in respect of any property in the possession of his master or employer shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Theft*—s. 378.]

Synopsis.

(1) *Analogous Law* 4159-4160).
(2) *Procedure and Practice* (4161).
(3) *Proof* (4162).
(4) *Form of Charge* (4163).
(5) *Principle* (4164).
(6) *Meaning of Words* (4165).
(7) *Theft by Clerk or Servant* (4165).
(8) *Clerk or Servant* (4167-4173).
(9) *Immaterial Elements* (4167).
(10) *Only Control Material* (4169-4170).
(11) *Who are Not Clerks and Servants* (4171-4173).

(14) From O. E. *dwellen*, to linger—akin to *dull*, which originally meant delay.
(15) From Lat. *custos*, guard.

(12) *Servants Illegally Employed* (4174).
(13) *Who are Clerks and Servants* (4175).
(14) *Person Employed as Clerk or Servant* (4176).
(15) *Ex-servant Excluded* (4177).
(16) *Liability Limited to Property in Employer's Possession* (4178).

4159. Analogous Law.—This section is not to be confounded with section 408 which punishes the offence of criminal breach of trust by a clerk or servant. The punishment in each case is the same, and in English Law the two cases are classed as larceny by a clerk or servant. But the Code makes a distinction, the dividing line being possession, the master being in possession of the property in this case, while the servant is punishable under section 408, if he was himself in possession of it.

It is not a necessity for aggravation of the offence that the servant should be in charge of the property or that it should have been his duty to guard it. The liability arises from the general duty of servants to protect the property of their master.

4160. The following provisions of the English Statute[16] are nearly identical with this section:—

"S. 67. Whosoever being a clerk or servant *or being employed for the purpose or in the capacity of a clerk or servant*, shall steal any chattel, money or valuable security belonging to, or in the possession or power of his master *or employer*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years .....or to be imprisoned..... and if a male under the age of sixteen years, with or without whipping."

The cases decided under this provision should, therefore, be instructive in the construction of this section.

4161. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class, and summarily, if the property does not exceed Rs. 50 in value.

For other points of practice calling for notice, reference should be made to the procedure set out under s. 379 (§§ 4118-4125).

4162. Proof.—The points requiring proof here are those necessary to constitute theft (§ 4126) in addition to which prove:—

(7) That the accused was at the time a clerk or servant, or employed as such by the person from whose possession the property was stolen.

4163. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of of the accused*) as follows:—

(16) Larceny Act, 1861 (24 & 25 Vict., c. 96), s. 67; re-enacted from 7 & 8 Geo. IV, c. 29, s. 6, with the exception of the words in italics.

"That on or about the——day of——at——you being a servant (*or* clerk of A B [——*or* employed in the capacity of a servant (*or* clerk) of A B] committed theft by stealing certain property, to wit——in the possession of the said A B, and thereby committed an offence punishable under s. 381 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4164. Principle.—The confidence reposed in a clerk or servant by his employer and the opportunity he possesses for robbing him are the reasons for making theft by servant specially heinous. It is not necessary that he should be a paid or regular servant, for the offence does not depend upon it, but rather upon the considerations already mentioned.

4165. Meaning of Words.—"*Being a clerk or servant*": These words are evidently taken from the English law. A clerk is necessarily a servant, though a servant may not be a clerk. It is not necessary that the servant should have been paid by the person he robs, but he must be under his control. So an orderly peon paid by Government, but working with the officer is a servant. And the same rule applies to clerks. It is the *factum* and not the legality of their relationship that is to be looked to.

4166. Theft by Clerk or Servant.—A theft by a clerk or servant of his master or employer's property is deemed specially flagrant on account of the abuse of opportunities and the confidence it involves, and the difficulty of taking measures for its prevention. Law, therefore, punishes such thefts with greater remorselessness. But it will be observed that the *quantum* of punishment provided both under the last as well as this section is the same, though the offence here may be committed in a house in which case it may be an act of double aggravation, which may be taken into account in awarding punishment, but for which the maximum penalty provided by law is the same. The point of aggravation under the last section was the violation of the protection of the house. Under this section it is the abuse of confidence. The measure of protection required in each case is the same. But as under one section the gravity of the crime depends upon the place of theft, so in the present case it depends upon the position of the two parties which must then be established. That is to say, the thief must be shown to have been a clerk, or servant, or then employed as such, and the theft must be of property then in the possession of his master or employer.

4167. Clerk or Servant.—This raises the question, what is a clerk or servant. A clerk or servant is defined to be a person bound by either express contract of service, or by conduct implying such a contract, to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to

Immaterial Elements

transact.[17] But the relationship would seem to depend more upon the right of control than the right to obedience. So where the prisoner who was employed as a traveller of the prosecutor, being charged for embezzlement, Lush, J., in summing up, said: "Now was the prisoner a 'clerk or servant' within the meaning of the Statute? That depends upon the terms of his employment. If a person says to another carrying on an independent trade: 'If you get any orders for me I will pay you a commission, and the person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a 'clerk or servant' but if a man says, 'I will employ you and will pay you, not by salary, but by commission' then the person employed is a servant. And the reasons for such distinction is this, that the person employing has no control over the person employed, as in the first case, but where, as in the second instance I have put, one employs another and binds him to use his time and services about the employer's business then the person employed is subject to control."[18] So Erle, C.J., in another case, said: "We think that this conviction ought to be quashed. The cases have established that a clerk or servant must be under the orders of his master, or employed to receive the moneys of his employer to be within the Statute; but if a man be entrusted to get orders and to receive money, getting the orders when and where he chooses, he is not a clerk or servant within the Statute."[19]

4168. The fact that the prisoner had bound himself by an agreement with the prosecutor not to work for another for a certain purpose does not make him necessarily a servant *pro tanto*, for such a case may be conceived of tradesmen and commission agents, who only undertake to sell the goods of persons with whom they enter into such agreements, but they do not thereby become their servants. As Blackburn, J., said, in such a case: "The test is, was the prisoner under the control and bound to obey his master, if he was bound to bestow his whole time upon his master this would be strong evidence, but it is not essential."[20] A servant may be employed on a single occasion, or his employment may be permanent, but in either case the nature of employment does not depend upon the length of service as upon the conditions of employment.

A drover was employed on a single occasion to take ten pigs to one Goose, a pig dealer, and to bring back whatever money Goose should deliver him. He had no authority to bargain with him or any other person, or to do anything with the pigs if Goose should refuse to receive them. He received a sum for expenses, for which he was to account, his wages being understood to be paid in accordance with the custom of the trade at a certain rate *per diem* for the number of days occupied. He was not precluded from driving cattle of other persons at the same time. The drover took the pigs to Goose who refused, whereupon he took them to the market and wrongfully sold them. His liability turned upon whether he took the pigs into custody as a bailee or as a servant. Park, B., said: "In this case on the one

(17) 1 Stroud's Judicial Dec., p. 325; Steph. Cr. L., Art. 337; followed in *Sohan Lal*, (1905) P. R. No 50.

(18) *Per Lush*, J., *Turner*, 11 Cox 551.

(19) *Bowers*, 35 L. J. M. C. 206.

(20) *Negus*, 42 L. J. M. C. 62.

hand, the circumstance that the prisoner was paid the expenses of the cattle, and also that the customary mode of payment of his remuneration was by the day, tend to show that he was a mere servant; on the other, the fact of his being a drover by trade, and also of his having the liberty to drive the cattle of any other person by the general usage with respect to drovers, raise an inference that he was not a servant." It was then held that upon the whole the prisoner must be held not to have been a servant.(21)

Only Control Material.

4169. The question of service then depends upon the terms of employment and the degree of control. If A employs B to carry his pony to C to sell it to him for a certain sum of money, B would be A's servant and not bailee because, it is said, the delivery was made for a certain special purpose.(22) But delivery of a pony by A to B to take to C, and if C refuses to sell it at his discretion was held to constitute B the servant of A.(23) The question whether a person was a clerk or servant is a question of fact,(24) and its answer must depend upon the terms and nature of the employment and the character and degree of direction and control, and then necessarily the obedience which the employee is bound to render to the other.

4170. The term "clerk or servant" is therefore, not synonymous with employee, but falls into a narrower class as connoting a subordination and subjection to habitual control. Such servant may be employed on a fixed salary or wages, or no wages at all. For the payment of wages is not a necessary condition of service. An unpaid apprentice or clerk may thus be a clerk or servant. So a person entertained by a tradesman as an apprentice to learn work, and as such entrusted with the duties of a salesman is a servant within the meaning of this section.(25) Such was held to be the case of a son who lived with his father and was employed by him for the performance of the duties of a clerk, though he received no salary, and the discharge of those duties was purely optional with him.(1) The fact that the employer paid the employee whatever wages he pleased would thus be immaterial,(2) so would also be the fact that the person was paid a commission or share of the profits.(3)

Who are Not Clerks and Servants?

4171. Neither the payment of wages nor an express appointment, nor the rendition of a definite or exclusive service or for any stated time, are material for the purpose of constituting service. What is material, however, is a definite control and the performance of certain duties. The fact that a person is accountable to another does not make him his servant, for bailees and trustees are likewise accountable. So the

(21) Hey. Den. C. C. 602, Denman, C. J. *contra*, following *Quarman* v. *Burnet*, 9 M. & W. 499; *Milligen* v. *Wedge*, 12 A. & E. 737.
(22) *Stanbury*, 2 Cox. 272.
(23) *Banks*, R. & R. 441.
(24) *Negus*, 42 L. J. M. C. 62; *Chater*, 9 Cox. 1.
(25) *Sohan Lal*, (1905) P. R. No. 50; *Mellish*, R. & R. 80.
(1) *Foulkes*, 44 L. J. M. C. 65.
(2) *Spencer*, R. & R. 299.
(3) *M'Donald's case*, 9 Cox. 10; *Hartley*, R. & R. 139; Carr, R. & R. 198; *Philip May*, 8 Cox. 421.

unpaid treasurer of a friendly society was held not to fall within the designation of clerk or servant, Bovill, C.J., observing: "I believe there is no case to show that the treasurer of a friendly society can be indicted for embezzlement. The essence of the indictment in this case is this, that the prisoner was a clerk or servant of the trustees. The trustees have all moneys of the society vested in them by Statute, as well as by one of their rules, and the prisoner must account to them, but this does not make him the servant. The treasurer is an accountable officer, but not a servant."(4)

So a member of a friendly society, who had been appointed by its committee to sell the tickets of an excursion arranged by it, sold the tickets and misappropriated the proceeds, he was held not to be a servant of the society.(5) And so it would seem that a person casually employed to perform a job, as for example, to cash a cheque on being promised 6d. for the work could not be held to be a servant.(6) So a person employed to receive a voluntary contribution and for which he was not remunerated could not be held to be the servant of his employer.(7) Such would be the case of persons employed to collect church offerings,(8) or benevolent and charitable subscriptions. Persons who work as members of an organization in which they are interested are not its servants unless they happen to be so employed, as if they are paid for the work or are secretaries, managers or the like.(9)

4172. So persons whose employment is in the nature of contract cannot be called clerks or servants. Such are drivers of a hackney carriage,(10) and others who stipulate for their remuneration for the performance of a specified work. But piece-workers, as such, do not cease to be servants, merely by the fact of their being paid wages on the quantity of their outturn. Such is, for example, the practice in the mills where the operatives are paid wages according to work, but they do not, therefore, cease to be servants. It was so held in the case of a butty collier, who was paid a fixed sum on every ton of coal raised by him, and which he was allowed to sell to his employer. He paid over to him the gross price thus received and on which he was allowed a poundage. He was held to be a servant of the colliery owner.(11) It will be observed that this scheme was devised merely to calculate the value of labour, and the labourer did not cease to be a servant, because he was ostensibly the owner of the coal he cut. Such is the system prevalent in this country where coolies are employed to collect myrabolams, lac and other jungle produce, and which is then purchased by the jungle contractors at a fixed rate.

4173. Intermediate between these and the servants pure and simple stands the case of a commercial traveller who may or may not

(4) *Tyree*, L. R. 1 C. C. R. 177 (181).
(5) *Bren*, 9 Cox. 398.
(6) *Freeman*, 5 C. & P. 534. In *Thompson*, 32 L. J. M. C., 53, a lady gave a sovereign to a person standing near a railway ticket office to purchase a ticket for her, upon receiving which he absconded; he was convicted of larceny, but the question turned upon possession.
(7) *Nettletom*, 1 Mood. C. C. 259.
(8) *Burton*, 1 Mood. C. C. 237.
(9) *Hall*, 1 Mood. C. C. 474; Miller, 2 Mood C. C. 249; *Woolley*, 4 Cox. 255; *Proud*, 9 Cox. 22.
(10) *Haydon*, 7, C. & P. 445.
(11) *Thomas*, 6 Cox. 403.

be the servant of his employer according to the terms of his employment. It appears to be settled that if a person employ another as his traveller or canvasser, and the latter be at liberty to get or abstain from getting orders as he might choose, he is then not a servant.[12] But he becomes undoubtedly a servant if he is to devote the whole of his time to his employer's service, though he may then be paid only by commission on the business secured.[13] So a debt-collector undertaking to collect the outstanding debts of another on the payment of a certain commission paid on the recoveries, the time and mode of collecting the debts being at his discretion, is a contractor and not a servant.[14]

4174. Servants Illegally Employed.—So persons, though employed as clerks or servants of an illegal organization or company are held to be so liable on account of the illegality, the Court withholding its assistance on the ground of public policy.[15] But in this respect law discriminates between an organization formed for a criminal purpose and one which is illegal merely because it is not registered, or because its incorporation is not otherwise legal or legalized.[16]

4175. Who are Clerks and Servants.—Lastly, there remain persons who are "clerks and servants." Of these those who are ordinarily classed as such present no difficulty. They are persons who receive a fixed stipend or wages and devote their whole time to the service of their masters. The nature of their employment is then immaterial. For it may vary or be invariable, but so long as they are paid for their employment they are servants irrespective of the nature of the work they are called upon to do. It will thus be seen that while the non-payment of salary does not exclude service, its payment is a certain criterion of it, and so is the devotion of one's whole time to the employment of another. So a solicitor who was paid a fixed sum of £ 300 a year to collect rents, etc., of a limited company, was held to be a clerk or servant of the company.[17] And so would be persons whatever their designation, whether as manager, secretary,[18] accountant, cashier,[19] or a director.[20] In such a case, the payment of a remuneration makes all the difference.[21]

The prisoner was employed by the prosecutor, an earthenware manufacturer, to act as his traveller and to visit the three kingdoms in quest of orders in the interest of the prosecutor. He undertook not to work for any other maker without the permission of the prosecutor. He was to pay himself his travelling expenses, but was to get a commission on sales, and render an account weekly. The prisoner was afterwards permitted by the prosecutor to take orders for two other

(12) *Per* Erch, C. J. *Bowers*, 35 L. J. M. C. 206.
(13) *Bailey*, 12 Cox. 56.
(14) *Hall*, 13 Cox. 49.
(15) *Hunt*, 8 C. & P. 642.
(16) *Stainer*, 39 L. J. M. C. 54; followed *per* Lord Coleridge, C. J., in *Tankard*, [1891] 1 Q. B. 548 (550) *Frankland*, 63 L. J. M. C. 61; *Webb*, (1893) T. L. R. 199.
(17) *Gibson*, 8 Cox. 436.
(18) *Macdonald*, 9 Cox. 10.
(19) *Hall*, 1 Mood. C. C. 474; *Miller*, 2 Mood. C. C. 249; *Woolley*, 4 Cox. 255; *Proud*, 9 Cox. 22.
(20) *Stuart*, (1894) 1 Q. B. 310.
(21) *Tyree*, L. R., 1 C. C. 177, cited *ante*.

manufacturers. He was held by Lush, J., to be a servant of the prosecutor,[22] the reason being the exclusive character of his services. So persons who enter into cultivating partnerships with tenants are servants of the latter, if they are paid a share of the produce as their wages. Such is the prevalent practice for remunerating field labourers in this country. So in England, the defendant who undertook to take entire charge of the prosecutor's glebe at a fixed annual salary and a share of the net annual profits, was held to be on a contract for the hire of the defendant as a labourer and not on a contract of partnership so that the defendant was liable to account as a servant.[23]

4176. Person Employed as Clerk or Servant.—The fact that the juridical relationship between him and his employer did not amount to the contract of service, does not make the employee any the less a servant of the other. For the law primarily looks to the employment and not to its legality. If it was in fact as a servant it is sufficient whatever defects his appointment may disclose. So again, the question by whom he was employed and whether the delegation of his services to another was or was not legal is wholly immaterial for the purpose. If a person be by service a bailiff, but if he was employed to sweep the house of his superior he is not any the less responsible because he had been illegally put on to do that work. This is evident, having regard to the purpose the section has in view and the mischief it is enacted to guard against. (§ 4164).

4177. Ex-servant Excluded.—The only question in such cases, then, that law considers material is, was the person in fact employed as a clerk or servant, and did he as such commit the theft in question. Of course, the theft must have been committed by the accused in his capacity as clerk or servant. The fact that the thief was at one time in the service of the prosecutor, and that he thereby secured facility for stealing his goods, does not appear to be within the rule, which is confined to a theft committed by one who was at that time in the service of his employer. Nor again, is the rule extended to a theft committed by a servant merely as such and irrespective of the property he steals. If A be the servant of B, and rob C, he could not be punished for stealing C's goods being A's servant, unless he was then in the service of both A and B. But the fact that B worked for C at A's instance, as if C was then A's guest, would suffice to enhance his liability on account of his employment under C. So servants robbing guests in a hotel, or stewards and waiters robbing passengers on steamers would, it is apprehended, be liable to special penalties here provided, because though they are not the servants of the guests or passengers, still they are in a manner and, for the time being, servants of the guests upon whom it is their duty to attend.

(22) *Turner*, 11 Cox. 551. But cases on this point are conflicting; the distinction pointed out in the text does not explain the following cases: *Carr*, R. & R. 198; *Huggins*, R. & R. 145: *Tite*, 30 L. J. M. C. 142.

(23) *Wortly*, 21 L. J. M. C. 44. The liability of partners is now the same. Larceny Act, 1868 (31 & 32 Vict., c. 116), s. 1. The allowance of a portion of profits does not destroy the relationship of master and servant; *Lall Chand Roy*, 9 W. R. 37.

4178. Liability Limited to Property in Employer's Possession.—This appears to be deducible from the word "theft" in respect of any property in the possession of his master or employer, and which shows that the enhanced liability for the theft here is dependant upon the fact that the property he steals was then in the possession of his master or employer. If the possession was with the servant, the offence committed is not theft but criminal breach of trust under section 408. It is only when and so long as the possession remains with the employer that this offence can be committed. In England, a large number of cases turn upon the question of possession, but in view of the alternative convictions possible under the Code, these cases have no interest in this country; moreover, some of them take a view of possession which it is difficult to reconcile with the view of the Code.

The term "possession" is here evidently used in the popular sense before referred to (§§ 4086-4087). It is distinct from a charge or a general supervision which is not possession. For instance, a cash box, presumably locked, was placed in a Treasury building over which it was the duty of the accused, who were police constables to mount guard. They stole the money and were convicted under this section, and their conviction was confirmed by the High Court.(24) The distinction between custody and possession may be illustrated by another case. The complainant hired a cart to convey his tamarind fruits from the forest to his house. The cartman was a contractor employed to carry the fruit, and on the day in question he was not as usually escorted by the complainant's servants. While on the way to the complainant's house he abstracted some fruit and it was held that at the time of the theft the tamarind was only in the custody and not in the possession of the accused, and that it was not put out of the possession of the owner any the less, because the cart was the cart of the accused. As for the accused, he was held to be a servant, though his employment was temporary and his offence was consequently held to fall under this section.(25) It is submitted that the question whether the cartman was a contractor or a servant, did not depend upon the temporary nature of his employment, but upon its condition. Was he paid for at so much *per diem*, or was he paid for the conveyance of the whole quantity,—questions upon which the judgment is silent. It is apprehended that a hired cartman, any more than a hired boatman,(1) cannot be held to answer the description of a clerk or servant within the meaning of this section.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

Theft after preparation made for causing death, hurt or restraint, in order to the committing of the theft.

382. Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or

(24) *Juggurnath Singh*, 2 W. R. 55. In another case (*Boidnath Singh*, 3 W. R. 29), the section applicable was held to be s. 380, but judgment in neither case is supported by any reasons or discussion on the subject.

(25) (1881) 1 Weir 437; following *Bonkall*, 9 Cox. 419.

(1) *Bawool Manjee*, 8 W. R. 32.

in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations.

(*a*) A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(*b*) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

[*Person*—s. 11. *Causing death*—s. 299. *Hurt*—s. 319. *Restraint*—s. 339. *Theft*—s. 378.]

Synopsis.

(1) *Analogous Law* (4179).
(2) *Procedure and Practice* (4180).
(3) *Proof* (4181).
(4) *Form of Charge* (4182).
(5) *Principle* (4183-4184).

4179. Analogous Law.—There is only this difference between this offence and robbery; that while in this the thief prepares himself and is ready to cause death, etc., if resisted, in robbery the preparation takes effect and some injury is actually caused. In the one case there is the threat and readiness to cause the injury, in the other the injury itself is actually caused. There is, however, very little to choose between the two offenders, for the abstention from causing injury may be entirely due to the want of necessity. In short, an offender under this section may be as desperate as one who is called and punished as a robber, but the difference of four years in the maximum penalty provided for the two offences is warranted by the forbearance or absence of necessity for causing the threatened injury.

4180. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

For other points of practice, *see* §§ 4118-4725.

4181. Proof. The points requiring proof are those necessary for a case of theft (§ 4126) in addition to which prove:—

(7) That the accused had when committing such theft made preparation for causing death or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person.

(8) That he made the said preparation either—

(*a*) to commit the theft; or

(*b*) to make good his escape; or

(*c*) to retain his spoil.

4182. Charge.—The charge should run thus :—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed theft of——(*mention the property*) the property of A B, after having made preparation for causing death (*or* hurt, *or* restraint, *or* fear of death, *or* of hurt *or* of restraint) to——by——(*specify the preparation made*) in order to the committing of the said theft (*or* in order to the effecting of your escape after committing the said theft, *or* in order to the retaining of the property taken by the said theft) and that you thereby committed an offence punishable under section 382 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4183. Principle.—The point of aggravation present in this case is intimidation of personal injury as evidenced by the preparation made. A mere verbal threat without the evidence of present power is not sufficient. Such preparation may consist of the possession of a stick or a knife or any other weapon used or sufficient for causing hurt, or it may consist of the presence of confederates, who, though unarmed, put a person in fear of restraint as in the illustration (*b*).

4184. The possession of a weapon such as a stick, a knife, or a *dha* would be *per se* evidence of preparation under this section, unless its possession is otherwise accounted for. Such would be the case, for instance, if a party of men went armed with scythes to cut another man's crops, or with hatchets to cut down another man's grove or dismantle his house, in which case the possession of weapons would be otherwise accounted for. If being in such possession they were disturbed, and thereupon on a spur of the moment used their tools as weapons of offence, they could not then be convicted under this section.[2]

Of course, the criminality under this section depends merely on preparation and not necessarily on its knowledge by the person in possession. The possession of a loaded pistol by A *under his garment*, in illustration (*a*) and the posting of confederates around Z in illustration (*b*) are both instances of preparation unknown to the other.

Lastly, the moment violence is used the offence ceases to be punished as a theft under this section, and becomes robbery and is punishable as such.[3]

(2) *Nga Shan Gale*, (1903) 10 Bur. L. R. 87. The statement in the text is the *ratio decidendi* of this case in which, however, Fox and Birk, JJ., permitted themselves to lay down a rule, but which, it is deferentially submitted, is too wide. They said: "The possession by a thief at the time of his committing a theft of a knife or other weapon, which, if used on a human being, might cause death or hurt, would not of itself justify a conviction under the section. There must be something to show, or from which it may properly be inferred, that the offender made preparation for causing one or more of the results in the section." Does not *res ipsa loquitur?*

(3) *Hushrut Sheik*, 6 W. R. 85.

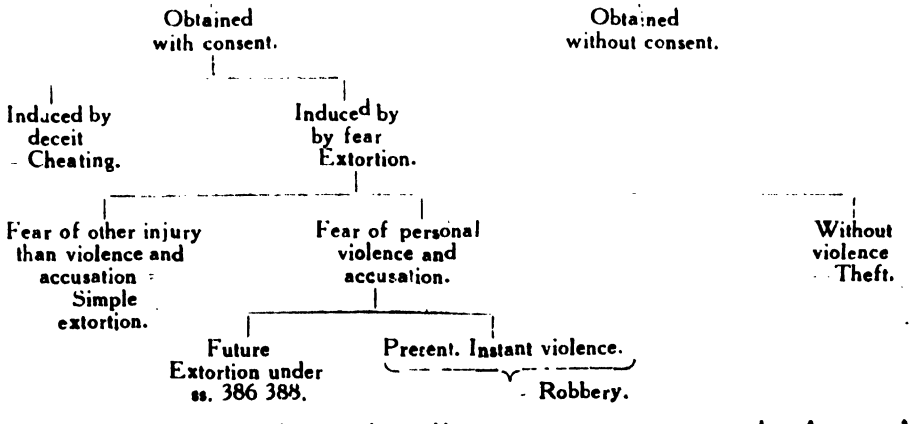
Of Extortion.

4185. Analysis of Extortion.—This branch of the chapter dealing with extortion comprises six sections, three of which (ss. 385. 387 and 389) deal merely with attempts, the remaining three dealing with the completed offence in its varying degrees of gravity depending upon the nature of the threat, and in this respect the sections are mere reproductions of the English cases, though presented in a much improved and systematized form. Briefly stated, the offence of extortion is here presented in three grades—the simplest form being an act by which delivery of property is obtained by menaces or threats not of the aggravated type presented in sections 386 and 388. These sections deal with the offence in which the offence is accompanied by threats of personal violence as grave as death or grievous hurt, or of the accusation of an unnatural offence or of any other offence punishable with imprisonment for ten years or more, or with transportation or death. Sections 385, 387 and 389 punish attempts of these offences respectively. The six sections thus deal with one offence presented in two stages of attempt and completed acts and both in three degrees of criminality proportionate to the nature of the threat by which the commission of the offence was attended.

These circumstances determine the gravity of the offence, the punishment for which may vary from a small fine to transportation for life.

4186. Extortion Contrasted with Cheating and Theft.—This offence has not quite a distinct place in the criminal jurisprudence of England, but it takes an intermediate place between theft and robbery, while it is also closely akin to the offence of cheating. The dividing line between these offences may not often be visible, but none the less it is distinct, as may be best seen in the following table:—

DELIVERY OF PROPERTY.



Extortion.

383. Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable

security, or anything signed or sealed which may be converted into a valuable security, commits "extortion."

Illustrations.

(*a*) A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(*b*) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain moneys to A. Z signs and delivers that note. A has committed extortion.

(*c*) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(*d*) A by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

[*Person*—s. 11. *Dishonesty*—s. 24. *Valuable security*—s. 30. *Injury*—s. 44.]

Synopsis.

(1) *Analogous Law* (4187-4188).
(2) *Extortion Distinguished from Theft and Cheating* (4189).
(3) *Principle* (4190).
(4) *Meaning of Words* (4191).
(5) *What is Extortion* (4192).
(6) *Intentional Intimidation* (4193-4197).
(7) *Legal Demand When Extortionate* (4198-4200).
(8) *What Dishonesty is Material* (4201-4203).
(9) *Inducement Necessary* (4204-4206).
(10) *Legal Demand* (4207).

4187. Analogous Law.—The offence here defined corresponds to the provisions of the English Statute, which enacts thus:—

"45. Whosoever shall with menaces or by force demand any property, *chattel, money, valuable security or other valuable thing* of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude."(4)

There are other provisions of the same Statute, relating to sending letters demanding money, etc, with menaces,(5) or sending a letter threatening to accuse of crime with intent to extort,(6) or inducing a person by violence or threats to execute deeds, etc., with intent to defraud,(7) or threatening to publish a libel, etc., with intent to extort which is punishable under the Libel Act 1843.(8) All these disjointed provisions of the English Statutes have been boiled down in the single provision here enacted, for "the putting of any person in fear of any injury to that person" is sufficiently comprehensive to comprise all that

(4) Larceny Act, 1861 (24 & 25 Vict., c. 76), s. 45, re-enacting 7 Will., IV & 1 Vict., c. 87, s. 7, with the addition of the words italicized.
(5) *Ib.*, s. 44.
(6) *Ib.*, ss. 46, 47.
(7) *Ib.*, s. 48.
(8) 6 & 7 Vict., c. 96, s. 3.

is enacted in the seven sections of the two English Statutes, and probably more. The offence here called " extortion " is itself unknown to English Law in the sense in which it is here used. There is no doubt such an offence as extortion was held in the older books to signify any oppression under a colour of right,[9] but it is more appropriately meant to signify the unlawful taking by any officer, by colour of his office, of any money or thing of value, that is not due to him, or more than is due, or before it is due.[10] This is the view of common law declared by the Statute of Westminster,[11] the provisions of which were extended to this country in 1792 by a Statute of that year[12] under which one Douglas, a resident of Tanjore, was convicted by the Court of the Queen's Bench in England for unlawfully receiving a gift of Rs. 2,000.[13]

4188. The English Statutes punish (*i*) threats, and for sending threatening letters, (*ii*) obtaining property by menaces, (*iii*) or robbery with threats, and (*iv*) extortion, which is obtaining money by public officers. Under the Code, the first would be punishable as criminal intimidation,[14] the second only as extortion, and the third as either extortion or robbery—according to the infliction of violence, and the fourth as taking illegal gratifications.[15] or extortion if it is obtained by use of intimidation. There is thus nothing exactly corresponding to this offence in English Law, though criminal acts are, of course, in each case liable to punishment.

4189. Extortion Distinguished from Theft and Cheating.—As has been pointed out before (§§ 4185, 4186), the primary object of the three offences of theft, extortion and cheating is wrongful gain of property. But they differ in the *modus operandi* adopted by the wrongdoer. In theft, there is the removal of property without consent. In cheating there is the removal with consent obtained by fraud, while in extortion here defined, the consent to delivery is obtained by show of fear. Extortion and cheating, therefore, agree in this that they both relate to delivery of property made or suffered, but the consent to delivery is not free as defined in section 30; and adopting the phraseology of that section, in the one case it is given under fear, while in the other case, it is given under a misconception of fact brought about by the cheat, or his accomplice.

4190. Principle.—Extortion takes an intermediate place between theft and robbery, and it is more akin to robbery than to theft. It becomes, indeed, robbery if the " offender at the time of committing the extortion is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, or instant hurt, or of an instant wrongful restraint to that person or to some other person, and by so putting in fear induces the person so put in fear to deliver up then and there the thing extorted."[16] But all robbery is not extortion, for robbery may consist of the forcible removal of property

(9) 1 Hawk, P. C. C. 68, s. 1; 4 Black 141.
(10) *Ib.*,
(11) 3 Edw. I, c. 26.
(12) 33 Geo. III, c. 52, s. 62.
(13) *Douglas*, 13 Q. B. 42.
(14) S. 506.
(15) S. 161.
(16) S. 390.

without the consent of the person in possession. The inter-relation between extortion and robbery only arises when robbery is effected by coerced delivery of property by another, or when there is some consent, though not a free consent. Extortion and robbery are then akin, and the difference between them is reduced to one of degree. Extortion is also closely allied to the two other offences of theft and cheating, but it is clearly distinguishable from either for reasons already considered (§§ 4185, 4186).

4191. Meaning of Words.—"*Intentionally puts in fear of any injury*": The intention must be to induce the delivery of property. It is not necessary that the person delivering property should be directly threatened. For if the extortioner threatens A knowing that it will induce B to deliver up property, it will be as much extortion as if he had threatened B. The threat must be of an injury, which means a harm illegally caused[17] (§ 362). "*And thereby dishonestly induces*": The inducement must be related to the fear as cause and effect, and it must be "dishonestly," that is, with the intention of causing wrongful gain or wrongful loss.[18] "*Any property*," not necessarily moveable property as in the case of thefts. "*Or valuable security or anything signed or sealed*": All these are property if convertible into a valuable security, but are mentioned for the sake of greater clearness. The clause was drafted at a time when the status of a chose-in-action as property was not so well defined as it has been since under the Transfer of Property Act.[19]

4192. What is Extortion?—The offence of extortion is the outcome of a judicial refinement which regards criminality from the threefold stand-points of intention, act and effect, and in which it is graduated according to the degree of mental malignity, manifested by the act and effect no less than by the determination of the mind of the offender directed against the wrongful seizure of property. That the seizure is wrongful in each offence against property goes without saying—that the offender is in each case punishable follows as a matter of course. But it is evident that the degree of punishment in each case cannot and should not be identical. It is, indeed, here that the work of science begins, each offence being placed in its true perspective according to the degree of culpability judged no less by the degree of mental wickedness of the offender than by the menace to the security and peace of the people directly and indirectly affected by the crime.

The offence of extortion has, therefore, a clearly logical place on the law of offences. And as here defined, its essential ingredients are (*i*) intentional, (*ii*) intimidation, (*iii*) inducing, (*iv*) delivery of property.

4193. Intentional Intimidation.—In the first place, then, the extortioner must intimidate, and his intimidation must be intentional. The word "intentional" would exclude cases of pure theft in which the mere presence of the thief may create alarm in the mind of the person whose property is threatened. Such a case would be dealt with as

(17) S. 44
(18) S. 24
(19) Ss. 3 and 130, *et seq.*

theft and not extortion, though in consequence of the alarm the person may himself deliver up his property. The gist of this crime is not only the fear caused, but the fear intended to be caused but for which the act ceases to be extortion, whatever other offence it might be.

4194. The intimidation here must consist of putting any person in fear of any injury to that of any other person. As such, and apart from the object aimed at, the act would constitute the offence of criminal intimidation which is elsewhere defined by the Code to be threatening another "with any injury to his person, reputation or property or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat."(20) This is probably a more exhaustive statement of the "injury" which is otherwise sufficiently defined in section 44. The mode of putting any person in fear of injury must necessarily vary with the nature and plasticity of the other's mind. For instance, a person may threaten another with the practice of magic or charms, and thereby induce him to deliver property, which he would not otherwise deliver. But in this case there may at times be a very thin line dividing this offence from that of cheating.

Suppose a Brahmin astrologer, intending to profit by the credulity of his victim, plays upon his fears by announcing the wrath of Saturn foreboding the destruction of him and his, and thereupon the victim, believing in his coming doom, averts it by making a large present to the astrologer who professes to reverse the course of the planet, the offence will undoubtedly be cheating because of the credulity of the victim and his consenting under a misconception of facts to the delivery of property.(21) But suppose in the same case the astrologer threatened to ruin his victim by magic or charms unless he delivers up the same property, and the latter is thereby constrained to deliver it to him, in which case the offence is extortion, because the delivery was made under fear. But in each case there was no consent, and such consent as was given was induced by either fear or a misconception of facts. The intimidation may thus take any form, and may arouse any fear whether of mundane or of spiritual injury, but not of good. And in this respect this offence is narrower than the cognate crime of cheating which may appeal to both.

4195. It is an essential element of the crime that the extortioner works on the fears and not on the hopes of his victim. He compasses his object by threatening injury rather than by promising a reward. The injury thereatened may be harm of any kind so long as it is threatened to be caused illegally. It may then be a harm "in body, mind, reputation or property."(22) It is not necessary that such harm in fact should be caused: all that is necessary is that the person should *fear* the coming of such harm as the alternative of non-delivery of his property to another. It is not necessary that the delivery of any pro-

(20) S. 503.
(21) §§ 166-168.
(22) S. 44.

perty should be indicated or specified, or indeed that its delivery should be more than hinted at. In fact, it is on this point that the subtle insinuations of the blackmailer differ from the crude attempt of a person like beggar in Gil Blas who with a musket on his shoulder waylaid a traveller and begged him for his goods. What intimidation suffices to constitute extortion cannot, therefore, be defined. It must depend no less upon the circumstances of the moment, than upon the age, sex and situation of the victim, and the fears and susceptibilities of his mind. But whatever may be the intention, and whatever the nature of the threats, they must be sufficient to *induce* the person to part with his property.

As Lord Ellenborough, C. J., said: "To obtain money under a threat of any kind, or to attempt to do it, is, no doubt, an immoral action; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money detained in the former cases, under the influence of such threats may amount to robbery; but not so in cases of threats of other kinds. But this is a case of threatening and not of deceit; and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case, attended with duress, or according to others such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money.(23)

So where the accused sent a letter to the prosecutor demanding £10 on pain of prosecuting him for selling a certain medicine without stamps, Lord Ellenborough, C. J., throughout the case, added "Now, the threat used by the defendant at its utmost extent was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is not such a threat as a firm and prudent man might not and ought not, to have resisted." The distinction between a threat of personal violence and threats of other injury here pointed out has been retained in the Code, and is made clear in defining robbery, which then refers to threats of injury of that special kind, as distinguished from other injuries affecting mind, reputation or property, the presence of which would in the same circumstances constitute extortion, though not robbery. If, therefore, A says to B: "Pay me Rs. 100, or else I will set your house on fire," the offence committed is extortion and not robbery, as the injury threatened affects his property but not his person.

4196. Now since the "injury" here threatened may be of any kind, it follows that the question depends not so much upon the nature of the threat as upon the effect it is intended to and does produce upon the mind of the other. Nor, indeed, is it necessary that the threat should be directed against the victim, if it is intended to influence him. For instance, the son, may for the purpose of extorting money from his father feign an attempt to commit suicide thereby frightening the father

(23) *Southerton*, 6 East, B. 726.

and making him accede to his request. He would then be guilty of extortion as all necessary elements of the offence are present in his case.(24) So a corrupt police officer intending to extort money from a person took him into custody and threatened to prosecute him for an imaginary offence, intending and knowing that his relations would come forward to ranson him and which was done. Here the money may be intended to be extorted out of the relation, and yet the injury may not be directed against him. In this respect the English view is coincident, it being held by Lord Russel, C. J., that "the word 'menaces' in the English Statute includes not merely threats to person and property, but also involving, no doubt, a threat of injury, but of injury not confined to the person or property of the person threatened."(25) And as was added in the same case the threats may relate to any threat of a danger by an accusation of misconduct, not amounting to a crime.(1) The threat may, again, be of the exposure of truth, it need not be of a falsehood. For the offence has nothing to do with the truth or falsehood of the accusation, but with the intention and its effect upon the mind of the victim.(2)

4197. So where the prisoner sent a letter to the prosecutor demanding of him a sum of money, failing which he should summon his daughter in a case as having visited a brothel with an officer, it was contended that the prosecutor had not controverted the fact that the prosecutor's daughter had visited the brothel, but Rolfe, B., told the jury that even if the lady had gone in fact to the brothel it would not make any difference in the charge.(3) The same view was taken in other cases in which the accused had threatened to expose the prosecutor for having been guilty of an infamous crime, unless a certain sum was paid up as hush-money, and whereupon the Court ruled that the offence had nothing to do with the truth of the accusation.(4)

So the prosecutor while returning home one night met a woman on the way to whom he spoke, and whereupon he was accosted by the prisoner who was a policeman on duty, who demanded his name threatening to prosecute him for having spoken to a prostitute on the street for which he made himself laible to pay a fine of £1. He, however, proposed to let the matter drop if he was paid 5s. which the prosecutor paid him. He was held to have brought himself within the plain words of the Statute.(5) The same view has been taken in this country, it being held that the terror of a criminal charge is a fear of injury within the meaning of this section, and that this offence may be committed whether the charge threatened is true or false. So where a person charged another of cattle-lifting, and the accused, who were policemen, thereupon apprehended certain persons and on being paid Rs. 30 reported the case as one of cattle-trespass, they were held to have brought themselves within the penalties of this section, irrespective of

(24) *Gregory*, (1866) I. J. (N. S.) 423.
(25) *Tomlinson*, (1895) 1 Q. B. 706 (708).
(1) *Ib.*, pp. 708, 709.
(2) *Hamilton*, 1 C. & K. 212; *Gardner*, 1 C. & P. 479; *Cracknell*, 10 Cox. 408; *Richards*, 11 Cox. 43; *Mobarruk*, 7 W. R. 28.
(3) *Hamilton*, 1 C. & K. 212.
(4) *Redman*, 10 Cox, 159; *Cracnell*, 10 Cox. 408; *Richards*, 11 Cox. 43.
(5) *Robertson*, 10 Cox. 9.

the truth of the charge against the person from whom they had extorted money.(6)

4198. Legal Demand When Extortionate.—But this rule has necessary limits due to the fact there are certain offences which the policy of law has made compoundable and in which a demand may be justifiably made by the party aggrieved as compensation or solatium for the injury suffered by him at the hands of the accused. Where the making of demand is legal, there is no injury in law, for injury means the causing of harm *illegally*, and no harm, whatever mental suffering it may cause, can be illegal when it is countenanced by law. But while this is conceded, it is said that in Madras, even in such a case a legal demand may become illegal and extortionate, if it is excessive and out of all proportion to the injury sustained. The accused, a Village Magistrate, had his goat, worth two and a half rupees, injured by the complainant, whereupon he demanded a sum of Rs. 10 by way of compensation, failing which he threatened to prosecute her. He was convicted of extortion and on the question about the legality of the conviction being referred to the High Court, Best, J., said : "Though to threaten to use the process of the law is perfectly lawful, to do so for the purpose of enforcing payment of *more than is due* is illegal, and such a threat made with such object must be held to be a threat of injury sufficient to constitute the offence of extortion. The fact that the offence with which the complainant was liable to be charged was compoundable can make no difference. The question is, was the complainant induced by such threats to pay the accused more than the latter was entitled to, and the finding is in the affirmative. This is sufficient to justify the conviction."(7)

4199. But in this case the goat was capable of correct valuation, and the demand made was found to be egregiously out of all proportion to the injury done. There the injury was not a reason but an excuse for the exaction. There may, however, be cases in which the injury sustained is not capable of approximate valuation. Such would, for instance, be a case of the deprivation of one's estate or damaging one's reputation, in which case such a rule would appear to be inapplicable, not less because of the difficulty of valuation than because the demand must be one which, as held by Lord Ellenborough, C.J., must be of such a nature as is calculated to overcome a firm and prudent man.(8) In the Madras case, the demand gained its sting from the position of the demandant who was a Village Magistrate,(9) and such facts taken along with the demand itself may be sufficient to overcome even a firm and prudent man. But the question is one of fact(10) which must be decided upon the proved circumstances of each case. For, the Court does not fix an inflexible standard of firmness and prudence. It judges of the act according to the fact of each case.

(6) *Mobarruk*, 7 W. R. 28.
(7) *Appalasami*, (1892) 1 Weir 441.
(8) *Southerton*, 6 East R. 126.
(9) So in *Robertson*, 10 Cox. 9; one important element of the crime was that the accused was a policeman. *See* the facts of this case given, *supra*.
(10) *Tomlinson*, (1895) 1 Q. B. 706; *Carruthers*, 1 Cox. 138; *Wallon*, L. & C. 288.

The accused was a travelling grinder and ground six knives of the prosecutrix, the ordinary charge for grinding being 1*s.* 3*d.* The accused first ground the knives, and then demanded 5*s.* 6*d.* for the work, and on her refusing to pay it he assumed a menacing attitude, kneeling on one knee and threatening the prosecutrix, saying: "You had better pay me, or it will be worse for you," and "I will make you pay." The prosecutrix was frightened and paid the amount demanded. He was convicted of extortion. The prisoner contended that as some money was due, the question rested simply on a *quantum meruit*, but on a case reserved seven Judges held the conviction to be right.(11) It is said that it is of the essence of this crime that the property should be at once parted with in consequence of the fear due to the threat.(12) But this is not apparent from the section, which, indeed, only requires that the person threatened should be put in fear of injury, which may as much rush upon him at once or crawl upon him by degrees. But there is this to be said in the latter case, that if he had time to take advice and in fact took it, he could not be said to have acted from fear and not under the advice. So if a person demand a large sum of money to withdraw from a criminal charge, assuming that the offence is compoundable, and the parties consult their legal advisers and then would-be accused pays down a sum much in excess of what would be reasonable in the circumstances, it cannot be held that the other was guilty of extortion, for people sometimes pay out large sums merely to purchase peace.

4200. The prisoner had been carrying on an intrigue with the prosecutor who was a clergyman, and who had at different times paid her £ 1,200. She was then neglected, and being in distress, made repeated calls upon him for assistance, and finally sent an epistle demanding £400 on pain of exposing his immorality. She was indicted for extortion, and Tindal, C.J., told the jury "that parts of this offence have been made out, is perfectly clear; that a letter was sent by the prisoner to the prosecutor making a demand of money with menaces, there is no doubt, what you will have to say, therefore, is whether that was done without reasonable and probable cause; for it is admitted that the menaces contained in these letters are such as are contemplated by the Act;(13) and, indeed, the threat of exposing a clergyman, who has been guilty of great vices, in his own church on the most solemn day of the year, of publishing his conduct afterwards to every rank of society in his own neighbourhood, and also of spreading his disgrace more publicly still, can scarcely be said to be such a threat as not to require more than ordinary firmness to resist it; and, therefore, according to the proper test laid down by Lord Ellenborough,(14) to be such as not to fall within the meaning of this Act. But the main defence is that there was some just and reasonable ground for the demand made in this case, or that the prisoner at least truly and honestly believed that she had just and reasonable cause for making it; and that is the view which I recommend you to take in applying this evidence. Ask yourselves the question whether this demand was made at the time when the party making it really and honestly believed that she

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(11) *Lovell*, 8 Q. B. D. 185, (186); following *M'Grath*, L. R. I. C. C. 205.
(12) *Fuller*, R. & R. 308; Jackson, 1 Leach. 193-*n*.
(13) 7 & 8 Geo. 4 c. 29, s. 8.
(14) *Southerton*, 6 East, R. 126, cited *ante*.

had good and probable cause for making it.[15] That this is a good defence under this Code is indicated by the presence of the word "dishonestly" in the section.

4201. What Dishonesty is Material.—For in such cases the improper threat of a prosecution may constitute a legal "injury," but the mere threat of such an injury does not amount to extortion unless it induced another person to deliver any property, and it does *dishonestly* not necessarily follow from the existence of injury. The word "dishonestly" has been defined before,[16] and shortly stated, it implies the intentional employment of unlawful means to obtain property to which one is not legally entitled. The question then reduces itself to this: (*a*) did the accused *intentionally* intimidate; (*b*) did the intimidation relate to the doing of an illegal harm; (*c*) did he *intentionally* adopt this means to secure a gain for himself; and (*d*) were the *means* adopted unlawful, and the *demand* made illegal. There can be no dishonesty where the accused believes in the righteousness of his demand. So where the accused who were toll gate-keepers demanded tolls from carts which the cartmen refused to pay, and left their carts at the gate, taking away their bullocks, it was held that the element of dishonesty being wanting, the accused could not be convicted of extortion.[17] The question of dishonesty would arise where the demand is made not as a claim of right, and if it was *bona fide* there can be no extortion, for the essential element of dishonesty is then wanting.[18]

4202. Dishonesty is, of course, a matter of inference: it is incapable of occular demonstration. It may be inferred from acts which make it improbable that the accused had acted from a motive other than what his acts naturally point to. The accused was the agent of a toll-contractor, and, as such, had been warned against levying a toll on empty carts leaving a certain town, which were exempt from the duty. Notwithstanding this he persisted in levying such toll and detained the carts till it was paid. He was rightly held guilty of extortion, and his accomplice, who did not receive the money but detained the carts, was similarly convicted, his wrongful detention of the carts being held to be a sufficient injury within the meaning of section 44 of the Code.[19]

4203. But there is neither illegality nor dishonesty in demanding a heavy compensation for loss done by the trespass of the prosecutor's cattle before taking them to the pound, threatening to impound them unless the demand was met. It was held that as the charges were paid under threat of what was a proceeding that was lawful and which did not furnish

(15) *Miard*, 1 Cox. 22; followed in *Chalmers*, 10 Cox. 450.

(16) S. 24.

(17) *Paditi Chenchu*, (1882) 1 Weir 440.

(18) So in England the demand must be without reasonable and probable cause; *Miard*, 1 Cox 22; *Chalmers*, 10 Cox 450, which are held to apply to the prisoner's mind when the demand is made and not to the truth or falsity of the accusation; *Hamilton*, 1 C. & R 212; *Gardner*, 1 C.& P. 479; *Cracknell*, 10 Cox 408; *Richards*, 11 Cox 43, in *Chaturbhuj* 45 A. 137; *Hanmant Rao*, 75 I.C. (N.) 764, it was held that compelling merchants by means of picketting to sign pledges not to import foreign cloth and realizing fines for trading in foreign cloth by means of picketting constituted extortion; *sed quaere* where is the dishonesty?

(19) *Appalasami*, (1892) 1 Weir 441.

ground for civil action, there was no injury within the meaning of the Code.[20] The case would be the same and even stronger for the accused, if he drove the cattle, and some friendly mediators persuaded the complainant to bargain with the accused for the compensation which the accused declined to reduce, and which the complainant thereupon paid, failing which the accused threatened to impound his cattle.[21]

So a pleader is at liberty to demand what fee he likes for his service, and the client cannot hold his demand to be extortionate merely because it is excessive. The accused was junior pleader in a criminal case, and was on a certain date of hearing instructed by his senior to apply for an adjournment which presumably not being granted, he declined to conduct the defence singlehanded unless he was paid Rs. 30, for which he took a bond from the complainant, who prosecuted him for extortion on the ground that he was constrained to yield to the pressure at a time when he was helpless; but the Court reversing the conviction held that the accused being retained with a senior, was under a contract to defend the case jointly with his senior, and that as such his demand of a fee to undertake the defence unassisted did not constitute extortion.[22] But the case would have been different if the pleader had been solely responsible for the conduct of the case, and had then at a critical time made a demand which the client could not resist. As the relationship between counsel and client is not that of a principal and agent, and as the fee paid to him is not *mercēs* but an *honorarium*, his case would in this respect appear to be exceptional.

4204. Inducement Necessary.—Again, a mere demand, however illegal and dishonestly made, is not necessarily extortionate, unless the demandant uses the fear as a weapon of persuasion and inducement to secure delivery of the property. The inducement may be express or implied.[23] But it must then be so implied as to leave no reasonable doubt that the real intention was to extort. In other words, while the delivery of money must be unerringly traced to the threat, as an effect to its cause, it is not necessary that the threat and its consequential demand should be explicit and leave nothing to the understanding. So where one Abbas Ali, a subordinate in the Small Causes Court, demanded two rupees from a peon, and the latter paid it from fear of being turned out of his appointment, the Court took into consideration the similar fate which had befallen other peons at the instance of Abbas and his influence, real or supposed, with the establishment.[24] The Court officials are accustomed to commit petty extortions as a matter of time-honoured usage of their tribe, which they justify under the euphemistic names of *dasturi, inam haq* and the like. Even the village *patwari* expects the village tenants to worship his inkpot and lay before it a rupee which finds its way into the *patwari's* pocket, and but for which the recalcitrant tenant has to mourn the confusion of his holding.

The fact that the extortioner says little does not reduce his crime, for a hint from a highly placed official may be taken to heart more readily

(20) (1880) 1 Weir 438.
(21) *Pethiredla,* (1883) 1 Weir 440.
(22) 5 M. H. C. (App.) 14.
(23) *Hickman,* R. & M. C. C. 34; *Jackson,* 1 Leach 267.
(24) *Ameer Abbas Ali,* 18 W. R. 17.

than a dogged persistency on the part of a man of no consequence. The question in such cases, to quote the words of Wilde, B., is: "What are the incidents attending the procurement of money or property by menace or threats necessary to constitute stealing?[25] It is said in East,[1] the taking must in all cases be against or without the consent of the owner to constitute larceny or robbery.' On the other hand, it is said at the same place, 'a colourable gift, which in truth was extorted by fear, amounts to a taking and a trespass.' These two passages, when taken together, appear to define the offence of stealing in the case of menaces. For if a person is induced to part with property, through fear or alarm, he is no longer acting as a free agent, and is no longer capable of the consent above referred to. Accordingly, in the cases cited in the argument[2] the threatened violence, whether to person or property, was of a character to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent."[3]

4205. In such cases criminality does not merely depend upon the intention of the wrong-doer as upon the effect it has on the other party. If it fails to produce the requisite effect the act may be an attempt, but it falls short of the completed crime. But as in either case the threat may be as much pointed and explicit as circuitous and understood, the jury have to consider whether the words used or written were intended to convey the inducement to deliver property. For this purpose evidence might be offered to show that the words were used in a special sense, and that the prosecutor so understood them.[4] So where the prisoner wrote: "This is to inform you that you had better not let your farm to any of your family; if you do you will suffer as before." The Court admitted evidence to prove the threat the closing words of the letter was intended to convey. The prosecutor's farm had been burnt down on a previous occasion, and evidence of it was consequently admitted. It is not then the words used, but the intention, that is to be regarded. The prisoner wrote a letter to a banker, stating that it was intended by a cracksman to burn his books and cause his bank to stop, but that if £250 were put in a certain place, the writer would prevent the mischief, otherwise the mischief was inevitable. It was held that the letter contained a demand made with menaces.[5]

4206. The accused had taken a license to collect wood from a certain Government forest, which only entitled him and his servants to collect as much wood as they could, instead of which he commenced acting as if he had a monopoly to the jungle wood, and began levying a toll from persons going to the jungle for wood; it was found that in doing so he acted in defiance of explicit orders that he was not to levy a toll from the other ryots, and it was consequently contended for him that in forcing the ryots

(25) In England the offence under 24 & 25 Vict., c. 96, s. 45, is so described.

(1) 2 East P. C. 555.

(2) *Parfail*, 1 East P. C. 416; *Simon's case*, 2 East P. C. 731; *Taplin's case*, *ib.* 712.

(3) *Walton*, L. & C. 288.

(4) *Hendy*, 4 Cox 243.

(5) Decided under 7 & 8 Geo. IV, c. 29, s. 8; *Smith*, 4 Cox. 42, overruling *contra* in *Pickford*, 4 C. & P. 227, now overruled by 24 & 25 Vict., c. 96, s. 49.

to pay a toll for the wood which they were entitled to remove without payment, he was guilty of extortion, but Couch, C.J., held that the act did not amount to that offence, for what the prisoner in effect said was, "you shall not have the firewood unless you pay me for it," which left the villagers option in the matter of payment. It was, moreover, held that in view of the agreement, the accused might justifiably have believed that he had a right to levy the toll, and if so, his act, even though illegal, would not be dishonest. It was, moreover, added that if the demand was dishonest, the offence would not still be extortion, but cheating, as the accused would then have made wrongful gain without threatening injury which is the gist of this crime.(6)

The same view was held in the case of two policemen who had received an order to collect certain statistics as to the prevailing market rates, whereupon they declared in the bazar that the traders were to be taxed and to escape which they paid the accused certain sums of money, whereupon they were convicted of extortion; but the High Court held that as "it was more in consequence of their credulity than in consequence of any personal fear that they parted with their pice," the offence was held to be not of extortion but one of cheating to which the conviction was altered.(7) In such a case it is possible for the accused to play upon the fears of a person as much as upon his credulity, and in that case it may not be possible to say whether the payment had been induced by fear or credulity, and when the accused should be convicted in the alternative.(8) Similarly, cases may arise in which it is doubtful whether a payment made to a public servant was made from the hope of a favour or fear of a disfavour, in which case the offence is either bribery or extortion; for which a conviction in the alternative would be justifiable. The accused, who were vaccinators, received certain moneys from the parents of infants for exempting them from vaccination, and threatened to vaccinate them if they were not squared. They were convicted of this offence on the ground that since they had no power of compulsory vaccination, their threat to vaccinate the infants compulsorily was the threat of an injury which induced the parents to part with their money.(9) But if they had such power the offence would probably have been doubtful, justifying a conviction under either section 161 or 384.

4207. Legal Demand.—A legal demand however high does not constitute extortion. The accused was entitled to solemnize *nikah* marriages. He demanded prepayment of a fee before officiating at the marriage. He was held justified.(10)

384. Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Not comp.

Punishment of extortion.

[*Extortion.*—s.383.]

(6) *Abdul Kadar*, 3 B. H. C. R. 43.
(7) *Meajan*, 4 W. R. 5.
(8) *Ramnarain*, 3 W. R. 32.
(9) *Harihar*, 1 C. P. L. R. 24.
(10) *Nizham Din* 4 L. 179.

Synopsis.

(1) *Analogous Law* (4208-4209).
(2) *Procedure and Practice* (4210-4211).
(3) *Proof* (4212).
(4) *Charge* (4213).
(5) *What is Extortion* (4214).
(6) *Extortion of Bribe* (4215).
(7) *Extortion and Robbery* (4216).

4208. Analogous Law.—Extortion is defined in the last section, and this section provides a penalty for a case not otherwise provided for. For this is not the only section under which the offence is punishable, as there are two other sections (ss. 386 and 388), which prescribe higher penalties for the same offence committed with threats of greater injury. In this respect the offence may be said to possess three degrees of gravity varying according to the nature of the threats:—

"(*i*) Where the threat is of an accusation that the accused had committed an unnatural offence, in which case the only maximum punishment is transportation for life (s. 388, cl. 2).

"(*ii*) (*a*) Where the threat is of causing death, or grievous hurt (s. 386) or (*b*) of an accusation of an offence punishable with death, transportation for life or imprisonment for ten years (s. 388), in both of which cases the accused is liable to the maximum sentence of ten years, and fine.

"(*iii*) Where the threat is of a kind not before provided for, in which case alone is the accused punishable under this section.

4209. There remain three other cases of attempts in which, however, the sentences vary as follows:—

Cases (*i*) and (*ii*) (*b*), maximum sentence ten years and fine; case (*ii*) (*a*), maximum sentence seven years and fine; case (*iii*), maximum sentence three years or fine. The three offences are thus subject to a double classification in their two stages in accordance with the nature of the accusation. The case here presented is the simplest, and as such is necessarily excluded by the sections prescribing the higher penalties.

4210. Procedure and Practice.—This offence is non-cognizable and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class.

4211. As this offence is non-cognizable, there is no duty cast on a village watchman to apprehend persons committing extortion in their presence, and a village watchman quietly looking on extortion committed in his presence could not be prosecuted for abetment as he is not thereby guilty of an illegal omission.(11) So a person who advances money to another to pay to the extortioner cannot be regarded as an accomplice, nor is his testimony vitiated on that account.(12) As regards the venue of an offence under this section, it is provided by the Procedure Code as follows:—

(11) *Gopal Chunder Sirdar*, 8 C. 728. (12) *Deodhar Singh*, 27 C. 144; *Deonandan Pershad*, 33 C. 649.

"A is put in the fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.(13)

4212. Proof.—The points requiring proof are:—

(1) That the accused put the complainant in fear of some injury

(2) That the injury threatened was either to the complainant or some other person.

(3) That such threat was intentional.

(4) And the accused thereby induced the person threatened to deliver to some person some property or valuable security, or something signed or sealed which was convertible into a valuable security.

(5) That the accused did as in (4), dishonestly.

4213. Charge.—The charge must specify the nature of the threat used by the accused, the name of the person threatened with the amount alleged to have been in consequence. A failure in this respect is an illegality vitiating the conviction.(14) The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of ——at——you committed extortion by putting *A B* in fear of a certain injury, to wit——, and thereby dishonestly induced the said A B to deliver you a certain property, to wit ——, and that you thereby committed an offence punishable under section 384 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4214. What is Extortion?—The principle ingredients of this crime are (*i*) putting any person in fear of any injury and (*ii*) thereby inducing such person dishonestly to (*iii*) deliver property. The intimidation by which the extortioner dishonestly victimizes another is the principal distinguishing feature of this offence, which is otherwise allied to cheating and theft and other offences of which the object is dishonest acquisition of property. The intimidation may be of any kind (§ 4195). It may be of an accusation of crime, in which case the nature of the offence will vary with the nature of the accusation (§ 4186). It is not necessary that the person threatening should himself receive the money. If such were the law, an extortioner would have secured immunity by engaging an accomplice. If two or more conspire and one utters the threat, and the other receive the money, they would be liable for extortion.(15) And so it is unessential that the person intimidated should also be the person against whom an injury should be threatened, as long as the former is

(13) S. 179, *ill.* (c), Cr. P. C.
(14) *Ramchandar Sahai*, 35 I. C. 971.
(15) *Shankar Bhagvat*, 2 B. H. C. R. 394.

thereby induced to part with his property. The terms "injury" and "dishonestly" are in this connexion material, but their sense has been already the subject of discussion in the foregoing commentary to which reference should be made for further information on the subject.(16)

4215. Extortion of Bribe.—The distinction between extortion and some cases of bribery, though in theory well marked, is in practice often negligible; since, while in extortion the person accused receives the money by menaces and threats, the inducement in bribery depends upon the inducement to render service or disservice. Now a threat of injury(17) and a threat of harm, though distinguishable in law, have often the same operation upon the human mind.(18) But the mode of proof in the two cases is different In a case under s. 161 it is not necessary for the prosecution to show how the illegal gratification came to be demanded or obtained, so long as it can be established by evidence that it was obtained. But in a case under this section it is necessary to prove that the accused put the complainant in fear of injury with the object of inducing him to pay him money. Moreover, while in a case of bribery the complainant is an accomplice and his evidence requires corroboration, the complainant under this section labours under no such disability.(19)

4216. Extortion and Robbery.—As will be presently seen (§ 4258) extortion may amount to robbery, when the extortioner induces prompt delivery of property as a result of his threat of injury of the kind described in s. 390. It may, sometimes, be difficult to discriminate between extortion and an attempted robbery. Such was the case of a drunken accused who, armed with a *dah*, proceeded to the house of another and commenced kicking at the doors of his room, demanding money and threatening to kill him if he was refused it. The door gave way to his kicks, but then the accused fell down, and meanwhile, the inmates had fled out of the backyard to raise an alarm in the village, which resulted in his immediate arrest. He was convicted under s. 398 but on appeal his conviction was altered to one under s. 387 on the ground that it was doubtful whether his threats would have led to the instant delivery of property.

For other cases, *see* s. 390, Commentary.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Not comp.

Putting person in fear of injury in order to commit extortion.

385. Whoever in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Injury*—s. 44. *Extortion*—s. 383.]

(16) Ss. 24, 44.
(17) S. 44.
(18) *Naga Kan Tha*, (1912) 6 Bur. L. T. 92, 20 I. C. 237.
(19) *Tapeshri*, 15 A. L. J. 127, 38 I. C. 429.

Synopsis.

(1) *Analogous Law* (4217).
(2) *Procedure and Practice* (4218).
(3) *Proof* (4219).
(4) *Form of Charge* (4220).
(5) *Attempted Extortion* (4221).

4217. Analogous Law.—The section punishes an attempt to commit extortion, when the attempt has failed to induce delivery of the property. But the intimidation was intended to bring about that result though it did not succeed in doing so.

4218. Procedure and Practice.—This offence is non-cognizable, but warrant should, ordinarily, issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class.

4219. Proof.—The points requiring proof are:—

(1) That the accused put or attempted to put some person in fear.

(2) That the fear shown was of some injury.

(3) That the intention was to commit extortion.

4220. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you put A B (*or* attempted to put A B) in fear of an injury, to wit——, in order to the committing of extortion, and that you thereby committed an offence punishable under section 385 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4221. Attempted Extortion.—There must be something more than a mere demand to amount to an attempt to commit extortion. It must be at least an attempt to put any person in fear of injury. As such, the accused must intend that his act would have the effect of frightening the complainant, though instead of being frightened, the latter may resent his act and prosecute him under this section. Persons who utter threats or send threatening letters would be so punishable, if they thereby intended to commit extortion. In England, these acts are statutory crimes[20] and are similarly punishable independently of the effect they produce upon the other party. So if one says to another "Pay me Rs. 100 or else you will find your house burnt down within a week," the words uttered would distinctly amount to this offence irrespective of the power of the threatener to execute the threat or the inflammability of the house. So it has been held in England that where a person used menaces to demand money of another, the offence was committed, though the party menaced had no money to pay.[21] It is a question of fact whether what was done by the

(20) Larceny Act, 1861, 24 & 25 Vict., c. 96, ss. 44, 45.

(21) *Edwards*, 6 C. & P. 515.

accused amounted to an attempt to commit extortion.(22) For this purpose, there must, however, be evidence not only of a demand, but also of a demand supported by threats of injury in case of non-compliance. This need not be expressed, but may be understood from the position of the accused and the surrounding circumstances. Where, for example, the accused who were policemen, put a person in the lock-up and threatened to prosecute him, demanding a sum of money from him or his relations, the offence of attempt was held to be complete, though the money be never paid.

Session. Non-cog. Warrant. Not bail. Not comp.

Extortion by putting a person in fear of death or grievous hurt.

386. Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Person*—s. *Death*—s. 46. *Grievous Hurt*—s. 320. *Extortion*—s. 383.]

Synopsis.

(1) *Analogous Law* (4222).
(2) *Procedure and Practice* (4223).
(3) *Proof* (4224).
(4) *Principle* (4225-4226).
(5) *Charge* (4227).

4222. Analogous Law.—The exact place of this section in the offence of extortion has already been defined.

4223. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

4224. Proof.—The points requiring proof are the same as for an offence under s. 384 (§ 4212), but instead of the first point, prove:—

(1) That the accused put the complainant in fear of death or of grievous hurt.

4225. Principle.—The greater heinousness of this offence depends upon the more serious nature of the threat, and the consequently greater alarm which it is likely to cause in the mind of the person threatened. Here there must be not only extortion, but extortion made by threat of death or grievous hurt. That the threat amounted to that and nothing less or different must be of course, proved by the prosecution. It is in any case a question of fact within the province of the jury, who must consider the question having regard to the language of caution usually employed by persons in the position of the accused on such occasion, and the real nature of the injury actually intended to be threatened.

(22) *Menaye*, 3 F. & F. 310; *Bragnell*, 4 Cox 402.

4226. The prosecutor received a letter from the prisoner who signed himself as "Cut-Throat" as follows:—

"You are rogue, thief, and vagabond, and if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall reap it, my banker. Have a care, old chap, or you shall disgorge some of your ill-gotten gains, watches and cash, that you have robbed the widows and fatherless orphans. Don't make light of this, or I'll make light of you and yours."

It was contended that the letter was hypothetical and conveyed no definite threat for which regard must be had to the letter and not to the signature. But Patterson, J., held that the letter must be read as a whole and that it clearly conveyed a threat to kill and murder, as no one who received it could have any doubt as to what the writer meant to threaten.(23) It is not necessary that the threat to kill should be plain and couched in absolutely unambiguous language; it is sufficient if it is so clear as to make a reasonable man apprehend the injury threatened. So where the accused wrote: "The most desperate gang in the metropolis have resolved to obtain possession by whatever means of a certain portion of your property. They, however, mutually agree that if I give them £ 100, they will relinquish the design upon you but if not, non-compliance will hereafter be repented of too late." The letter was directed to J. Coutts, and the question was whether his partners could prosecute, and which Maule, J., held they could, otherwise "nothing could then be more easy than to send a threatening letter with perfect impunity." It was then objected that the letter conveyed no threat to the partners, upon which Maule, J., told the jury: "To ascertain this you must, of course, look to the letter itself, and to the situation of the parties. It may be that, under certain circumstances, an apparently innocent letter may convey a threat. It may be that no letter could be written which it might not be possible to prove by extraneous matter, did not contain a threat. Now I can conceive a case where such a letter as this might be written:—'Sir, I trust you are well, and I shall be happy to meet you to-morrow.' There I should consider myself called upon to withdraw such a letter from the jury, because it would be absurd to say such a letter contained a threat. But as it is impossible, I can tell you that this letter may not contain a threat, I cannot decide that it is not a question for the jury."(24)

4227. Charge.—For form, *see* § 4213, in which, *for* "in fear of a certain injury, to wit——" *substitute* "in fear of death or grievous hurt."

387. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Session. Non-cog. Warrant. Not bail. Not comp.

Putting person in fear of death or of grievous hurt in order to commit extortion.

[*Person*—s. 11. *Death*—s. 46. *Grievous Hurt*—s. 320. *Extortion*—s. 383.]

(23) *Boucher*, 4 C. & P. 562. (24) *Carruthers*, 1 Cox 138.

Synopsis.

(1) *Analogous Law* (4228).
(2) *Procedure and Practice* (4229).
(3) *Proof* (4230).
(4) *Charge* (4231).
(5) *Attempted Extortion by Threat of grievous Injury* (4232-4233).

4228. Analogous Law.—This section bears the same relation to the last as section 385 bears to section 384. And both being cases of attempts, the points requiring proof are the same, but there must be necessarily evidence that the attempt made or fear caused was of death or of grievous hurt.

4229. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

For other points of practice, *see* under s. 384.

4230. Proof.—The points requiring proof are the same as for an offence under section 385 (§ 4219), but instead of the first point there, prove:—

(1) That the accused put some person in fear or attempted to put him in fear of death, or of grievous hurt.

4231. Charge.—For form, *see* s. 385 (§ 4213), where, *for* "in fear of injury" *substitute* "in fear of death or grievous hurt."

4232. Attempted Extortion by Threat of Grievous Injury.—As has been observed under section 383 the person threatened must necessarily be the person from whom property is attempted to be extorted, but the fear of "death or of grievous hurt" need not refer to him. So at one time it was a common spectacle of a certain class of beggars to visit houses for beggary and on refusal of alms to threaten to commit suicide or mutilate their body—thus moving the victim to deliver money demanded by the extortioner. So a son intending to frighten his father into submission may feign an attempt to commit suicide in order to extort money, in which case the son may be prosecuted for extortion or an attempt according to whether the father was or was not thereby induced to deliver property.(25) Between these cases and those in which the black-mailer threatens to shoot his victim unless his demand is met, there is naturally a wide difference. The one moves the moral sense, the other causes alarm by threats of direct bodily injury.

4233. The difference between this offence and that of robbery will have to be presently considered, but the following case illustrates one aspect of it. The accused was found to have been drinking toddy before he went into the house of another, *dah* in hand, and called out to the owner to give him money, otherwise he would cut up the house-master and his wife. The accused kicked at the doors and slashed them, but when the doors gave way, he fell down; meanwhile the inmates had escaped by the

(25) *Gregory*, (1866) I. J. (N. S.) 123.

back door. He was convicted under s. 398 but on appeal his conviction was altered to one under this section on the ground that when he uttered the threat the door was shut and the accused could not get at the inmates, and that therefore it was doubtful whether he could have executed his threats.(1)

Session. Non-cog. Warrant. Bailable. Not comp.

Extortion by threat of accusation of an offence punishable with death or transportation, etc.

388. Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be one punishable under section 377 of this Code, may be punished with transportation for life.

[*Person* s. 11. *Offence* s. 40. *Extortion* s. 383.]

Synopsis.

(1) *Analogous Law* (4234).
(2) *Procedure and Practice* (4235).
(3) *Proof* (4236).
(4) *Charge* (4237).
(5) *Extortion by Accusation* (4238, 4239).
(6) *Proof of the Offence* (4240-4243).
(7) *Proof of Other Acts* (4243).

4234. Analogous Law.—This section, again, presents the same offence in another equally aggravating form in which the accused threatens the accuser with the accusation of an offence punishable with imprisonment for ten years, or transportation for life, or death, or its abetment. And for the purpose of punishment the section distinguishes between an accusation of an unnatural offence punishable under section 377 and other offences; the former being subject to the higher punishment of transportation, while the latter may be sentenced to imprisonment extending to ten years. This distinction between the two accusations is obviously dictated by the English precedents which abound in cases of the former kind. But it is by no means the common form of extortion in this country, and the specially deterrent punishment for that offence would seem to have been provided on an assumption of facts which time has shown to be fallacious.

4235. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session. Other points of practice have been set out under section 383.

4236. Proof.—The points requiring proof are the same as for an offence under section 384 (§ 4212), but instead of point (1) there, prove:—

(1) *Nga Tun Baw*, (1912) 5 Bur. L. T. 193, F. B., 17 I. C. 800.

(1) That the accused put the complainant in fear of an accusation of—

(*a*) an offence punishable with death, or transportation for life, or with imprisonment for ten years; or

(*b*) an attempt to commit the above offence; or

(*c*) an abetment of the same;

And as a special point of aggravation, prove:—

(6) That such offence was unnatural offence punishable under section 377.

4237. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed extortion by putting A B in fear of an accusation against him or against——of having committed (*or* attempted to commit) the offence of—which is an offence punishable with death [(*or* with transportation for life, or with imprisonment for ten years) or under s. 377] and thereby dishonestly induced the said A B to deliver you——(*specify the property delivered*) and that you thereby committed an offence punishable under section 388 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4238. Extortion by Accusation.—Between an extortion by threat of violence and the threat of other injury there is some difference elsewhere noticed (s. 383). But when the threats assume the form which cause alarm, it is an offence of high degree against which the Code makes special provision. As such, this section must be read as supplementary to section 386 which deals with another instance of the same offence committed under another similar circumstance of aggravation.

4239. So far as this offence is concerned, its special criminality depends upon the threat of the accusation of a serious crime punishable with death, transportation or imprisonment for ten years. The section, moreover, holds one accusation in special abhorrence and it provides for the higher penalty of transportation for life if the threat related to the commision of an unnatural offence or its attempt or abetment. This appears to be a favourite form of accusation with the extortioner in England, if we may judge from the large number of cases in which the accusation related to that offence, and in which the offence then was, as it is still, held to be robbery.(2) This form of accusation was favourite with the

(2) 7 & 8 Geo. IV, c. 2; G. 1 Vict., c. 87, s. 4; Rolfe, B., in *Stringer*, 2 M. C. C. 261; *Jones' case; Brown's case; Donnall's case*, 2 East P. C. C. 16, s. 130, pp. 714, 715, 717, 721, *Staple's case; Hickman's case*, 2 East P. C., p. 728, 1 Leach 278; *Reane's case*, 2 Leach. 626; *Jackson*, 1 East P. C., Add. XXI; *Cannon*, R. & R. 146; *Egerton*, R. & R. 375; *Fuller*, R. & R. 408; Gardner, 1 C. & P. 479: *Gill's case*, 1 Lew. 305; *Kain*, 8 C. & P. 187; *Henry*, 8 C. & P. 809.

blackmailer on account of the offence being then a capital crime and the consequent terror and alarm which it naturally caused in the mind of the person. Moreover, it was a charge which could be made with comparative impunity and was as difficult to rebut as it was easy to make.

The word "accusation" has not been used here in the sense of a formal charge or complaint made to a person in authority, but may refer to a mere statement made to a third person implicating the person in that crime.(3)

4240. Proof of the Offence.—The charge of accusation has nothing to do with its truth or falsity,(4) the offence being complete as soon as the threat is uttered with the requisite intention and effect. The two accused were indicted of robbery, under circumstances which would be extortion under this section. They were accomplices, and one of them went up to the prosecutor to ask him the nearest way to the city. The other accused then came up and seized the prosecutor from behind and accused him and his own confederate of indecent exposure of their persons and each holding the private parts of the other. The charge was preferred in accordance with the preconcerted plan of the two prisoners who were thereupon indicted for robbery, and Rolfe, B., told the jury that if the two prisoners were acting in accordance with a previous concert with a view to induce the prosecutor to deliver money in order that he might escape the annoyance of such a charge, it was an assault with intent to rob, and on a case reserved, the conviction was upheld.(5) The same view was taken in another case in which the accused threatened to defame the prosecutor for having, on a previous occasion, committed an unnatural offence in case the prosecutor did not pay him money, and the charge was held to be good.(6)

4241. The charge need not implicate the accused, so long as it was intended to frighten him. The accused went to a boy's father, and falsely stated to him that the boy had committed unnatural offence with his mare which he urged the father to purchase for £3 10*s*. failing which he threatened to charge the boy of the offence and which he did. The charge being dismissed, the accused was prosecuted for threatening to accuse the boy of an infamous crime, and he was convicted.(7)

4242. A letter containing no charge, but a threat that the writer was procuring witnesses to make a charge was held to be no accusation. As Bayley, J., said: "It is one thing to accuse, but another to procure witnesses in support of an accusation already made."(8) But between this and an actual accusation there is a thin line, and it may be a question what other object a person could have of apprising another that he was suborning witnesses to strengthen his accusation against the prosecutor which he was then shortly to prefer.

(3) *Robinson*, 2 Lew. 273.
(4) *Cracknell*, 10 Cox 408; *Richards*, 11 Cox 43.
(5) *Stringer*, 2 M. C. C. R. 261.
(6) *Norton*, 8 C. & P. 671.
(7) *Redman*, 10 Cox. 159; *contra* in *Pickford*, 4 C. & P. 227, has long since been overruled; *Smith*, 1 Den. C. C. 510, in which however, Wilde, C. J. considered it unnecessary to overrule that case. At all events it is now overruled by the Legislature; *see* Larceny Act (24 & 25 Vict., c. 96), s. 49.
(8) *Gill's case*, 1 Lew. 305; to the same effect, *Allgood*, 2 C. & P. 436.

Proof of Other Acts

4243. It has been held that for the purposes of proving intention it is not admissible to give evidence of other similar acts of extortion.(9) But Creswell, J., held in a case that evidence of declarations of the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house and accuse him of an unnatural crime was admissible.(10) This was the case of a sentry who had falsely accused the prosecutor of having indecently touched him, and referring to it Erle, J., explained: "There the main question turned upon the intent with which the accusation was made, and the evidence was there admitted to throw light upon that subject. But in this case the intent was quite manifest, if the prisoner was believed."(11)

For further commentary, *see* s. 383 (§§ 4185-4206).

Session. Non-cog. Warrant. Bailable. Not comp.

Putting person in fear of accusation of offence in order to commit extortion.

389. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed or attempted to commit an offence punishable with death or with transportation for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be punishable under section 377 of this Code, may be punished with transportation for life.

[*Person*—s. 11. *Offence*—s. 40. *Extortion*—s. 383.]

Synopsis.

(1) *Analogous Law* (4244).
(2) *Procedure and Practice* (4245).
(3) *Proof* (4246).
(4) *Charge* (4247).

4244. Analogous Law.—This section bears the same relation to the last as sections 385 and 387 respectively bear to the sections which immediately precede them. The gist of the crime is in each case the same.

4245. Procedure and Practice.—This offence is non-cognizable, and warrant should, ordinarily, issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session.

For other points of practice *see* s. 383 (§ 4211).

4246. Proof.—The points requiring proof are:—

(1) That the accused put or attempted to put any person in fear

(2) That the fear was of an accusation of an offence, or an attempt to commit it.

(9) *Per* Erle, J. in *McDonnel*, 5 Cox 153
(10) *Cooper*, 3 Cox 547.
(11) *McDonnel* 5 Cox 153.

(3) That such offence was punishable with death, transportation for life, or imprisonment for at least ten years.

(4) That he did so in order to commit extortion.

To which may be proved the following aggravating circumstance:—

(5) That the accusation was of an unnatural offence punishable under section 377.

4247. Charge.—The charge should follow the form given under s. 385 (§ 4220).

Of Robbery and Dacoity.

4248. Topical Introduction.—This branch of the chapter dealing with robbery and dacoity consists of thirteen sections which regulate penalties for the two offences in accordance with their gravity and development. Thus classifying the two offences in the order of their gravity, we find five sections dispose of the offence of robbery in this order:—

Robbery.—

(1) Attempt (s. 393).

(2) Simple robbery (s. 392).

(3) Robbery armed with deadly weapons (s 398).

(4) Robbery with hurt (s. 394).

(5) Robbery with grievous hurt or death (s. 397).

In the same way the remaining sections provide graduated penalties for dacoity:—

Dacoity.—

(1) Preparation (s. 399).

(2) Joining dacoits (s. 400).

(3) Assembling for dacoity (s. 402).

(4) Simple dacoity (s. 395).

(5) Dacoity armed with deadly weapons (s. 398).

(6) Dacoity with grievous hurt (s. 397).

(7) Dacoity with murder (s. 396).

The two offences are parts of the same offence of theft with violence, which is one description of robbery. Dacoity was formerly called gang robbery, and as such, it is nothing but robbery with the aggravating circumstance superadded, that it is committed in gangs. The essential features of the two offences, as now presented in the Code, will be presently considered.

Robbery.

390. In all robbery there is either theft or extortion.

When theft is robbery.

Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.

Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to delivery up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations.

(*a*) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has, therefore, committed robbery.

(*b*) A meets Z on the high road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z, by putting him in fear of instant hurt, and being in his presence at the time of committing the extortion. He has, therefore, committed robbery.

(*c*) A meets Z and Z's child on the high road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has, therefore, committed robbery on Z.

(*d*) A obtains property from Z by saying: "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees." This is extortion, and punishable as such: but it is not robbery, unless Z is put in fear of the instant death of his child.

[*Voluntarily*—s. 39. *Hurt*—s. 319. *Wrongful restraint*—s.339. *Theft*—s. 378. *Extortion*—s. 483.]

Synopsis.

(1) *Analogous Law* (4249-4250).
(2) *Meaning of Words* (4251).
(3) *What is Robbery* (4252).
(4) *When Theft is Robbery* (4253-4256).
(5) *Hurt etc. must be Subservient to Robbery* (4254).
(6) *Hurt or Restraint must be Voluntarily Caused* (4255).
(7) *Wrongful Restraint* (4256).
(8) *Fear of Instant Hurt or Restraint* (4257).
(9) *When Extortion is Robbery* (4258-4260).
(10) *Hurt to Prevent Pursuit* (4261).

4249. Analogous Law.—This definition of robbery is much narrower than the vague and almost undefinable sense attached to that term in English law. As has been pointed out in the preceding discussions (§§ 4187-4190), English Law does not discriminate between robbery and extortion, and there are certain forms of cheating which generally pass there as robbery. According to Blackstone, larceny from the person may be either by privately stealing, or by open and violent assault, which is robbery. "Open and violent larceny from the person, or robbery, the *rapina* of the civilians, is the felonious and forcible taking from the person of another, of goods or money to any value, by violence or putting him in fear."(12) It is in the manner the person is put in fear that the English law is more extensive. For, as Blackstone points out: "And when it is said to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force, or threatening by word or gesture be used, as might create an apprehension of danger or induce a man to part with his property without or against his consent."(13) He then instances a case of extortion under a pretence of sale which, on the authority of Hawkins,(14) he calls robbery,(15) though Hawkins himself doubts if it is a true case of robbery.(16) No Statute has set this uncertainty of the law at rest, and, consequently, English Law teems with cases of so-called robbery, which would be anything but that offence under the Code.

4250. Adverting now to the Code, the definition of robbery recognizes its affinity to the two cognate offences of extortion and theft. In fact, robbery and these offences are so closely allied, that there may be sometimes a difficulty to say whether an offence is one or the other. The framers were aware of this, for they wrote:—

"In one single class of cases, theft and extortion are in practice confounded together so inextricably, that no Judge, however sagacious, could discriminate between them. This class of cases, therefore, has, in all systems of jurisprudence with which we are acquainted, been treated as a perfectly distinct class; and we think that this arrangement, though somewhat anomalous is strongly recommended by convenience. We have therefore made robbery a separate crime.

"There can be no case of robbery which does not fall within the definition either of theft or of extortion; but in practice it will perpetually be a matter of doubt whether a particular act of robbery was a theft or an extortion. A large proportion of robberies will be half theft, half extortion. A seizes Z, threatens to murder him, unless he delivers all his property, and begins to pull off Z's ornaments. Z in terror begs that A will take all he has and spare his life, assists in taking off his ornaments, and delivers them to A. Here, such ornaments as A took without Z's consent are taken by theft. Those which Z delivered up from fear of death are acquired by extortion. It is by no means improbable that Z's right arm bracelet may have been

(12) 4 Black 243; citing 1 Hawk. P. C. 95.

(13) Fost Cr. L. 128; cited in 4 Black 243, 244.

(14) 1 Hawk. P. C. 96.

(15) 4 Black 244.

(16) 1 Hawk. P. C. 97.

obtained by theft, and left arm bracelet by extortion; that the rupees in Z's girdle may have been obtained by theft, and those in his turban by extortion. Probably, in nine-tenths of the robberies which are committed, something like this actually takes place, and it is probable that a few minutes later neither the robber nor the person robbed would be able to recollect in what proportions theft and extortion were mixed in the crime; nor is it at all necessary for the ends of justice that this should be ascertained. For though, in general, the consent of a sufferer is a circumstance which very materially modifies the character of the offence, and which ought, therefore, to be made known to the Courts, yet the consent which a person gives to the taking of his property by a ruffian, who holds a pistol to his breast is a circumstance altogether immaterial."(17)

4251. Meaning of Words.—"*For that end*" in paragraph 2 do not merely refer to the circumstances therein mentioned. They mean that the hurt must have been caused for that purpose, or with those objects in view.(18)

4252. What is Robbery.—Shortly stated, robbery may be distinguished from theft and extortion by the presence of force and imminent fear of violence. Paragraph 2 distinguishes the offence from theft, the next paragraph distinguishes it from extortion. The common purpose of the three offences is, of course, wrongful acquistion of property, and the three offences therefore merely differ in the *modus operandi* adopted to achieve that purpose.

4253. When Theft is Robbery?—As distinguished from theft robbery consists in the *causing* or *attempting* to cause death, hurt, or wrongful restraint, or fear of *instant* death, hurt or wrongful restraint. As such, robbery may be said to be either theft with homicide, hurt or wrongful restraint with attempted homicide, hurt or wrongful restraint or theft with criminal intimidation of committing those offences. Now these offences must be caused or threatened to be caused *voluntarily*, that is to say, they must be caused by means whereby he *intended* to cause or *knew* that those acts were likely to be caused. In other words, the robber must cause the hurt, etc., intending to cause it and on purpose. It must not be caused by mere accident, as for example, by accidentally dropping a thing on the owner whereby he is hurt and whom it was not the intention of the thief to arouse during his nefarious visit. So the prosecutrix was driving in a car to the rails of which she had tied a basket, which the prisoner tried to remove by stealth, but as the string prevented its removal he took out his knife to cut the string through, when the prosecutrix also stretched out her hand to lay hold the basket, and which was consequently cut, and in consequence of which, she withdrew it, leaving the thief to make off with the basket. Alderson, B., told the jury that as the violence was inflicted undesignedly and by mere accident, there was no case of robbery in which there must be intentional force and

(1) Voluntary Hurt or Restraint.

(17) Note N., Reprint, p. 162.

(18) *Otaruddi* v. *Kafiluddin* 5 C. W. N. 372; *Mathura Thakur*, 6 C. W. N. 72 (79); *Karuppa*, 38 I. C. (M.) 370.

violence.[19] Such would be the case where a person forcibly pulls out a woman's nose-ring, though it got thereby unfastened without tearing the cartilage. But in this case there was pain and effusion of blood, which was sufficient to cause hurt, and which, again, was sufficient to constitute robbery.[20]

(2) Hurt, etc., must be Subservient to Robbery.

4254. Again, the hurt or restraint must be caused *in order* to the committing of theft, or (*ii*) *in* committing theft, or, (*iii*) in carrying away, or (*iv*) attempting to carry away property *and for that end,* which implies that the causing of hurt must be shown to have been intended for or made subservient to any of those purposes. If it was caused, for instance, to avoid capture when surprised while stealing, it may be hurt caused in committing theft, but it is not hurt caused *for that end* and therefore, the offence is not thereby enhanced to one of robbery.[21] The petitioners went with a number of others to eject the prosecutor from his house, for which purpose they threatened him and his family with assault, who then left the premises. The petitioners then also left, carrying away with them certain articles of property from the house upon which the Magistrate convicted them of rioting, trespass and theft. It was contended for them as their offence was one of dacoity the Magistrate had no jurisdiction to try them, and that he had erred in splitting up a charge into its components and thus give himself jurisdiction in the case. But it was held that since the violence was used for the purpose of dispossessing the prosecutor and had no reference to the theft, though the taking of the property took place at the same time as the beating of the prosecutor's women and the threatening of the complainant, but as the beating was not for the end of theft, the offence was not heightened into one of robbery, and the Magistrate, consequently, had jurisdiction to try the petitioners.[22]

But this forbearance of law has due limits, for it is subject to the provisions of section 397, which provides punishment for the mere use of a deadly weapon or the causing of or an attempt to cause a grievous hurt. The discrimination which law makes between the use of force and robbery only extends to simple assaults or hurt beyond which it regards the gravity of the act as marking the criminal too desperate to deserve further commisseration. But within those limits, the use of force or violence, though accompanying the seizure of property, is not necessarily connected with it, and its connection must be proved. So the mere snatching of a bundle from a boy who was carrying it along a street in hand, was held to be no robbery as the amount of force or violence used was not sufficient to constitute that offence.[23] The same view has prevailed in other cases in which the hat and the wig of a gentleman had been snatched from his head[24] or in which a

(19) *Edwards,* 1 Cox. 32.

(20) The language of Jackson and Glover, JJ., implies that the act did *not* amount to hurt which is erroneous; *Teekai Bheer,* 5 W. R. 95.

(21) *Kalio Kerio,* (1872) B. U. C. 65.

(22) *Otaruddi* v. *Kafiluddi,* 5 C. W. N. 372.

(23) *Macauley's case,* 1 Leach. 287; *Backer's case,* 1 Leach, 200; *Robin's case,* 1 Leach. 290-*n* (*a*).

(24) *Steward's case,* 2 East. P. C., c. 16, s. 121, p. 702.

watch(25) or an umbrella(1) had been suddenly snatched away from persons in the street. But if in such cases the owner resists, and there is a struggle, and the violence then used is sufficient to constitute hurt, it will then be robbery.

Hurt or Restraint must be Voluntarily Caused.

4255. But it must be not only hurt, but hurt, which was *voluntarily* caused. This is also the view of English law, which was thus stated by Garrow, B.: "The mere act of taking being forcible will not make this offence a highway robbery: to constitute the crime of highway robbery the force used must be either before or at the time of the taking and must be of such a nature as to show that it was intended to overpower the party robbed and prevent his resisting, and not merely to get possession of the property stolen; thus, if a man, walking after a woman in the street, were with violence to pull her shawl from her shoulders, though he might use considerable violence it would not, in my opinion, be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.(2)

So where a person forcibly snatched an earring from a lady's ear and the force used tore the ear through, drawing blood, it was held to be robbery.(3) The case of the person who snatched a lady's nose-ring which accidentally got unfastened, but which in wrenching off the nose caused pain and drew some blood, illustrates the same principle.(4) The drawing of blood is not necessary, for in such cases it is sufficient if the act cause "bodily pain."(5) So, where a person forcibly snatched away a diamond pin from a lady's person which was securely fastened into the lady's hair, and in drawing which a part of her hair was torn away, the violence was held to be sufficient to constitute robbery.(6) So, while the mere snatching away of a thing from the person of another is not robbery, it is aggravated into that crime if the thing snatched away is known by the prisoner to be fastened to something else on his body, and in wrenching which away he uses force causing pain. So where a person wore a watch secured by a chain, which he wore round his neck and which the prisoner forcibly jerked to break the chain, the force used was held to be sufficient to constitute robbery.(7) So where a person ran up against a person to confuse him, while he picked his pocket, the force used was held to be sufficient.(8)

Wrongful Restraint.

4256. The same considerations apply to theft accompanied by wrongful restraint. The prisoners intercepted a boat conveying property which they impressed as required by a Magistrate to convey treasure. They represented themselves to be persons in authority and the boatman obeyed. They then plundered it. They were held to have com-

(25) *Gnosil*, 1 C. & P. 304.
(1) *Horner's case*, 2 East. P. C., c. 16, s. 121, p 703.
(2) *Gnosil*, 1 C. & P. 304.
(3) *Lapier's case*, 1 Leach, 320; followed *per* Jarvis, C. J., in *Simpson*, Dears, C. C. 421.
(4) *Teekai Bheer*, 5 W. R. 95.
(5) S. 319.
(6) *Moore's case*, 1 Leach, 335.
(7) *Mason*, R. & R. 419
(8) 1 Lewin, 300.

mitted robbery and not extortion.(9) The same view was taken in an English case in which the prisoner intercepted the prosecutor's cheese on the ground that it could not be carried without a permit, which was unnecessary, and which was a mere excuse. , The prosecutor remonstrated, and the prisoner thereupon offered to take him to a Magistrate, but during the prosecutor's temporary absence the prisoner's confederates plundered the cheese.(10) It was held that the taking was attended with sufficient violence to amount to robbery.(11) In another case the prisoner wrongfully took a woman in charge pretending to be a jail warder and then extorted from her a sum of money as the price of her freedom. It was held that the act was robbery.(12) So where a person attempted to rape a woman who thereupon offered him a sum of money, which he received as the price of his forbearance, it was held to be robbery though his original intention was to commit a rape.(13) As wrongful confinement is only an aggravated form of wrongful restraint, the result is the same whether a person be wrongfully restrained or wrongfully confined.

4257. Fear of Instant Hurt or Restraint.—Between the causing and attempting to cause hurt, or restraint and the attempt to cause the fear of instant death, instant hurt or wrongful restraint, there is a noticeable difference. The one depends as much upon the act of the offender as upon the effect produced on the person aggrieved, the other depends solely upon the feelings of the latter irrespective of any act and intention of the former. Such fear may be reasonably engendered by violent entry of large numbers the presence of which is otherwise inexplicable, and which is in itself sufficient to cause fear in the minds of those whose security is thereby invaded.

Where, for instance, a large number of men besiege a house with a view to plunder its contents, and the prosecutor's family being thereby frightened, make their escape before the robbers effect their entry, the fact that they did no overt act to frighten them would not minimize their offence into anything less than robbery, and, if the invading force numbers more than five, dacoity.(14) Indeed, this is the only natural view possible under the circumstances, for otherwise, what was the object of appearing in overwhelming numbers at the dead of night, and surprise the inmates by attempting a forcible entry. It will be noted that the fear need not be caused to the owner or other inmates of the house. It is sufficient if it is caused " to any person " " in committing the theft," that is, it may be caused to the watchman or other persons who intervene to prevent the theft. Any general consternation caused in the neighbourhood by frequent robberies which frightens the inmates into vacating their houses does not convert an ordinary thief into a robber. So if one set of robbers should leave the house and another set enter it without causing the fear which converts them into robbers

(9) *Duleeloodeen Sheik*, 5 W. R. 19.

(10) *Merriman* v. *The Hundred of Chippenham*, 2 East., P. C. c. 16, s. 127, p. 9.

(11) *Merriman* v. *The Hundred of Chippenham*, 2 East, P. C., c. 16, s. 127, p. 709.

(12) *Gascoigne's case*, 1 Leach, 280.

(13) *Blackburn's case*, 2 East., P. C., 16, s. 128, p. 711.

(14) *Kissore Pater*, 7 W. R. 35 (in which the number was 200); *Yamin*, L. R. 5 A, 81.

they would be only guilty of theft and its allied offences but not of robbery or dacoity.(15)

4258. When Extortion is Robbery.—Again, in such a case the fact that the persons so frightened remained in the house and themselves delivered up their goods to the marauders is immaterial, for even then the offence would be the same, though its ingredients are different. It is then a case of extortion which is robbery by reason of the delivery having been induced by fear of instant death, hurt or wrongful restraint. The second clause of the section contemplates such a case, and it requires that in such a case: (*i*) the offender must be in the presence of the person intimidated, and (*ii*) he should, as such, put the person in such fear, and (*iii*) in consequence of which the person fearing should deliver up the thing extorted. The question when the offender is said to be in the presence of the other is explained to mean that he should be sufficiently near to put the other person in fear of instant death, hurt or wrongful restraint. Here again, the question is one of probability and reasonableness. One may level his pistol from behind a bush at another passing along a road. He may remain unobserved and may still awaken in the mind of the other fear of instant death unless he threw down his goods and left. He would be guilty of robbery even though he was, in one sense, never in the presence of the other. But though the presence of the offender face to face with the other party is not necessary, it is an essential element of this offence that he should be "sufficiently near," to be able to execute his threat *instanter*, if necessary. In this respect the offence is considerably narrower in its extent than as understood in English law, where the presence of the offender is by no means necessary to constitute robbery, nor, indeed need the threat be of an immediate injury. Demanding money by menaces is an example of an offence which is robbery under English law, though it is only extortion under the Code(16) (§ 4189).

4259. Again, the fact that the injury must have been threatened *instanter*, excludes threats of accusation and other injuries which are all classed as robberies under English law. The injury which converts extortion into robbery under the Code must be injury of "instant death, instant hurt or instant wrongful restraint." The injury must be threatened, and it must produce fear inducing delivery of the property. It is not necessary that the threatener should possess the present capacity or intention of executing the threat. He may, for instance, be presenting a popgun or an unloaded pistol, or he may possess the power to cause hurt, but may have no intention of causing it. In either case if he creates an impression on his victim of fear, who thereupon delivers the property, his offence is robbery, whatever may have been his power or intention to cause injury.

4260. In any case the threat need not be to injure the person robbed, if it induces him to deliver up the property. So if a man take another's child, and threaten to destroy him unless the other give him

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(15) *Yamin*, L. R. 5 A. 81.

(16) 2 East., P. C. 714; *Donnally*, 1 Leach, 193; *Cannon*, R. & R. 146; *Gardner*, 1 C. & P. 479; *Hickman*, 1 Leach. 278; *Egerton* R. & R. 375; *Fuller*, R. & R. 308; *Jackson*, 1 Leach. 193n; ib., 618, n; now 24 & 25 Vict., c. 96, s. 47; *Stringer*, 2 Mood. C. C. 261; *Norton*, 8 C. & P. 671.

money, this is robbery.(17) So if the accused, a policeman, threatens to confine a person intending thereby to induce his relatives to ransom him, he would be guilty of the offence in the same way as if the relatives had been themselves the victims of the threat.

4261. Hurt to Prevent Pursuit.—Hurt caused to prevent the thief's capture or pursuit after he has abandoned the goods but merely wishes to make good his escape is not hurt caused *in the committing* of theft and does not aggravate the crime of the latter into one of robbery.(18) The case would, of course, be different if the thief was then carrying the stolen goods.(19)

Dacoity.

391. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity."

[*Persons*—s. 11; but *see* ss. 82, 83. *Robbery*—s. 390.]

Synopsis.

(1) *Analogous Law* (4262).
(2) *What is Dacoity* (4263-4265).
(3) *No Robbery* (4266-4268).

4262. Analogous Law.—There is no difference between robbery and dacoity except in the number of offenders. Robbery is dacoity if the offenders committing robbery are five or more in number. The gravity of the offence is here measured by the terror presumed to be caused by the force of number. So the framers of the Code wrote: "We have provided punishment of exemplary severity for that atrocious crime which is designated in the Regulations of Bengal and Madras by the name of Dacoity. This name we have thought it convenient to retain, for the purpose of denoting not only actual gang-robbery, but the attempting to rob when such an attempt is made or aided by a gang."(20) The term "dacoity" was not before the present enactment in vogue in Bombay where such offence was designated gang-robbery, and where under the Regulation the number fixed was four,(21) while under the Bengal(22) and Madras (23) Regulations the offence might have been committed by a single person going forth with an offensive weapon with intent to rob, and actually perpetrating or attempting to perpetrate a robbery, or by a gang with or without offensive weapons doing the same. This was but the echo of the English statutory provision on the subject of robbery with violence.(24) The punishment for

(17) *Per* Eyre, C. J., in *Reane*, 2 East, P. C. 735, 736; *Donnally*, 1 Leach. 193.
(18) 1 Weir 442; *Kalio Kerio*, B. U. C. 65; *Nag Po Thet*, 42 I. C. (R.) 987; 19 Cr. L. J. 27.
(19) *Lashkar*, 2 L. 275.
(20) Note N, Reprint, p. 163.
(21) Bom. Reg. XIV of 1827, s. 36.
(22) Beng. Reg. LIII of 1803, s. 3.
(23) Mad. Reg. XV of 1803, s. 3.
(24) 7 Will IV & 1 Vict., c. 87, ss. 2 & 3; re-enacted 24 & 25 Vict., c. 96, s. 43.

such offence was in the case of leaders of gangs, or other heinous offenders convicted of a repetition of the crime, or without such repetition of a degree of cruelty, violence or other aggravating criminality, which under the discretion allowed by the Mahomedan law may be punishable with death.(25)

The original draft Bill had fixed six as the number necessary to constitute dacoity, and the punishment prescribed was transportation for life or imprisonment for not less than three years. These two questions exercised the Law Commissioners who upheld the present sentence, and recommended the reduction from six to four as the minimum number for dacoity. Later on, however, by the rule of golden mean the present number was fixed upon. And as regards punishment, while it was admitted that the sentence proposed was none too severe for the normal cases of dacoity, still there were likely to arise cases of technical dacoity in which the fixing of the minimum was stated to lead to a hardship. The Law Commissioners considered these circumstances of mitigation as fit "for the consideration of those whose prerogative it is to temper the ordinances of the law with mercy."(1) But later on, the clause fixing the minimum was deleted, presumably in deference to the objection that famine sometimes leads to grain riots by starved or starving people in whose case it would be preposterous to apply the drastic provisions relating to this offence, so long as the rioters limit their plunder to grain and do not give themselves up to a carnival of indiscriminate plunder.

4263. What is Dacoity?—The essential ingredients of this offence are the co-operation of five or more persons to commit or attempt to commit robbery; persons who are present as abettors of the crime being counted as amongst the number. The term "conjointly commit" is important, for it excludes aiders and abettors, and all those who, though cognizant of the crime do nothing to prevent its commission. In order to count as a dacoit a person must either conjointly commit the offence, or at least be *present* and must *aid* in its commission. Persons who conjointly commit robbery are those who participate in those stages of the crime which are necessarily criminal. So, if a person be employed to make false keys or burgling instruments, he may or may not be cognizant of the purpose of those requisitioning his services, but he cannot be held to commit robbery conjointly with those whose work his labour and intelligence have done much to facilitate. Persons who are involuntarily tools in the hands of dacoits are, of course, wholly exempt from liability (§§ 1034, 1037).

The section is intended only to punish those who co-operate in the crime either by taking part in committing the theft or extortion under circumstances stated in the last section, or are present and assist in the commission of that crime. Now such persons are necessarily abettors of the crime, but all abettors do not count for this purpose, because abetment does not imply presence of the abettor at the fact, nor is it restricted merely to *aiding* the offender—for a person may be guilty of

(25) Beng. Reg. LII of 1803, s. 3. (1) First Rep., s. 544.

abetment though he may have done nothing to *aid* in the commission of the crime (§ 295). The aider must then be something more than an abettor. Suppose, for instance, a large number of dacoits are plundering a house, past which a solitary policeman passes on his beat. From cowardice and fear he runs away leaving the dacoits unchallenged. Now, being a policeman, it was his duty to apprehend the dacoits, and not to run away from them. In doing so he is guilty of an illegal omission, which under circumstances is abetment of the crime (§ 1027). He is thus liable as an abettor, but he could not count as a dacoit for the purpose of the present rule.

4264. The section speaks of person present *and* aiding the commission of dacoity. But persons who are merely present may be aiding in the commission of the crime by their very presence—as when they may be present to overawe opposition, or keep clear the means of escape. Even persons who may be at some distance from the crime would count for this purpose, for they may have been posted as the plunderer's pickets. But persons merely holding horses at a distance from the scene of crime could not count for this purpose, for they aid in the escape of the dacoits and not in the commission of the dacoity.

4265. As regards the crime itself, being essentially robbery it must possess all the ingredients of that offence (§§ 4252-4260). Now as robbery is either theft or extortion it follows that dacoity must necessarily be the same. But since dacoity is declared to be an atrocious crime, every petty case of wrongful seizure should not be magnified into that offence. On the other hand, if a case presents all the elements of the crime, there is then nothing more to be said against its being that offence, though it may be differentiated for the purpose of sentence. The accused who were Hindus, five or more in number, forcibly seized an ox and two cows from the possession of the prosecutor Asalat to prevent their slaughter by him, which they naturally regarded as an outrageous act. It was held by Tyrrell, J., that as the intention of the accused was to prevent their butchery they could not be said to have acted dishonestly within the meaning of section 24 of the Code, and that, therefore, they could not be convicted of dacoity.(2) This case was distinguished by Edge, C. J., and Burkitt and Aikman, J.J., in another case decided upon the same facts, in which the offence was held to be dacoity.(3) It is submitted that the two cases are indistinguishable, and that the earlier precedent was wrongly decided upon mistaking the accused's motive for their intention (§ 253). It appears to be unquestionable that if a body of men, whether acting under the impulse of religious zeal or bodily want, overpower another and seize his property by force, the offence is dacoity, whatever mitigation in sentence the motive may justify. The case is, of course, different where of two disputants one seizes the property and carries it off in good faith believing it to be his own, and when its possession by another is disputed and not clearly proved.(4)

(2) *Raghunath Rai*, 15 A. 22.
(3) *Ram Baran*, 15 A. 299.
(4) *Karaka Nachiar*, 3 M. H. C. R. 254.

4266. No Robbery.—Under English Law the offence of robbery may be committed by use of constructive violence, that is to say, by means which excite fear of injury to one's *property* or *character*. Such cases are naturally excluded from the definition of the offence, and in such cases the accused could only be charged for theft and the other offence which the act may constitute. For instance, the prisoner Simons, who was the ringleader of the Cornwall rioters, surrounded the house of the prosecutor with about seventy of his companions and demanded a guinea threatening to level his house and tear his mow of corn. The prosecutor gave him a crown to appease the rioters, but the prisoner swore that he would have five shillings more, which the prosecutor gave through fear. The rioters then made themselves merry on cider, of which they opened a cask by force, and the prosecutor's pork, bread, and cheese, of which they ate some and carried away a piece. They were all held to have committed robbery in a dwelling house.(5) But under the Code they would be liable only for rioting and theft. But in such a case, the offence may aggravate into theft, if from the tumultuous nature of the mob or from their demeanour the prosecutor had reason to fear *personal* violence of the nature here specified. But the question is one of fact, and must largely depend upon the nature and purpose of the mob and their mission and mode of execution.

During the London riots in 1780, a boy wearing a cockade in his hat knocked violently at the prosecutor's door who thereupon opened it, and then the boy said to him: "God bless your honour, remember the poor mob." The prosecutor told him to get along, whereupon the boy told him that he should fetch his captain, which he did, followed by a mob of a hundred men armed with sticks and other chance weapons. The boy who led the prisoner's horse said: "Now I have brought my captain," and some of the bystanders said: "You must give them money," and some of the mob exclaimed: "God bless this gentleman, he is always generous." The prosecutor then asked the prisoner: "How much?" The prisoner said: "Half a crown, Sir," upon which the prosecutor gave the money, though he intended to give only a shilling. The mob then gave three cheers and passed on to the next house. This was held to be robbery,(6) but there is nothing to make it so under the Code. So in another case arising out of the same riots the prisoner entered the prosecutor's dwelling-house with a drawn sword and threatened to destroy his house unless he put one shilling into his hat. It was sworn by a witness that the prisoner had also said that if the prosecutor would keep the blood within his mouth, he must give the shilling. The offence was held to be robbery,(7) and it would be so under the Code. But a distinct threat by the mob that they should destroy the prosecutor's house, unless he satisfied their demand for money, would be rioting and extortion, but not robbery, if there was nothing said or inferrable from their mien that a refusal would lead to personal violence. Such cases

(5) *Simson's case*, 2 East, P. C., c. 16, s. 131, p. 731.
(6) *Taplin's case*, 2 East, P. C. c. 16 s. 128, p. 712.
(7) *Brown's case*, 2 East, P. C., c. 16, s. 131, p. 731.

have, however, been disposed of as robberies in England owing to the more extensive definition of that term.(8)

4267. So a threat by the prisoner in England, saying: "You had better comply, or I will take you before a Magistrate and accuse you of an attempt to commit an unnatural crime," has been held to be robbery.(9) And Willes, J., thus stated the law bearing upon the subject: "The facts of this case show that there was the necessary felonious intention in the prisoner to rob the prosecutor; and that it was impossible to raise a doubt, that there was a sufficient taking from the prosecutor's person. With respect to the putting in fear, it is not necessary to lay a putting in fear in the indictment; and the circumstances of actual fear need not be proved upon the trial; for if the fact be laid to be done violently and against the will, the law *in odium spoliatoris* will presume fear. There need not be actual violence, a reasonable fear of danger caused by constructive violence being sufficient; and that where such terror is impressed upon the mind as does not leave the party a free agent, and he delivers his money in order to get rid of that terror, he may clearly be said to part with it against his will, so as to constitute robbery. No actual danger is necessary, as a man may commit a robbery without using any offensive weapon, as by using a tinder-box or candlestick instead of a pistol. When a villain comes and demands money, no one knows how far he will proceed."

He then recited the facts of the case and said that the threat of the prisoner to take the prosecutor before a Magistrate if he did not give him a present was robbery. "This then was a threat of personal violence; for the prosecutor had everything to fear in being dragged through the streets as a culprit charged with an unnatural crime. It was a threat which must necessarily and unavoidably produce intimidation, and occasion a reasonable fear, which might operate *in constantem virum*, as well as *in meticulosum virum*." He then referred to an argument of the prisoner's counsel that this was a fraudulent taking, and not a taking by violence; and said that, that in many cases fraud would supply the place of violence, as in burglary, where, though it was necessary, to charge a breaking in the indictment, yet there might be a constructive breaking by a person fraudulently getting admission into a house by colour of law, or under pretence of taking lodging, or of having business.(10)

4268. So in another case of extortion by threatening to charge another of sodomy, the Judges considered the previous case and held the true definition of robbery to be "the stealing or taking from the person, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party unwillingly to part with his property; and whether the terror arises from real or ex-

(8) *E.g., Astley's case*, 2 East, P. C., c. 16, s. 131, p. 729.

(9) *Donnally's case*, 1 Leach, 193; other cases of demanding money under threat of an accusation of an unnatural offence were similarly determined; *Staples' case*, 2 East, P.C., c. 16, s. 130, p. 728.

(10) *Donnally's case*, 1 Leach, 193; other cases of demanding money under threat of an accusation of an unnatural offence were similarly determined:— *Staples' case*, 2 East P.C. c. 16, s. 130, p. 728.

pected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally, if not more, terrific than the dread of personal injury."[11] It is needless to add that the cases of constructive violence are excluded by this section from the definition of robbery and that they will be dealt with as extortion or other offence according to their constitution.

For a further commentary on this section, *see* ss. 378, 379 and 390.

Session. Pres. Mag or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

Punishment for robbery.

[*Robbery*—s. 390.]

Synopsis.

(1) *Analogous Law* (4269).
(2) *Procedure and Practice* (4270-4273).
(3) *Joint Trial* (4272).
(4) *Proof* (4274).
(5) *Form of Charge* (4275-4276).
(6) *Evidence of Robbery* (4277).

4269. Analogous Law.—This section prescribes a punishment for simple robbery, an attempt to commit which is punishable under the provisions of the next section, and of which the more aggravated forms are otherwise punishable. This section thus deals with cases of robbery not otherwise provided for. And as such, it still recognizes degrees—an offence committed on the highway between sunset and sunrise being punishable with the higher sentence here prescribed than any other case of robbery.

4270. Procedure and Practice.—This offence is cognizable and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. It should be, however, noted, that all forms of dacoity are not so triable, offences under sections 397, 398 being exclusively triable by the Court of Session, while though offences under sections 393 and 394 are triable even by a Presidency Magistrate or a Magistrate of the first class, still the offences are distinct and liable to different punishments. This is one of those offences in which the Whipping Act [12] provides for the additional sentence of whipping which would be justified in case of aggravation,[13] or of a previous conviction.[14]

(11) *Hickman's case*, 1 Leach, 278.
(12) Act IV of 1909.
(13) *Badri Prasad*, 44 A. 538.
(14) Act IV of 1909.

As this offence does not involve a breach of the peace, a conviction therefor does not justify an order for furnishing security for future behaviour under s. 106 of the Code of Criminal Procedure.[15]

4271. There are certain facts which are declared by the Evidence Act[16] as relevant for the purpose of proving this offence. So on a question arising whether A robbed B, the facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to a third person are relevant.[17] So are the facts that, after B was robbed, C said in A's presence: "The police are coming to look for the man who robbed B," and that immediately afterwards A ran away.[18] So are the facts that after the alleged robbery B made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made are relevant. The fact that he said he had been robbed, without making any complaint is not relevant as conduct under section 8 of the Indian Evidence Act, though it may be relevant as a dying declaration under section 32, clause (*i*), or as corroborative evidence under section 157.

Joint Trial.

4272. As regards two or more offences committed by the accused in the same transaction, or two or more persons embarking on the commission of robbery and one of them committing an offence on his own individual responsibility, the Procedure Code contains the following provisions:—

"S. 235—

"Ill. (*m*). *A* commits robbery on *B*, and in doing so voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code."

"S. 239—

"Ill. (*b*). *A* and *B* are accused of a robbery, in the course of which *A* commits a murder with which *B* has nothing to do. *A* and *B* may be tried together on a charge, charging both of them with the robbery, and *A* alone with the murder.

4273. As regards the plurality of acts constituting as many distinct offences, the question here depends upon the same considerations as apply to the case of theft, and from which it follows that if persons are committed on three separate and distinct charges for three separate and distinct robberies committed on the same night in three different houses they must be tried separately on each of the three charges.[19] As the use of some violence is a necessary ingredient of robbery, a person who wrongfully confines another by tying him up hand and foot to facilitate his work of robbery, was held to be liable only for robbery and not also for the offence of wrongful confinement. As Collins, C. J., and Wilkinson, J., observed: "It is evident that but for the violence caused to the farm servant, the accused could only have been convicted of theft. It was the wrongful restraint which converted the offence into robbery, and therefore section 71 of the Indian Penal Code applied, and the

(15) *Muthurakka*, (1915) 18 M. L. T. 121, 30 I. C. 435.
(16) Act I of 1872.
(17) Act I of 1872, s. 7 ill. (*a*).
(18) *Ib.*, s. 8, ill. (*j*).
(19) *Itwaree Dome*, 6 W. R. 83.

accused could only be convicted under section 392.[20] In this case the accused had entered the complainant's garden to commit theft. They were surprised by a field servant of the owner whom they not only threatened to kill, but whom they tied up hand and foot and left him so tied after the robbery. They were held liable only for robbery. This view is apparently in conflict with section 235, illustration (*m*) before cited, though it conforms to the view taken in other cases.[21]

Where the evidence pointed to six robbers of whom three were acquitted, the conviction of the rest was altered from the last into one under this section.[22] But where there is evidence of five or more persons being concerned in the commission of the offence, the acquittal of some would not necessarily reduce the crime to one of robbery if the evidence that at least five persons took part in the crime remains unshaken.[23]

4274. Proof.—The points requiring proof are:—

I. *When theft is Robbery*:—

(1) That the property in question is moveable property.

(2) That it was in possession of a person.

(3) That the accused moved it.

(4) That he did so without the consent of the possessor.

(5) That he did so in order to take it out of his possession.

(6) And with intent to cause wrongful gain to himself or wrongful loss to the possessor.

(7) That the accused caused or attempted to cause death, or hurt or wrongful restraint to any person, or that he attempted to cause or caused fear of the same.

(8) That he did so, voluntarily.

(9) That he did it, in order to commit theft, or in committing theft, or in carrying away or attempting to carry away property obtained by theft.

II. *When Extortion is Robbery*—

(1) That the accused put such person in fear of instant death, hurt or wrongful restraint.

(2) That he was then in the presence of such person.

(3) That he did so intentionally.

(4) That he thereby dishonestly induced that person to deliver any property, etc.

(20) *Mattaparti*, (1888) 1 Weir 445.
(21) *Durga*, (1890) B. U. C. 511; *Mootkee Kora*, 2 W. R. 1. The subject will be found discussed under s. 394.
(22) *Pedda Enumundugaru*, (1910) M. W. N. 52, 5 I. C. 707; *Uda*, (1915) P. W. R. 26, 30 I. C. 458.
(23) *Rashidaz Zaman*, 15 C. W. N. 434, 10 I. C. 684.

4275. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed robbery of——(*specify the property*), which was the property of A B then in his possession [and which you robbed him of in——street (*specify the highway*), at about——between the hours of sunset and sunrise], and thereby committed an offence punishable under section 392 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4276. Where the accused were committed to the Sessions for dacoity, the Judge could not reduce the charge to one for robbery before hearing evidence.(24)

4277. Evidence of Robbery.—The offence of robbery punishable under this section must naturally possess all the ingredients of the offence as described in section 390. According to that definition the basis of the offence is either theft or extortion committed under the circumstances specified in that section. But the offence here made punishable, introduces an element of aggravation which calls for notice. For the offence here punishable is not only the simple offence of robbery, but also robbery committed on the highway between sunset and sunrise. The term "highway" has been nowhere defined in the Code, but it is a concept the meaning of which is well understood and has been explained in another connection (§§ 2765-2766). It must be understood to have been used here in that sense. The period between sunset and sunrise is the period of darkness which naturally calls for greater security as it affords greater facility to the robber. The gist of this crime would appear to be that the robbery was committed on the highway. If a person be decoyed from the highway and then robbed, it would then appear to be no case of special aggravation. Such a case may be conceived of a person lured into a house of ill-fame for the purpose of robbery and then robbed, in which case the offence could not be punished under the second clause, though the house abut on the road, and the victim be taken in for greater immunity against capture.

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

Attempt to Commit robbery.

[*Robbery*—s. 390.]

Synopsis.

(1) *Analogous Law* (4278).
(2) *Procedure and Practice* (4279).
(3) *Proof* (4280).
(4) *Form of Charge* (4281).
(5) *Attempt to Rob* (4282).

(24) *Paimullah*, 16 C. W. N 238, 13 I.C. 783.

4278. Analogous Law.—As this section is a special section dealing with the offence of attempted robbery, such attempt should not be punished under the more general provisions of section 511, which applies only to cases not otherwise specifically provided for.

4279. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. There is nothing in law to convict a person for an attempt, though he was charged for robbery. Such a procedure has been long since held to be legal in England,(25) where, however, a person charged for an assault with intent to rob cannot be convicted of simple assault,(1) but even this may be done under Code.

4280. Proof.—The points requiring proof are those which are sufficient to constitute an attempt as that term is defined in section 511, the offence attempted being shown to be robbery. As an attempt is something more than a mere preparation, the evidence must amount to the doing of an overt act manifesting an intention to commit robbery, but which falls short of that offence.

4281. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name the accused*) as follows:—

"That on or about the- —day of——at——you did an act, to wit ——(*mention the act*), and which was an attempt to rob A B and thereby committed an offence punishable under section 393 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4282. Attempt to Rob.—It is an essential element of all attempts that there should be some overt act done to manifest the present intention to rob a person, and that that act should be wrongful. In this respect the Code steers clear of the ideal of the English law under which an attempt to rob has been the subject of several, some very unsatisfactory, decisions. The prisoner was indicted for attempting to rob one Lowe, whilst travelling along a road in a postchaise, when the prisoner ordered the postboy to stop the chaise at the point of the pistol and which he did; but at this juncture, finding himself pursued, the prisoner made himself scare. He was indicted for assaulting Lowe and then the postboy, but the charges failed owing to the defective wording of the Statute under which they were tried,(2) which required that in order to be punishable as an assault to rob, the assault should be made on the person to be robbed; but this Statute has since been

(25) *Mitchell*, 2 Den. C. C. 468.
(1) *Woodhall*, 12 Cox, 240.
(2) *Thomas's case*, 1 Leach, 330, decided on 7 Geo. II, c. 21.

amended in England, but it was never the law under the Code, under which in any case, such a case as the last would be clearly punishable under this section.(3)

For further commentary on this section, *see* section 392.

394. If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing hurt in committing robbery.

Session Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

[*Person*—s. 11; but *see* ss. 82, 83. *Voluntarily*—s 39.
Hurt—s. 319. *Robbery*—s. 390.
Attempted Robbery—s 393.]

Synopsis.

(1) *Analogous Law* (4283).
(2) *Procedure and Practice* (4284-4287).
(3) *Proof* (4288).
(4) *Form of Charge* (4289).
(5) *Robbery with Hurt* (4290-4292).

4283. Analogous Law.—This section must be read with section 397, which refers to the same offence, but in which the hurt caused is grievous. Otherwise the two sections refer to the same offence. The section introduces the element of constructive liability, the principle of which has been already considered (§§ 1439-1450).

4284. Procedure and Practice.—This offence is cognizable and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

4285. This section raises the question whether the offence here described justifies the passing of an independent sentence in addition to the sentence for robbery, or whether the section presents only a case of aggravated robbery, a conviction for which would bar a further conviction for robbery. The question has been made somewhat difficult

(3) It is not intended to exhaust here such cases which turned upon the faulty language of the Georgian Statute since repealed and replaced by later Statutes. They are, however, here referred to merely to show that they are longer law. In *Parfait's case*, 1 Leach, 19, an *actual demand* of money was held to be necessary, but this was denied in *Trusty*, 1 East. P. C., c. 8, s. 11, pp. 418, 419; *Sharwin*, 1 East P. C., c. 8, s. 13, p. 421. In *Edwards*, 6 C. & P. 521, the prisoner forced the prosecutor to sign an order for the payment of money and for delivery of certain deeds, but as the paper signed by the prosecutor was supplied by the prisoner, the latter was acquitted on the ground that the paper he got was his own. *Monteith's case*, 2 Leach 702, and *Remnant's case*, 5 T. R. 169, were disposed of because of the indictment being defective.

by reason of illustration (*m*) to section 253 of the Procedure Code which sanctions cumulative convictions in such cases (§§ 4270-4273), but opposed to which there is both reason and authority. It cannot be denied that the causing of hurt is a necessary ingredient of the offence of robbery (§§ 4253-4257). It may heighten the crime, but does not make the hurt distinct. It has been consequently held that in such cases the accused could only be convicted of one offence under this section, and not both of this and under section 392.(4) But illustration (*m*) to section 235 of the Procedure Code enacts as follows:—

"*A* commits robbery on *B.* and in doing so voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offence under sections 328, 392 and 394 of the Indian Penal Code."

4286. This is a definite authority to the contrary, and so long as it remains separate, convictions under both the sections are justifiable, though the legalization of concurrent sentences under the present Procedure Code would naturally call that provision into requisition.

4287. This section has, of course, no application where the force used consists merely of a threat or an attempt to cause hurt; still less has it any application where the force consists of causing wrongful restraint or wrongful confinement, in all of which cases there should be only one charge framed under section 392. But if the commission of robbery was attended by the causing of hurt or grievous hurt, then an additional charge either under this section or section 397 should be added,(5) not only against the person actually causing hurt, but also against all his associates. Of course, if the hurt caused is grievous, the accused should be so charged and the case committed to the Court of Session by which it is exclusively triable. The Magistrate is not then justified in reducing the charge to one under this section to avoid a committal.(6) There is, however, no question of jurisdiction if such a procedure is adopted,(7) though it is one which is highly improper and may lead to inadequacy of punishment, in which case the High Court would be justified in ordering a retrial by the proper Court.

4288. Proof.—The points requiring proof are:—

(1) That the accused committed or attempted to commit, or was concerned in the commission of robbery.

(2) That in doing so the accused or some other person so concerned caused hurt.

(3) That the hurt was caused voluntarily.

4289. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

(4) *Mootkee Kora*, 2 W. R., followed in *Durga*, (1890) B. U. C. 511; to the same effect *Mattaparti*, (1888) 1 Weir 445.

(5) *Nga Po Lon*, (1902) 1 LB.R. 232.

(6) *Jobania*, (1889) B.U.C. 476, (1868) 1 Weir 448 (449, para. 7).

(7) *Surji Doss*, (1888) 1 Weir 449.

"That on or about the——day of——at——you committed (*or* attempted to commit or were jointly with P Q concerned in committing or attempting to commit) robbery of the property of A B, and that as such you (*or* P Q) voluntarily caused hurt to A B (or any other person *as the case may be*), and that you thereby committed an offence punishable under section 394 of the Indian Penal Code, and within my cognizance (or the cognizance of the Court of Session or the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."(8)

4290. Robbery with Hurt.—The question as to what constitutes the causing of hurt has been already considered elsewhere (§§ 3431-3435). This section deals with the liability of robbers some of whom cause hurt. Such hurt must be caused voluntarily, though it need not be caused precisely under the circumstances detailed in section 390. That section refers to the causing of hurt by the robber for the end of robbery, though it may be hurt caused at any stage of the crime. That is, generally speaking, also the case here, but the verbal variation here present would seem to suggest some extension of the circumstances in which hurt may be caused. But all the same it must be caused "in committing or in attempting to commit robbery." If, therefore, two persons go out to rob a third person with whom one of them was on terms of previous enmity unknown to the other, who consequently assault him while committing robbery, he could not be held liable under this section for causing hurt which was not caused *in* committing robbery; still less could his associate be held liable for constructive complicity, though he was otherwise "jointly concerned" in committing robbery. It will be observed that the section speaks of two distinct classes of persons in this connexion—those who actually cause hurt, and those who do not but are "jointly concerned" in the commission of the substantive crime of robbery. The latter are *ex hypothesi* not concerned in the causing of hurt, though they become liable therefor, independently of the knowledge of its likelihood or a reasonable belief in its probability, subject, however, only to the limitation that the hurt must have been caused *in* committing the substantive offence of robbery.

4291. The section supposes that persons who go out to commit an atrocious crime must at least be presumed to be aware that in the execution of their purpose they or some of them may be required to use force. They cannot, therefore, plead surprise if some one out of them does use force in prosecution of their common purpose. They are, therefore, all held indiscriminately liable for the same offence irrespective of who was the actual assailant. Nor, indeed, need the inquiry be directed to his identification, for it is not necessary. Four robbers entered a village; two of them went from house to house threatening the inmates to deliver up their valuables while the others stood guard on the house tops. Of the latter pair one was armed with a gun which he fired several times to frighten the awakened villagers,

(8) 2 W. R. Cr L. 6.

who, however, rallied and charged the pair by hurling a volley of stones. Thereupon the robber who had the gun, shot dead one of the villagers after which all the four made off with their booty. The accused Harnam Singh was one of the four but not who had killed the villager. He was convicted of murder and sentenced to death, but on appeal the Chief Court transported him under this section, holding that he could be held to have considered the commission of murder as a likely incident of the robbery. "If" observed the Court, "the appellant and his comrades had been asked by a friend shortly before the robbery what were the odds on a murder being committed during the course of that robbery, we imagine that they would have said the odds were *against* anybody being killed."(9)

4292. The persons spoken of as "jointly concerned" are, however, not those who are mere aiders and abettors of the crime, not present at the incident. The subject of constructive liability under such circumstances has been already the subject of extended notice elsewhere (§ 1439) and it is apprehended that persons other than those actually present at the robbery are not intended to be held liable for any hurt caused by persons behind their backs and in an act *in the commission* of which or attempt to commit which they were not *jointly* concerned.

Session. Cognizable. Warrant. Not bail. Not comp.

Punishment for dacoity.

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

[*Dacoity*—s. 391.]

Synopsis.

(1) *Analogous Law* (4293).
(2) *Procedure and Practice* (4294-4298).
(3) *Charge to the Jury* (4295).
(4) *No Attempt in Dacoity* (4296).
(5) *Inchoate Act* (4296).
(6) *Punishment* (4297).
(7) *Proof* (4298).
(8) *Charge* (4299).
(9) *Evidence of Dacoity* (4300-4303).
(10) *Mock Dacoity* (4304).

4293. Analogous Law.—Like section 392 this section, again, deals with the case of simple dacoity not specifically otherwise provided for. As has been already pointed out there are several sections dealing with this crime which is punishable at all stages, even from the earliest stage of preparation (s. 399) up to the final stage here presented. It may, again, be attended by other circumstances of aggravation which are then sufficient to convert the offence into one entirely different, and which would then be punishable under the provisions of the sections specially providing for it. These sections may be set out here for convenience of reference:—

(9) *Harnam Singh*, (1919) P. R. No. 21, 52 I. C. 395.

(1) Preparation (s. 399).

(2) Joining dacoits (s. 400).

(3) Assembling for dacoity (s. 402).

(4) Simple dacoity (s. 395).

(5) Dacoity armed with deadly weapons (s. 398).

(6) Dacoity with grievous hurt (s. 397).

(7) Dacoity with murder (s. 396).

4294. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session. A person convicted of dacoity under this section cannot be convicted also of dishonestly receiving stolen property under section 411, or of receiving property transferred by commission of dacoity under section 412, when there is no evidence of the commission of more than one offence.(10) It was said in a case decided in 1865 that where persons are found with portions of the plundered property in their possession, within six hours of the commission of a dacoity, the presumption of law is, that they are participators in the dacoity and not merely receivers.(11) And where the prisoner was apprehended even eight days after the dacoity with a part of the plunder in his possession, there was held to be as much justification for charging him for dacoity as for being merely a receiver.(12) Both these cases were decided before the Indian Evidnce Act, 1872, which now leaves the question to the discretion of the Court.(13) There is at any rate no legal presumption in any case.

Charge to the Jury

4295. As there must be at least five persons to commit this offence it is the duty of the Judge to instruct the jury that unless they are satisfied that there were at least five persons committing the robbery, or present and aiding in the commission of the robbery, there could be no dacoity. If, therefore, out of six persons tried for dacoity, the jury acquitted two persons, the Court presumed that the remaining four were intended by them to be convicted of robbery, though they purported to convict them of dacoity, not being told that any number short of five could not be so convicted. This was held to be a misdirection, though the Court did not think it expedient to order a re-trial, but was content to alter the conviction to one for robbery.(14) As dacoity involves either theft or extortion, offences which necessarily imply dishonesty, it is the duty of the Judge to direct the jury to find whether in committing dacoity the accused intended to cause wrongful gain or loss of property.(15) This is specially necessary in a case in which the accused plead justification, or in which there is a dispute as to right.

(10) *Shahabut Sheikh*, 13 W. R. 42.
(11) *Cassy Mul*, 3 W. R. 10.
(12) *Motee Jolaha*, (1864) W.R. 66.
(13) S. 114, Ill. (*a*), Indian Evidence Act (I of 1872).
(14) *Mookkandi Maniagaran*, (1903) 1 Weir 446.
(15) *Bonomally Ghose*, (1864) W. R. 8 (headnote wrong).

No attempt in Dacoity.

4296. As the definition of dacoity includes an attempt to commit dacoity[16] a person guilty of an offence should be convicted under this section and not under section 511 which is inapplicable.[17]

4297. Inchoate Act.—Where the accused were found to have attacked the complainant in an unenclosed open yard not surrounded by a wall without committing robbery they could not be convicted of dacoity under this section though they would be liable for criminal trespass.[18]

Punishment.

4298. Though the offence of dacoity may be committed under the most mitigating circumstances, a mere fine is not a legal punishment, as the section makes imprisonment compulsory.[19] But as the section prescribes no minimum, the requirements of the rule would be sufficiently complied with if the imprisonment is ordered only till the rising of the Court.[20] A dacoity coupled with atrocity, *e.g.*, the brutal ill-treatment of the inmates of the house deserves the most condign punishment.[21]

4299. Proof.—Where the conviction of the accused rests upon circumstantial evidence it has to be carefully scrutinized with a view to see whether it is exhaustive and excludes the possibility of guilt of any other person, and points conclusively to the complicity of the accused.[22] Where, therefore, in a charge under this section the evidence was the accused's admission that a gang of 13 persons assembled at his hut at night, that he was aware of their purpose, that he did not give information to the police till the next morning, and that after the dacoity the gang came and told him what had happened, it was held that the evidence fell short of proving that the accused had taken part in the dacoity.[23] The points requiring proof are:—

(1) That there were five or more persons jointly concerned in the crime.[24]

(2) That one or more of them committed or attempted to commit robbery.

(3) That those who did not join in committing or attempting to commit robbery, were present and aiding such commission or attempt.

4300. Charge.—The charge must specify the dacoity which is intended to form the subject matter of the trial. It is not necessary that the names of the other dacoits should be known or set out in the charge.[25] Where eight men were charged and four acquitted a conviction of the rest for dacoity would be good if there is evidence that

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(16) S. 391.
(17) *Koonee*, 7 W. R. 48 *Beni*, 23 A. 78.
(18) *Hasura*, 5 L. L. J. 52, (1923) A. I. R. (L.) 161.
(19) *Bhoja*, 6 W.R. 54.
(20) Cf. *Bayne*, 8 Bom. L. R. 414.
(21) *Sunder*, 56 I. C. (A) 771; 21 Cr. L. J. 515.
(22) *Chiraguddin*, 18 C. W. N 1144, 23 I. C. 501, 15 Cr. L. J. 293.
(23) *Umrao Khan*, 10 O. & A. L. R. 187.
(24) *Labh Singh*, 6 L. 24
(25) *Rashidazzaman*. 15 C. W. N. 434; 10 I. C. 684; 12 Cr. L. J. 193.

five or more persons took part in it.(1) The Court is cautioned against too readily relying on the evidence of identification by witnesses not proviously acquainted with the accused.(2) The fact that the accused was bound over to give security under s. 110 of the Criminal Procedure Code and had failed to furnish it is no evidence against him in a case of dacoity in which the verdict was held vitiated by such evidence.(3) The accused cannot be charged with more than three dacoities in all.(4) If the liability of the accused rests on the application of s. 34 or s. 149 he must be so charged, otherwise he cannot be so convicted.(5) The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed dacoity, an offence punishable under section 395 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."(6)

4301. Evidence of Dacoity.—The essential elements constituting the offence of dacoity have been already considered (§§ 4263-4265). The offence is nothing more but robbery committed by five or more persons. The proof of committing or attempting to commit robbery by one or more of such five persons is essential. In that case, it must be proved that the rest were both present and aiding the commission of the offence or its attempt. In a case of this kind much must depend upon the identification of the accused, and the establishment of facts which constitute co-operation in the crime. For this purpose the identification of a body of men marching in a certain direction is both relevant and useful, while evidence of their intention may be afforded by their demeanour and secrecy, or in the case of political or famine rioters by proof of their war cries.

Several reported cases have urged on the Courts the necessity of strict proof of this offence, and the identification of each accused. Nor was this precaution unnecessary, seeing that it is by no means uncommon to implicate persons of this offence upon merest suspicion or upon evidence, which, if carefully scrutinized, would be exposed to grave suspicion. The mere fact that a person accused of dacoity made a statement before several witnesses for the prosecution incriminating himself, and produced in their presence some of the stolen articles is not convincing or conclusive proof of his guilt.(7) The omission of the name of the accused in the first information is usually treated as fatal to the prosecution where the complainant professes previous acquain-

(1) *Rashidazzaman*, 15 C. W. N. 434; 10 I. C. 684; 12 Cr. L. J. 193.
(2) *Kallu*, 40 L. J. 63; 39 I. C. 296, 18 Cr. L. J. 456; *Din Dayal*, 10 O L. J. 347.
(3) *Asimuddin*, 33 C. L. J. 19; 59 I. C. 204; 22 Cr. L. J. 60.
(4) *Mandi Ghasi*, (1912) M. W. N. 49; 13 I. C. 781.
(5) *Kottoora*, 40 M. L. J. 311; 77 I. C. 444; 25 Cr. L. J. 396.
(6) Cr. P. C., Sch V. XXVIII (1); (10).
(7) *Fatta*, (1913) P. W. R 31; 21 I. C. 473.

tance with the accused.[8] It must also be remembered that dacoits do not often go undisguised, and where their number is large and the light faint it is by no means an easy task even to recognize familiar faces. The Courts are, consequently, not disposed to readily accept evidence as to indentification unless it is otherwise corroborated.[9]

4302. The points upon which such scrutiny is desirable are: (*i*) identification of the accused; (*ii*) identification of the property; and (*iii*) the nature of each accused's complicity in the crime. As regards identification of the persons the question depends upon whether the story put forward by the prosecution is credible and is supported by credible evidence. For this purpose the Court must compare the statement of witnesses in Court with their statements made to the police. As was pointed out in a case " it should be made clear exactly when and under what circumstances the prosecutor and witnesses denounced the persons whom they swear to have recognized."[10] In that case the dacoity had occurred on the 18th of July, but the case had not been sent up till the 18th of August, and the Court inquired how that interval was spent, at what stage of the investigation the property was recovered, and when did the witnesses denounce the dacoits, each of whose case, of course, received individual attention.[11] For this purpose the Court should not be satisfied with the evidence of mere recovery of property from the houses of the accused, eked out by the evidence of an approver, the more so if there is no reason why he should have volunteered the confession at all.

It is natural to expect that a person would confess if the incriminating traces of his crime are pretty strong—if, for example, some property is found in his house, or witnesses have unmistakeably identified him as a dacoit. But a person who has been arrested upon mere suspicion, and who thereupon hastens to support the version of the police, is a witness of a different calibre.[12] The fact that such evidence is sought to be corroborated by the production of such articles as a *lotah* a comb or a shirt from the house of each of the accused does not much improve the case of the prosecution. In such cases it may be a fact that a dacoity was committed, but what the prosecution have to prove is that it was committed by the accused, and that each of them satisfies the definition of a dacoit. The mere fact that a person had started off with others who are proved to be dacoits does not make him liable for dacoity.[13] That fact is only a link in the chain of evidence which has still to be completed by evidence of the conjoint commission of, or an attempt to commit, a robbery, or at any rate by evidence of presence and aid in it as required by section 391. Failing such participation, the accused may be liable only as an abettor. So where the evidence against a person consisted of pointing out to the dacoits the house to be robbed, or of active participation in planning the dacoity and in taking charge of camels used by some of the party whilst the offence was being

(8) *Ronki*, (1915) P. W R. 10, 27 I C. 846.
(9) *Kallu*, (1917) 4 O. L. J. 83, 39 I. C. 296.
(10) *Modhoo Manjee*, 5 W. R. 51.
(11) *Ib.*, p. 52.
(12) *Ram Sagar*, 8 W. R 57
(13) *Kamal Fukeer*, 17 W. R 50.

committed, he was held liable only as an abettor under section 395|109 of the Code.(14)

4303. It has been held that cases where the conviction rests solely upon the identification of the accused with the offender are particularly unsatisfactory in this country and should be narrowly scrutinized.(15) As opposed to such evidence, evidence entirely circumstantial is often the most satisfactory in this country; but in dealing with such evidence, the Court must not only be satisfied that each of the facts upon which the presumption of guilt is founded is proved beyond reasonable doubt, but that there is a chain of evidence or series of established facts, so far complete as to leave no reasonable ground for a conclusion therefrom consistent with the innocence of the accused.(16)

4304. These general considerations apply equally to all criminal cases, but they are specially applicable to a case of dacoity in which it is not difficult to implicate an innocent person with those who may have been really guilty of the crime. And this work is rendered not the more difficult by the non-chalant manner in which the ordinary witnesses are wont to exclaim. "They were all in it." But such evidence is neither sufficient nor satisfactory so far as it goes. And in such cases it is the duty of the Court to examine the witnesses on minutest details in order to elicit facts showing the part taken by each individual so that it may be able to judge of the participation of each individual.(17)

4305. Mock Dacoity.—Where five or more persons take part in a raid it may technically amount to dacoity but it is not what the Code intended to include in that offence. Such a case arose in Madras where in the course of a quarrel between four brothers about the partition of their property, the first three accused made a raid on the complaint's property, who tried to retake what the three accused had seized from him; but three other accused prevented him from doing so. It was held that they could not be convicted of either robbery or dacoity, though they might be technically guilty of it.(18)

396. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Session. Cognizable. Warrant. Not bail. Not comp.

Dacoity with murder.

[*Person*—s. 11, but *see* ss. 82, 83. *Murder*—s. 300. *Dacoity*—s 391.]

Synopsis.

(1) *Analogous Law* (4306).
(2) *Procedure and Practice* (4307).
(3) *Proof* (4308).
(4) *Form of Charge* (4309).
(5) *Dacoity with Murder* (4310-4312).

(14) *Chatar Singh*, (1901) P. R. No. 15.
(15) *Kashee Ram*, (1868) P.R. No. 27; *Kallu*, 4 O. L. J. 63, 39 I. C. 296, 18 Cr. L. J. 456; *Din Dayal*, 10 O. L. J. 347.
(16) *Goola*, (1867) P.R. No. 15; *Shera*, (1866) P. R. No. 117.
(17) *Mathura Thakur*, 6 C. W. N. 72.
(18) *Naramban*, (1922) M W. N. 396, (1922) A. I. R. (M.) 195.

4306. Analogous Law.—This section does not deal only with the individual liability of the actual murderer for a murder committed in the course of a dacoity, but also the liability of the other members of the gang for the act of their associate. The former may be tried as much for murder as for this offence, and for whatever offence he may be tried his individual responsibility for the act is unquestionable. But this section is enacted to declare the liability of other persons as co-extensive, and for this purpose all that is required is that they should then have been "conjointly committing" the dacoity.

4307. Procedure and Practice.—This section is cognizable, but warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session. The Courts make some distinction between an intentional murder, and one which is murder by reason of clauses 3 and 4 of section 300. In the latter case it has been held that even the actual perpetrator of the crime could not be charged or convicted of the double offence of murder as well as this offence, and that the only proper course in such a case is to convict him and those jointly concerned with him only under this section.(19) A person found in possession of goods stolen in a dacoity punishable under this section could not be punished for it, if he was found in such possession six weeks after the commission of the crime, though he would of course be liable for punishment under s. 411.(20)

The accused Fatta and Nurdad were convicted of this offence. On appeal the High Court acquitted Nurdad for want of sufficient evidence. It further found that there was not sufficient evidence to prove that as many as five had taken part in the commission of the offence, nor was it clear that the deceased's assailants were guilty of murder. His death was found due to blows given on the right side which caused the rupture of liver and the fracture of four ribs. The culprits had left the house without taking the jewellery which the inmates were wearing, and probably, alarmed at death decamped sooner than they would otherwise have done. It was held that Fatta could not be convicted of this offence because it was not proved that he intended to kill deceased or to cause him such injury as he knew to be likely to cause death. He was however convicted of the offence punishable under s. 460.(21)

4308. Proof.—The points requiring proof are:—

(1) The commission of a dacoity (s. 391).

(2) That one of the dacoits committed murder.

(3) That the murder was committed during the commission of the dacoity.

4309. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

(19) *Rughoo*, (1864) W. R. 30.
(20) *Arshed Molla*, 29 C. L. J. 325, 51 I. C. 685, 20 Cr. L. J. 525.
(21) *Nur Dad*, 1 L. L. J. 252.

"That on or about the——day of——at——you committed dacoity, and that, in the commission of dacoity, murder was committed by one of your number, and that you thereby committed an offence punishable under section 396 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court.)

"And I hereby direct that you be tried by the said Court) on the said charge."[22]

4310. Dacoity with Murder.—To begin with, any death caused by a dacoit in the course of dacoity would be murder, for the exceptions which mitigate that crime are obviously inapplicable to an act committed by men who embark on a crime so atrocious as dacoity. Proof of murder would consequently consist of the proof of committing culpable homicide. Nor need it be established against any one of the dacoits in particular, so long as death is the result of the cumulative effect of the violence used by the gang. It is apprehended that in such a case it will not be open to the accused to plead that they did not know that the cumulative effect of their conjoint violence would result in death. This could be only permitted in a case in which the liability of the accused is single and undivided. But *prima facie* it is not so. The nature and extent of individual ill-treatment is, therefore, only material for the purpose of determining the individual malignity for meting out appropriate sentences. It may also be a fit subject of inquiry in a case where a person is charged for the substantive crime of murder. Otherwise, the inquiry need proceed no further than is required to prove that (*i*) there was a dacoity, (*ii*) which was the joint act of the persons concerned; and (*iii*) that the murder in question was committed in the course of the commission of the dacoity in question.[23] If there was no dacoity this section is of course inapplicable. But there may be dacoity and yet the murder may not be "*in so committing dacoity*," in which case persons other than those actually committing the murder could not be held liable by reason of this section.

The fact that murder was committed whilst committing dacoity does not necessarily prove that it was committed *in* committing dacoity. And this is what is required to be established. The accused Mathura Thakur was the proprietor of a plot of land which had been sold in execution of a decree, and purchased by the prosecutor Jhumak Mistri. This plot was sown with rice (by whom it is not stated) and before it was ripe the prosecutor with a number of reapers commenced to cut it when the accused numbering several hundred men attacked them under the leadership of Mathura Thakur and commenced an assault in which a person Soman Dhaina was killed. The rioters were then stated to have taken away the paddy which had been reaped, and they thus carried away the whole of the crops. They were prosecuted under this section, and apart from the prejudice which the accused were held to

(22) *Muttirulappan*, (1877) 1 Weir 447 (448), in which the above form was set out as the correct form of charge under this section.

(23) *Mathura Thakur*, 6 C. W. N. 72.

have suffered, the question raised was whether the evidence given was sufficient to bring home the charge against each of the accused. It was said that this section contemplated murder committed in committing dacoity, and as dacoity was robbery, it became necessary to inquire whether the murder was committed in committing robbery, which again, reduced the inquiry to this, was the assault committed for the end of theft. It was held that as it preceded the theft and the deceased was struck when he was with the rest of the reapers flying away from the field, the assault on him could not be said to have been committed for the purpose of robbery, and consequently, one essential element of the offence under this section making for joint liability, was wanting.(24)

This was the *ratio decidendi* of another case in which after the commission of a dacoity in which the dacoits being interrupted by the villagers, beat a retreat without getting any plunder, and while they were attempting to escape, one or more of them turned round upon their pursuers and killed one of them, upon which they were all convicted under this section, but on appeal it was held that they could not be convicted under this section, because the murder was not committed "in so committing dacoity" within the meaning of this section; that is to say, there was no murder while the dacoity was committed, nor was it committed in carrying away property, for there was no property to carry.(25) The responsibility for murder was, therefore, confined to the actual murderer and could not be extended to the whole gang.(1)

4311. But this is the only limitation upon the joint liability of the dacoits for a murder committed by one of their members. They cannot be heard to plead that they had gone to commit dacoity and were averse to the murder committed, nor is it incumbent upon the prosecution to prove that they knew of its likelihood.(2) or that they were not even present at the time it was committed. The contrary was laid down by Knox and Blair, JJ., in a case in which they held it necessary to establish not only that the person accused under this section was committing dacoity conjointly with others, but that the murder was committed in his presence,(3) a proposition for which there is no justification, and which was rightly dissented from by Edge, C. J., and Banerji, J., in another case(4) in which the learned Judges held it to be immaterial for the purpose of this section whether the other accused were inside or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of dacoity.(5)

In this case the accused Teja was a member of a dacoit gang which invaded a house for plunder, Teja got inside to plunder it, while

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(24) *Mathura Thakur*, 6 C. W. N. 72 (79).

(25) S. 390; *aliter*, where murder is committed by one of the dacoits while making good their escape with their booty; *Karim Baksh*, 76 I. C. (Punj.) 1039, (1923) A. I. R. (L.) 329

(1) *Chandar*, (1906) 26 A. W. N. 47, 3 Cr. L. J. 294.

(2) *Girija Laxmappa*, 6 Bom. L. R. 248.

(3) *Umrao Singh*, 16 A. 437

(4) *Teja*, 17 A. 86. To the same effect, *Sakharam Khandu*, 2 Bom. L. R. 325; *Chittu*, (1900) P. R. No. 4; *Chatar Singh*, (1901) P. R. No. 15.

(5) *Ib*.

the accused Zaharia was outside and while so killed the deceased. Teja pleaded ignorance of the murder perpetrated behind his back while he was inside the house, but the Judges held that that fact was immaterial so long as the murder was proved to have been committed in the commission of dacoity. Teja had been sentenced to death and in this view the Court confirmed that sentence. But in this case the case for joint responsibility rests on conjoint dacoity. If, therefore, a person was not found guilty of the substantive offence of dacoity, but only of its abetment, he could not be held constructively liable for murder committed by persons whose act he had only abetted, but in which he did not participate so as to be responsible for conjointly committing dacoity. Such was the case of a person who pointed out the house to be robbed and held the camels of the dacoits at a distance while they committed the dacoity.(6)

4312. Even as regards persons who bring themselves within the penalties of this section by their conjoint dacoity, the section allows some latitude in apportioning the sentence to the nature of complicity in the crime. For, while there can be no doubt that the extreme penalty of the law is reserved to the actual murderers and those contributing to it by their acts, the lesser penalty would be more befitting those who are only constructively held liable under this section. And there may be even a case for special mitigation if a dacoit though otherwise joining in the plunder actively opposed the perpetration of murder, in which case, though he could not escape liability, his case would be one in which there is room for the exercise of discretion in apportioning the sentence.

Session. Cognizable. Warrant. Not bail. Not comp.

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Robbery or dacoity with attempt to cause death or grievous hurt.

[*Person*—s. 11. *Robbery*—s. 390. *Grievous hurt*—s. 390. *Dacoity*—s. 391.]

Synopsis.

(1) *Analogous Law* (4313).
(2) *Procedure and Practice* (4314).
(3) *Proof* (4315).
(4) *Form of Charge* (4316).
(5) *Meaning of Words* (4317).
(6) *Aggravated Robbery or Dacoity* (4318-4324).

(6) *Chatar Singh*, (1901) P. R. No. 15; to the same effect, *Sakharam Khandu* 2 Bom. L. R. 325; *Chittu*, (1900) P. R. No. 4 *Chatar Singh*, (1901) P. R. N. 15.

4313. Analogous Law.—This section does not constitute a separate offence; it merely regulates the punishment already provided for dacoity, by fixing a minimum term of imprisonment when its commission is attended by the two aggravating circumstances here specified.(7) This section is then a proviso which may be read as a part of any of the other sections prescribing punishments for robbery or dacoity.(8) It will be obviously inapplicable, where the presence of other circumstances renders its application unlikely. Such would be the case, where the offender is deemed liable to exemplary punishments by reason of other aggravation, as for example indecent assault on the females of the house robbed, mischief by fire or otherwise while perpetrating the crime. In short, while this section singles out two aggravating circumstances meriting condign punishment it is by no means exhaustive of cases in which that punishment is appropriate and proper.

4314. Procedure and Practice.—This section is cognizable and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session. As this section refers to a case of special aggravation, it is necessary to frame a charge under it, mentioning the special point of aggravation. A person could not be legally punished under this section, when he was only charged under section 395.(9) Again, since the section is applicable as much to robbery as to dacoity, a person may be acquitted of dacoity and yet convicted of aggravated robbery under this section.(10) There is nothing in law to prevent a person charged for this offence of being convicted of causing grievous hurt only under s. 326.(11) The accused cannot be convicted of this offence unless there is evidence to prove that he had used a deadly weapon or caused grievous hurt. The mere fact that grievous hurt was caused does not render him liable for this offence.(12) (§§ 4319-4320).

4315. Proof.—The points requiring proof are:—

(1) The commission of robbery (s. 392) or dacoity (s. 395).

(2) That the accused:—

(*a*) *used* a deadly weapon, or

(*b*) *caused* grievous hurt, or

(*c*) *attempted* to cause death or grievous hurt.(13)

(3) That he did so at the time of committing the robbery or dacoity.

(7) 7 W. R. Cr. L. 2; *Whadhaw Singh*, 76 I. C. (L.) 819, (1923) A. I. R. (L.) 389.

(8) It has been held to be merely a riot under s. 494; *Mohua*, (1901) P. R. No. 16

(9) *Punya Sakharam*, (1897) B. U. C. 921.

(10) *Dwarka Aheer*, 2 W. R. 49.

(11) *Aclobala Muttiyalu*, 37 M. 237.

(12) *Arunachala*, 22 M. L. J. 186: 13 I. C. 222, 13 Cr. L. J. 42.

(13) *Mohan Singh*, 88 I. C. 456, 26 P. L. R. 398.

4316. Charge.—The charge should be for the substantive offence of robbery or dacoity, as the case may be, in addition to which the following additional clause should be added[14]:—

"And that at the time of committing the said robbery (*or* dacoity) you used a deadly weapon to wit——(*mention the deadly weapon*), or caused grievous hurt to A B, *or* attempted to cause death or grievous hurt to A B), and thereby committed an offence punishable under section 397 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

4317. Meaning of Words.—"*Uses any deadly weapon*" may either mean, actually uses in causing hurt or the like, or that he is merely possessed of it for the purpose of overawing the person robbed. It is stated to include the latter sense.[15] But in that case the next section would be superfluous. A *lathi* is not a deadly weapon within the meaning of this section.[16] "*Such offender*" means the offender who uses the deadly weapon or causes grievous hurt; and not those who were present aiding and abetting (§§ 4319, 4320).

4318. Aggravated Robbery or Dacoity.—This section lays down a rule prescribing the minimum of punishment to which a person must be sentenced on a conviction for robbery or dacoity if his offence was attended by any of the four aggravating circumstances mentioned in the section. These are (*i*) use of a deadly weapon, (*ii*) causing of grievous hurt, (*iii*) attempting to cause death, or (*iv*) attempting to cause grievous hurt. A person may cause grievous hurt and commit no robbery or dacoity, or he may commit the latter without causing the former, in neither of which cases is the high penalty here prescribed admissible. The section applies only to persons against whom robbery or dacoity is, in the first instance, proved in addition to which there are the special circumstances which make his crime one of special aggravation.

4319. But, as observed before (§ 4314), these are not only the aggravating circumstances which the Court may take into consideration in awarding the sentence. But they are declared to be the circumstances, which the Court *must* take into consideration, and in which it has no option but to pass at least the sentence of seven years imprisonment, though, of course, it may pass any higher sentence in its discretion. The liability for the act is, however, personal, and is confined to the offender who actually uses the weapon or causes the injury. It cannot be inflicted upon his associates.[17] This would seem to be obvious from the section, but it is a point upon which the Courts were at one time by no means agreed. The difference of view was not, however, based upon the plain meaning of this section which was, however, conceded, but its extension was held to be justifiable by reason of the rule enacted in section 34 of the Code which says that

(14) *Dulli* 47 A. 59.
(15) *Nga I*, (1911) 6 L. B. R. 41, 14 I. C. 65; *Nazar Shah*, 92 I. C. 750. (1926) 150.
(16) *Lad Khan*, (1912) P. L. R. 11, 13 I. C. 998.
(17) *Deoje Keru*, (1872) B. U. C. 65, the judgment of which is not clear; *Powin*, 7 L. B. R. 26, 20 I. C 416; *Bharjya*, (1895) B. U. C. 797.

"when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." On the strength of this rule, it was held that though the hand that strikes the blow may be the hand of one, all are equally liable for the result, and its consequential penalties.

This was the view taken by Strachey, C. J., in a case in which the facts were these: A was sleeping in his threshing floor which was attacked at night by robbers. A got up and seized one of them, B. The other four or five men then attacked him, whereupon A let B go who also then beat A. As the alarm given brought other men to the spot the thieves beat two more men and then made off. A's hand was fractured, but there was no evidence as to which of the accused had caused the grievous injury. On these facts B was convicted under this section, and the question was whether his conviction was right. It was contended that this section applied only to the actual offender, as the use of "such offender" evidently referred only to the offender who caused the grievous hurt. This was presumably conceded, but it was held that, while this section defined the liability of the actual offender, section 34 of the Code, extended it to other confederates, and that as B was one such confederate he was equally liable whether he was or was not the offender who actually caused the grievous hurt.[18]

4320. This was the trend of view of two of the Bombay Judges in an unreported case of that Court.[19] But the Allahabad case was soon afterwards overruled,[20] and the Bombay case[21] was held in principle to support the construction limited to the actual offender.[22] At any rate, there is now consensus of opinions on this point,[23] and which may be justified by the maxim: *Specialia generalibus derogant.*[24] Indeed, the other view is only consistent with an extension of the rule of section 34 which is both unwarranted by its language and purpose (§§ 303-319). Indeed, it may be that the offender using a deadly weapon may keep it concealed from his confederates, who may be opposed to its use or to the infliction of injury which a desperado amongst them may cause in spite of the protests of his confederates.

S. 398 Compared.

4321. It will be observed that the terms of this section are analogous to those of the next section which punishes an offender to the same extent for being merely armed with a deadly weapon "at the time of attempting to commit

(18) *Mahabir Tiwari*, 21 A. 263, overruled in *Senta*, 28 A. 404 *note*, (1899) A. W. N. 186; *Nageshwar*, 28 A. 404; *Arunachala*, 22 M. L. J. 196, 13 I. C. 282, 13 Cr. L. J. 42.

(19) *Per* Lloyd. and Kemball, JJ., in *Deoji Keru*, (1878) B. U. C. 65.

(20) *Mahabir Tiwari*, 21 A. 263, overruled in *Senta*, A. W. N. 186, 28 A. 404 *note*.

(21) *Deaji Keru*, (1872) B. U. C. 65.

(22) *Bharjya*, (1895) B. U. C. 797.

(23) *Senta*, 28 A. 404, *note*; *Nageshwar*, 28 A. 404; *Arunachala* 22 M. L. J. 186, 13 I. C. 282, 13 Cr. L. J. 42; *Bharjya* (1895) B. U. C. 797; *Komali Viswasam*, (1886) 1 Weir, 450; *Nga Sein*, (1905) 3 L. B. R. 121; *Po. Win*. 7 L. B. R. 26, 20 I. C. 416, 14 Cr. L. J. 432; *Ilahia*, 72 I. C. (4) 517, 24 Cr. L. J 405; *Hashrut Sheikh*, 6 W. R. 85; *Ali Mirza* 51 C. 265.

(24) "Things special derogate from things general."

robbery or dacoity." If this phrase does not mean anything different from "at the time of committing robbery or dacoity," then the terms of that section would be in some respects wider than those of this section which requires the offender to *use* his deadly weapon in order to be liable to the same sentence. It will be seen that this group of sections uses at least three different phrases to denote the three stages of the crime: (*i*) *at the time of committing* robbery or dacoity, as in this section; (*ii*) at the time of *attempting* to commit robbery or dacoity, as in the next section; and (*iii*) *in committing* robbery or dacoity as in the last section. It would seem that these phrases mark different stages of the progress of the crime; the first would suggest a period more indefinite than the second, while the last suggests the actual act of robbery or dacoity. A case for enhanced sentence may thus arise under any of the following circumstances:—

"(*a*) If at any time immediately before, during or after the commission of robbery the robber uses a deadly weapon—in which case the degree of the resultant injury is immaterial (s. 397).

"(*b*) If during the commission of robbery the robber possesses a deadly weapon—in which case its use is immaterial (s. 398).

"(*c*) If at any time immediately before, during or after the commission of robbery the robber causes or attempts to cause grievous hurt or attempts to cause death—in which case the nature of the weapon used is immaterial (s. 397)."

4322. These are obviously not all the possible cases of aggravation. For there still remain cases of causing death, committing rape or indecent assault, arson and mischief by other means, wanton brutality not falling into the above classification, in which case the aggravation is at least as great though the Code leaves the apportioning of the sentence for the crime to the discretion of the Judge.

4323. The distinction between the phraseology of the several sections does not appear to have weighed with the Courts in the cases decided on the subject. In a case before Jackson and Glover, JJ., it was said that if the prisoner had been found guilty of committing dacoity and of causing grievous hurt at the time of committing it or of attempting to commit dacoity, being armed with a deadly weapon, it would have been imperative under section 397 or 398, as the case might be, to pass a sentence of not less than seven years' imprisonment.[25] This case was followed by Henderson, J., in a case in which the facts were these: the seven accused were held to have gone to commit dacoity in the house of the complainant, but while they were digging a hole into his wall they were surprised by the villagers who barred their escape, upon which one of them, Rahim Baksh fired a pistol to frighten the villagers, and which it did, enabling the dacoits to escape, but followed in hot pursuit by the police and the villagers. They were all convicted of preparation for dacoity under section 339,[1] and Rahim Baksh was convicted under section 398, because he was armed with a deadly weapon, namely a pistol. No reference was made to this section, because, as the learned judge regarded the act as a mere preparation, Rahim could not be said to have fired the

(25) *Koonee*, 7 W. R. 48. (1) *Harnaman*, (1901) P. R. No. 6.

pistol at the time of committing dacoity. In this view this stage would have been reached only after the dacoits had effected the entrance, or laid hold of the property they intended to steal. But such a case must be distinguished from the following: A was riding along a road when B, wishing to steal his pony, waylaid him and struck him two blows with a stick, fracturing one of his arms and felling him to the ground. He then attempted to ride away with the pony, but was prevented from doing so by the girth of the saddle having given way. The question arose, what was his offence?—and was he guilty under this section? It was held that in such a case he would be so guilty, for the hurt was undoubtedly caused at the time of committing the offence.

4324. Where an offender uses a deadly weapon its effect is immaterial. It may not even graze the person intended to be hit, or it may have been used merely to frighten and not hit anyone, but still the offender would bring himself within the penalties of this section by the mere fact of using it. And so the section advisedly does not require that the grievous hurt caused or attempted should be voluntary, from which it follows that if the offender uses force intending merely to cause hurt, and grievous hurt is caused, he brings himself within the penalties of this section though he may not have anticipated grievous hurt. So in the last case it was contended that A's fracture was not proved to have been due to B's blows, but the Court held that whether the fracture of the arm was caused by the blow or the fall, inasmuch as the appellant caused the fracture by an act done in furtherance of his intention to steal the pony, and that act was in itself an offence, this section was applicable. It was immaterial whether the hurt which he intended to cause, or knew himself to be likely to cause, was not grievous hurt. Hurt amounting to grievous hurt was caused by an act in itself an offence, done in furtherance of the intention to rob, and at the time of committing robbery.

Session. Cognizable. Warrant. Not bail- Not comp.

Attempt to commit robbery or dacoity when armed with deadly weapon.

398. If, at the time of atempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

[*Robber*—s. 390. *Dacoity*—s. 391.]

Synopsis.

(1) *Analogous Law* (4325).
(2) *Procedure and Practice* (4326).
(3) *Proof* (4327).
(4) *Charge* (4328).
(5) *Principle* (4329).

4325. Analogous Law.—The subject of this section has already been anticipated in discussing the scope of the last section, so far as it is related to it. (§ 4318-4320). This section is evidently intended to penalize the possession of deadly weapons during the commission of robbery,

4326. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session (*or* High Court).

4327. Proof.—The points requiring proof are:—

(1) That the accused was armed.

(2) That the arm was a deadly weapon.

(3) That as such he attempted to commit robbery or dacoity.

4328. Charge.—The charge under this section should follow the form set out under the last section (§ 4316).

4329. Principle.—The terror which people feel at the sight of deadly weapons is enough to make the presence of a robber formidable. He may not use it, but the fact that it may be brought into use any moment has almost the same effect.[2] This section is not intended to punish possession of a deadly weapon at any time prior to an attempt to commit robbery. The question is then important as to when a preparation ends and an attempt commences. The subject will have to be presently considered (§§ 4334-4335).

399. Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Session. Cognizable. Warrant. Not bail. Not comp.

Making preparation to commit dacoity.

[*Dacoity*—s. 391.]

Synopsis.

(1) *Analogous Law* (4330).
(2) *Procedure and Practice* (4331).
(3) *Proof* (4332).
(4) *Form of Charge* (4333).
(5) *Criminal Preparation for Dacoity* (4334-4335).

4330. Analogous Law.—This is one of the three sections[3] which punish a mere preparation to commit an offence. It punishes a preparation, because of the atrocity of the crime which the preparation may lead to. Law assumes that persons who plot about the commission of so enormous a crime deserve no *locus poenetentia* for they are not like ordinary criminals likely to turn away from their purpose

4331. Procedure and Practice.—This offence is cognizable and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

4332. Proof.—The points requiring proof are:—

(1) That what the accused did was a preparation.

(2) Cf. *Nga I*, 6 L. B. R 41, 14 I. C. 651, 13 Cr. L. J. 267.

(3) The other two sections are ss. 122 and 126.

(2) That it was a preparation for committing dacoity.

It is not necessary that five or more persons must be shown to have joined in the preparation. All that is necessary is that the preparation must be to commit dacoity, which implies that the raid for which the accused was making preparation was to be committed by five or more persons.(4)

4333. Charge.—As compared with section 402, this offence marks a step further in the progress of the crime. Consequently, where a person charged in the alternative of this and that section, the two charges being however treated as supplementary, is acquitted of this offence, he may be still convicted under section 402.(5) The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you made preparation by——(*specify the act*) for committing dacoity, and thereby committed an act punishable under section 399 of the Indian Penal Code, and within the cognizance of the Court of Session.

"And I hereby direct that you be tried by the said Court on the said charge."

4334. Criminal Preparation for Dacoity.—This section is confined to a preparation made to commit dacoity. It has no reference to any other offence against property short of dacoity, such as house-breaking or robbery.(6) The Code does not define, nor does it indicate, the nature of the preparation that this section is intended to provide against. But comparing this section with the following, it would seem, that these sections refer to certain specific instances of preparation which should be presumably *ejusdem generis* with forming or joining a gang of dacoits,(7) or assembling for dacoity.(8) So any previous arrangement necessarily connected with a contemplated dacoity would be a preparation, when it falls short of an attempt, and is something more than a mere mental determination. Such preparation is, in short, an act to get ready for a dacoity, such as the collection of men and beasts, arms and ammunition, provisions and the like, which coupled with the other circumstances plainly manifest an intention to commit dacoity.(9)

The making of preparation to commit dacoity postulates the determination to commit that offence. Any stage antecedent to such determination will not, therefore, ordinarily be a preparation, though in such a case it is possible that that preparation here punishable may proceed side by side with deliberation. Nor is it necessary that the person making the preparation should himself be a dacoit. He

(4) *Khwaja Hassan*, 71 I. C. 350, 24 Cr. L. J. 136.
(5) *Romesh Chandra. Banerjee*, 41 C. 350.
(6) *Shera*, (1868) P. R. No. 18.
(7) S. 400.
(8) S. 402.
(9) *Karmun*, (1916) P. R. No. 6, 34 I. C. 1000.

may be organizing a dacoity expedition, in which case he would be guilty of this offence, though he may propose to proceed no further in the matter. But a preparation for dacoity presupposes at least knowledge of the purpose of the preparation. If, therefore, a person be employed as an innocent agent to execute the nefarious purpose of others, he could not be held liable for a preparation under this section. For example, if a gunsmith is approached to sell a gun to a would-be dacoit, and being questioned as to his name and residence, he gives a wrong name, thereby inducing him to sell the gun, the gunsmith could not be charged under this section for having sold the dacoit a gun which he used in a dacoity, though he would be guilty of abetment if he sold it with the knowledge of its intended use. But even in this case he could not be charged under this section, as it does not refer to aiders and abettors of dacoits, but to persons who make preparation for a dacoity which they intend to commit themselves.

4335. Again, these sections make a clear distinction between a preparation and an attempt. The latter amounts to dacoity itself and is punishable as such. The distinction is, therefore, important, for, if an attempt, the offence would be subject to the higher penalty of section 395. It would seem that an attempt on the part of the dacoits to dig a hole in the wall of the house which they intended to rob, and for which purpose they had commenced operations, would be punishable merely as a preparation under this section, and not as an attempt to commit dacoity. [10] But in such a case, if the hole had been cut through, and a dacoit effected his entrance, then the stage of preparation would presumably have been over. In such cases the distinction between a preparation and an attempt is rather fine, but there is a distinction though it may not be obvious.

See the subject further discussed under section 511.

400. Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Session. Cognizable. Warrant. Not bailable. Not comp.

Punishment for belonging to gang of dacoits.

[*Person*—s. 11; but *see* ss. 82, 83. *Dacoity*—s. 391.]

Synopsis.

(1) *Analogous Law* (4336).
(2) *Procedure and Practice* (4337).
(3) *Proof* (4338).
(4) *Form of Charge* (4339).
(5) *Principle* (4340).
(6) *Meaning of Words* (4341).
(7) *Punishment for Joining a Dacoit Gang* (4342-4348).
(8) *What is Habitual Association* (4344).

(10) *Beni*, 23 A. 78.

4336. Analogous Law.—This section is intended to break up dacoit gangs by punishing their associates. It is not intended to punish casual visitors to or associates of dacoits, but only those who enlist themselves in the service of the gang and become identified with it. As such, this section re-enacts section 1 of the Dacoity Act, 1843, (11) which ran as follows:—

"S. 1. Whoever shall be proved to have belonged to any gang of dacoits shall be punished with transportation for life, or with imprisonment for any less term with hard labour."

As to this the Law Commissioners remarked: "The intention was to apply to dacoity the law in force for the prevention of Thagi, but it differs in the punishment, as transportation for life is not authorized in cases of Thagi. If this very stringent law be continued—and it may be presumed that the grounds upon which it was so recently deemed to be necessary are such as will justify its continuance for the present, though it may be hoped that eventually it may be mitigated—we would suggest, with reference particularly to the observations of Mr. Thomas as to the constitution of these gangs that some definition be given of what is meant by a person belonging to a gang of dacoits. The preamble to act XXIV of 1843 shows that the phrase is intended to designate, not a person who ordinarily lives by honest labour, and who on some occasion has been tempted to join himself to a gang and to take a subordinate part in a robbery committed by such gang in the manner described by Mr. Thomas but one who has habitually associated with a gang of professional dacoits, systematically employed in carrying on their lawless pursuits in different parts of the country, accompanying them in their expeditions, and actively participating in their operations." (12) This section has been drawn in the light of these observations.

4337. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session and the High Court.

In a case under this section the prosecution is bound to prove that the accused belonged to a gang, which was consciously associated for the purpose of habitually committing dacoity. The associating and the purpose of the association may be proved by direct evidence or by proof of facts from which they can be reasonably inferred. Evidence of the commission of other offences than dacoity is only evidence of bad character and is admissible under section 54 of the Evidence Act. Evidence that the accused or groups of them had been concerned in a large number of theft,(13) robberies or dacoities in a comparatively short space of time, as evidenced by their previous convictions or an order passed under section 110 Criminal Procedure Code, may be suffi-

(11) Act XXIV of 1843, s. 1, superseded by the Code and repealed by Act XVII of 1862.

(12) First Rep., ss. 538, 539.

(13) *Nidhi* 10 O. & A. L. R. 639.

cient evidence of such association.[14] Such evidence is admissible to establish habit or association [15] but not bad character. [16]

It is improper, though not illegal, to try persons, charged of this offence, with those charged under section 396 or 397. [17]

4338. Proof.—The points requiring proof are:—

(1) That there was a gang of dacoits.[18]

(2) That the accused belonged to it.

(3) That such gang was associated for the purpose of habitually committing dacoity.[19]

(4) That by joining the gang the accused intended to do the same.

4339. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——at——you belonged to a gang of persons associated for the purpose of habitually committing dacoity, and thereby committed an offence punishable under section 400 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

4340. Principle.—This section is a highly penal one, and as Phear, J. remarked, "one of a very special character and entirely the creature of statute."[20] It must, therefore, be all the more strictly construed, Since the section strikes at special conspiracies formed to commit dacoities, its necessary ingredients are the *association* of a body of men for the purpose of *habitually* committing dacoities. These words constitute the gist of the crime, and they must be established by independent evidence.[21]

4341. Meaning of Words.—"*Belong to a gang of persons*": The term "belong" excludes the notion of casual association, but rather implies an intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band the common object of

(14) *Bonigiri Pottigidu*, 32 M. 179. *contra* in *Haji Sher Mahomed*, 25 Bom. L. R. 214, 75 I. C. 67, (1923) A. I. R. (B.) 65; *Ram Prasad*, 23 A. L. J. 18, 86 I. C. 282; (1925) A. 250 (S. 110, Cr. P. C., does not include dacoity, and an associate of a dacoit cannot be dealt with under that section).

(15) *Scolu Molla*, 52 C. 595.

(16) S. 14, Expl. 2, Indian Evidence Act; *Bonai*, 38 C. 408; *Kader Sunder*, 16 C. W. N. 69; *Walia*, (1910) P. L. R. 18, 6 I. C. 492; *Ishar Das*, (1912) P. L. R. 258, 17 I. C. 543, 1915 P. R No. 3, 28 I. C. 524; *Hari Lal*, 13 O. J 243, 7 I. C. 1012.

(17) *Ghulam Mustafa*, (1911) P. L. R. 68, 10 I. C. 838.

(18) *Nidhi*, 83 I. C. 683; (1925) O. 144.

(19) Each accused need not have taken part in every one of the dacoities; *Kurli Brahman*, 27 O. C. 385, 89 I. C. 836, (1925) O. 374.

(20) *Mooktaram*, 23 W. R 18

(21) *Kader Sundar*, 16 C. W. N. 69 following the text.

which is the habitual commission of dacoity.[22] "*Associated for the purpose of habitually committing dacoity*": Merely belonging to a dacoit gang or associating with them does not render one obnoxious to the penalty of this section which punishes only an association for *habitually* committing dacoity; relations, servants and dependants of the dacoits are thus excluded. "Habit" implies a uniform course of conduct and must be proved by an aggregate of acts.[23]

4342. Punishment for Joining a Dacoit Gang.—This section has been enacted to suppress dacoity by cutting off all recruits, their support and assistance to perpetrate the crime. As such this group of sections punishes a preparation (s. 399) for belonging to a gang of dacoits, (s. 400) or assembling for the purpose of dacoity, (s. 402). Of these three sections this is more general and punishes members of a dacoit gang as such, and independently of any specific crime committed or contemplated. As remarked by Straight, J. this section "was intended by the Legislature to provide for the punishment of those who belong to a gang of persons who make it their business to commit dacoity; and as the Judge has very properly pointed out, it is not essential for the purpose of conviction that the evidence should show the same degree of particularity as to the commission of each individual dacoity as is required to support a simple and substantive charge of that crime. It is sufficient to establish that the person accused belongs to a gang whose business is the habitual commission of dacoity, or, in other words, that he was associated with others for the habitual pursuit of that offence."[24]

Accordingly, there must be in the first place a gang of dacoits,[25] and that gang must have been formed to commit systematic dacoities, and of which the accused must be a member. What is then a gang of dacoits, and how is it to be distinguished from a band of casual marauders? The word "gang"[1] signifies a number of persons associated for a particular purpose, specially for a disreputable purpose. Such association may be for a single or temporary purpose, or it may be more or less permanent. This section does not refer to the former but only to the latter, that is to say, to the gangs of habitual dacoits.[2] Such would be persons who live by dacoity and who make systematic depredations in gangs avowedly formed for that purpose.

4343. It is an offence to join such a gang and the section assumes that it must be to re-inforce it for the purpose of dacoity. So the mere fact that women lived as wives or mistresses with men, who are dacoits, is not sufficient for a Court to hold that they belonged to a gang of persons associated for the purpose of habitually committing dacoity within the meaning of this section, unless it be proved that the

(22) *Bhabuti*, 19 A. L. J. 725, 63 I. C. 455, 22 Cr. L. J. 663; *Hari Lal*, 13 O. J. 243, 7 I. C., 1012.

(23) *Navakumar*, 1 C. W. N. 146; *Afridi*, (1880) P. R. No. 9; *Walia*, (1910) P. L. R. 18, 6 I. C. 492; *Kure*, (1886) A. W. N. 65.

(24) *Kure*, (1886) A. W. N. 65 (66).

(25) *Mooktaram Sirdar*, 23 W. R. 18; *Naba Kumar Patnaik*, 1 C. W. N. 146 (150).

(1) From iceia, *gany*, a going, Sansk. *gam*, to go lit., a number of men in company.

(2) *Naba Kumar Patnaik*, 1 C. W. N. 146 (150); *Afridi*, (1880) P. R. No. 9; *Walia*, (1910) P. L. R. 18 6 I. C. 492; (1915) P. R. No. 3, 28 I. C. 524.

women themselves were associated with their husbands or protectors for the purpose of themselves habitually committing dacoities.(3) No doubt, in one sense even such dependants *belong* to the gang, but having regard to the object the section has in view, they should be regarded rather as attached to the gang than belonging to it—a term which has been held to refer only to the effective members and not to those who do not directly contribute to its effectiveness and strength.

It necessarily excludes persons who merely assist and shelter the dacoits,(4) or associate with them for friendship's sake, as by joining them in drinks, or meeting them at fairs, weddings or other social functions.(5) Such persons may run the risk of being punished for harbouring dacoits, but they could not be held to belong to a dacoit gang. This leads to a necessary deduction that persons who join a gang in ignorance of its aim or object cannot be held amenable to this section, provided that they do not continue in it after its true purpose is known. But a person who joins a gang of habitual dacoits becomes liable to punishment irrespective of his actual participation in any dacoity that may have been committed by such gang. It may be that he is taken in as a recruit for training, and that as such he has not been yet exposed to the perils of plundering, but still being a member of the gang of habitual dacoits he exposes himself to the penalties of this section. But though the prosecution is not bound to prove a specific act of dacoity by the accused, they are bound to prove that his associates are habitual dacoits. And this can only be proved by evidence of previous dacoities committed by the gang in which its members were convicted, evidence of which is for the present purpose admissible.(6) But these convictions must be of a date anterior to the date specified in the charge under trial. If they relate to a subsequent date they are not relevant.(7)

What is Habitual Association.

4344. This raises the next question what is the test of habit, and when should a gang be said to have been associated for *habitually* committing dacoity. Would one previous dacoity be sufficient? If not, how many dacoities will suffice to stamp the dacoit as a "habitual"? This word has been used in section 413 in connection with the dealing in stolen property. Referring to it Norris and Baverly, JJ., said: "The very essence of the offence ....is the habitual, that is to say, constant receipt of or dealing in goods which the prisoner knew or had reason to believe were stolen.....We do not think that a man can be said to be habitually receiving stolen goods who may receive the proceeds of a dozen different robberies from a dozen different thieves on the same day, but in addition to the receipt from different persons there must be a receipt on different occasions and on different dates."(8) From

(3) *Per* Parsons and Ranade, JJ., in *Yelli Kom Yalla*, (1896) B. U. C. 863; *Ajita* 9 A. L. J. 565, 10 I. C. 23.

(4) *Vithu*, 1 B. L. R. 156.

(5) *Wasawa Singh*, (1916) P. L. R. 110, 35 I. C. 1003.

(6) *Nabakumar Patnaik*, 1 C. W. N. 146 (149), relying on s. 14, Expl. 2 of Act I of 1872, and *Kartick Chunder Dass*, 14 C. 710, F. B., in consequence of which s. 54 of the Indian Evidence Act was amended by Act III of 1891, s. 6; see *Nabakumar Patnaik*, 1 C.W.N., pp 148, 149; followed in *Mankura Pasi*, 27 C. 139; doubted in *Bonai* 38 C. 408.

(7) *Ib.*, p. 150.

(8) *Baburam Kansari*, 19 C. 190.

this it is evident that a number of dacoities committed on the same day would not condemn an offender into a habitual dacoit for which, there must be plurality of dacoities committed at some little distance of time, and directed not against some individual in particular but irrespective of individuals. For example, a person may have some dispute about the possession of land with another, and consequently he may plunder his crops in the assertion of a right, and he may do so again and again, but neither he nor his associates could by any stretch of language be called habitual dacoits. On the other hand, the case would be different, if a marauding band were to descend upon property wherever it is found and which offers a safe chance for plunder.

4345. Of course, it is not necessary that the composition of the gang should remain unchanged, but what is necessary is that the gang must be a gang not of habitual dacoits, but a gang which is associated for habitual dacoity. Its *personnel* may vary, but its policy may not. If the accused habitually committed dacoities, joining gangs not proved to be habitual, he could not be dealt with under this section which refers to joining habitual dacoits, and not for being a habitual dacoit. But such a person may give the whole gang that character, but it does not necessarily follow. Nor can this fact be presumed from the fact that the accused belongs to a tribe or caste of professional dacoits.(9) Nor does the fact that the accused belongs to a criminal tribe,(10) or had committed other offences than dacoity,(11) or was believed to be a dacoit, and was suspected as being implicated in several dacoities, sufficient, or indeed admissible, for it is not the evidence of a fact, but of a general reputation, in short, of bad character,(12) make him amenable to this section.

In order to establish his association with habitual dacoits, there must not only be proof of his being an accepted member of that gang, but also that other members of it were themselves associated for the purpose of habitually committing theft or robbery. For instance, suppose A is on his trial under this section for being a member of a gang of habitual dacoits, of which B, C, D, E and F are stated to be the other members. In order to prove that the gang of which A, B, C, D, E and F are members of a gang, associated for the purpose of habitual dacoity, it must be shown that B, C, D, E and F have at least on more than one occasion conjointly committed dacoities, and not merely that some of its members in company with others have committed several dacoities. Suppose B had committed several dacoities with H, I, J, K and L, and C committed several dacoities with M, N, P, Q and R, and similarly D, E and F committed dacoities with other persons, the fact that B, C, D, E and F are all habitual dacoits does not make their gang a gang *associated* for the purpose of *habitually* committing dacoity.

4346. Association implies community of intention and purpose, and the existence of such a gang implies the existence of some men inspired with a common intention and purpose, which under the section must

(9) *Savaldas*, (1888), B. U. C. 418.
(10) *Kader Sundar*, 16 C. W. N. 69, 13 I. C. 279; *Bonigiri*, 32 M. 179.
(11) *Bonigiri Pottigadu*, 32 M. 179.
(12) *Mankura Pasi*, 27 C. 139; *Peera*, (1869) P. R. No. 37.

be the habitual commission of dacoities. If members of such a gang have been once convicted of dacoity, their association again under circumstances evidencing repetition of their past crime would be a sufficient justification for their conviction under this section. But if they were convicted of other offences, or dacoities in others' company, their meeting may be sufficient to raise a strong suspicion, but no member thereof could be convicted of this offence upon only so much evidence, though if there is only evidence of other offences distinct from dacoity, it is inadmissible being merely evidence of bad character.(13)

But the fact that the accused, or groups of them, had been concerned in a large number of dacoities in a comparatively short space of time may be sufficient evidence of such association.(14) But such evidence must not be itself open to challenge. It must be either the evidence of previous convictions for dacoity, or in a proceeding under the next section, of an order under s. 110 of the Code of Criminal Procedure, passed on the ground that the accused were by habit a robber, house-breaker or thief.(15) But such evidence though admissible to establish a habit is not of itself sufficient to justify a conviction under this or the next section, for which independent evidence must be found to establish the main ingredients of the offence.(16) In other words, the previous convictions and orders are merely corroborative evidence and cannot be made the basis for a further conviction under this or the next section.(17) Examples have been set out of actual cases the circumstanes of which have been held to be insufficient to establish all the ingredients there required to constitute an offence under that section. As those are also the ingredients of this offence, the same cases hold good as precedents under this section.

4347. Again, when previous convictions are relied on, they must naturally be of the offence of dacoity. If they were for housebreaking or robbery they could not be used to prop up the evidence of "habitually" committing dacoity. The section, it will be observed, is a highly penal one, the offence is "one of a very special character and entirely the creature of Statute,"(18) and it must, therefore, be strictly construed (§§ 19-21).

4348. Even as between persons who are shown to be members of such a gang, there is room for discrimination. As was observed in a Burmah case: "If an accused takes part in any dacoity accompained with murder, the proper section of the Penal Code to apply to him is section 396 in addition to section 400, and he is liable to be sentenced to death or transportation for life or ten years' rigorous imprisonment and fine. If he has not rendered himself liable to this extent, a distinction must still be made between those dacoits who, though belonging to an organized band, have only recently joined it, and perhaps have not taken part in more than one or two dacoities at

(13) *Ponigiri Pottigadu*, 32 M. 171.
(14) *Ib.*
(15) In *Ishar Das*, (1912) P. W. R. 36, 17 I. C. 543, an order under s. 110, Cr. P. c. was erroneously assumed to suffice.
(16) *Kader Sundar*, 16 C. W. N. 69, 13 I. C. 279; *Bonai*, 38 C. 408, doubting *Mankura Pasi*, 27 C. 139.
(17) *Boniagiri*, 32 M. 17.
(18) *Per* Phear, J., in *Mooktaram Sirdar*, 23 W. R. 18, followed in *Kader Sundar*, 16 C. W. N. 69.

the utmost, and those who have belonged to a gang for years and have taken part in many dacoities; between those who have belonged to the worst gangs, who go about armed defying the authorities and inflicting grievous hurt upon the people, and those smaller and less dangerous gangs who dacoit only because driven to do so by want and starvation, and because they are afraid of surrendering, and who inflict no injury upon the people beyond that of depriving them of a few fowls and baskets of paddy, the food they are in search of."[19] In apportioning the sentence, it is, therefore, legitimate to inquire, though the inquiry need not be confined only to these questions, as to(*i*) the period of the accused's association with the gang, (*ii*) the number of dacoities committed by it since the accused joined it, (*iii*)the dacoities in which he actually took part,, (*iv*) the character of such dacoities; also, (*v*) were they accompanied with murder, culpable homicide, grievous hurt, torture, or with any act or acts of a specially brutal character, or were they only dacoities in name, or those possessing no aggravating feature?

For a further commentary on this section, see s. 401.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

Punishment for belonging to gang of thieves.

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

[*Thug*—s. 310. *Theft*—s. 378. *Robbery*—s. 390. *Dacoit*—s. 391.]

Synopsis.

(1) *Analogous Law* (4349).
(2) *Procedure and Practice* (4350).
(3) *Proof* (4351).
(4) *Form of Charge* (4352).
(5) *Principle* (4353).
(6) *Joining a gang of thieves or robbers* (4354-4359).

4349. Analogous Law.—This section is enacted to extend the principle underlying the last section to thieves and robbers. The two sections are otherwise the same. But having regard to the nature of the offences to which it relates, it is likely to be of wider application than the last section.

4350. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable as well as non-compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first class. In summing up a charge under this section to the jury, it is essential that the Judge should put clearly to the jury;(*i*) the necessity of proof of association; and (*ii*) the need of proving that that association was for

(19) *Per* Ward, J. C., in *Nya Lu Nye Gyi*, (1889), S. J. L. B. 441

the purpose of habitual theft, that habit being proved by an aggregate of facts.[20]

4351. Proof.—While under the last section only evidence of a previous conviction for dacoity is admissible, from its more general character, evidence of a previous conviction for theft[21] or of an order under s. 110 of the Code of Criminal Procedure passed on the ground that the accused was by habit a robber, house-breaker or thief would be equally relevant, not for the purpose of proving the offence, but merely as evidence of habit.[22] But in some cases it has been held that it is evidence to prove the offence.[23] But it is submitted that what the section requires is evidence of habitual association for thieving. How are the previous convictions relevant to prove it? Since the question at issue is the habitual association of a gang for thieving, it follows that evidence of any number of offences extending over any period is relevant. Section 234 of the Code of Criminal Procedure does not apply to such cases.[24] A large number of thefts committed in a locality during the presence of the gang there, is evidence of habitual association.[25] The fact that a person is bound down under s. 110 of the Criminal Procedure Code does not preclude his being tried for this offence.[1] The points requiring proof are:—

(1) That there was a gang of persons.

(2) That they had associated for the purpose of committing theft or robbery.

(3) That their purpose was to commit it habitually.

(4) That the accused joined the gang with the same intention.

4352. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you belonged to a (wandering) gang of persons associated for the purpose of habitually committing theft (*or* robbery) and that you thereby committed an offence punishable under section 401 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4353. Principle.—Gangs of Thugs and dacoits are punishable under ss. 311 and 400, while gangs of thieves and robbers are dealt with here

(20) *Sriram Venkatasami*, 6 M.H.C.R., 120.

(21) *Tukaram*, 14 Bom. L. R. 373, 15 I. C. 811, 13 Cr. L. J. 539.

(22) *Bonai*, 38 C. 408; *Mankura Pasi*, 27 C. 139; *Naba Kumar Patnaik*, 1 C. W. N. 146; *Hidayata*, (1915) P. R. No. 3, 28 I. C. 524; *Beja*, (1914) P.R. No. 13, 26 I. C. 625; *Ishar Das*, (1912) P. W. R. 36, 17 I. C. 543; *contra in Tukaram*, 14 Bom. L. R. 373.

(23) *Tukaram*, 14 Bom. L. R. 373, 15 I. C. 811, 13 Cr. L. J. 539; dissenting from *contra* in *Bonai*, 38 C. 408; *Mankura Pasi*, 27 C. 139; *Naba Kumar*, 1 C W.N., 146.

(24) *Kasem Ali*, 31 C. L. J. 192, 55 I. C. 994, 21 Cr. L. J. 386.

(25) *Per* Buksh, 73 I. C. (L.) 815, (1923) A. I. R. (L.) 327.

(1) *Kasem Ali*, 31 C. L. J. 192, 55 I. C. 994, 21 Cr. L. J. 386.

The object of the three sections is the same, *viz.*, the punishment of organized crime against property.

4354. Joining a Gang of Thieves or Robbers.—The principle of the last section is here extended to persons belonging to a wandering or other gang of persons associated for the purpose of habitually committing theft or robbery. Here, again, as under the last section, the primary question for consideration is—Was there a gang, and was it associated for the purpose of theft or robbery, and if so, was it habitually concerned in the commission of those offences, and was the accused a member of such a gang? A gang of robbers of five or more persons would be a gang of dacoits, and a member of such a gang would be punishable under the provisions of the last section. This section only applies to a gang of offenders not punishable either under the provisions of the last section, or those of section 310. But the question arising under all the three sections is the same. And these questions cannot be settled by mere vague allegations of confederacy and companionship of the accused being of a criminal tribe, or even an occasional participation in a thievish adventure.

Six accused in a case were prosecuted under this section on the following evidence: (*i*) that they were seen together on a certain day at midnight assembled under a tope with implements of house breaking; (*ii*) that they were in the habit of committing thefts together, and that some of them were seen together in different places where offences such as house-breaking and theft were immediately afterwards committed; and (*iii*) that they have been convicted at different times of theft, etc. Upon this the Judge told the jury that "it was sufficient to show that there was nothing improbable in the charge brought against them, for, if they were once found assembled for the purpose of committing theft, they might do so for the purpose of habitually committing theft."

But this was held to be a misdirection, because, as Muthusami Aiyar and Best, JJ., said: "It is clearly illegal to say that because a person once commits an offence, it is to be presumed that he habitually commits that offence." Referring to the first point they said: "It is only evidence of their once being associated together for committing house-breaking" and from which no inference of a habit could be inferred. As to the second point, the Court observed that "the fact of certain persons being seen together in different places where house-breaking and theft are committeed is not sufficient to justfy a remark that the offences were committed by those persons." And as to the last, the previous conviction of the accused was relevant but not conclusive of their association for habitual thefts. It would be violent to presume that they constituted a gang unless they were jointly convicted on several occasions. It was said that the accused were vagabonds and constantly seen together, but as to this the Court observed that the "appellants being without means of livelihood, and being observed drinking together or proceeding together on a lawful occasion are no legal evidence of associating together for the purpose of committing theft." The prosecution had adduced evidence of an approver, but the Court rejected it for want of a corroboration, and in the result they were all acquitted.(2)

(2) *Subhan and five others*, (1893) 1 Weir 452.

4355. The same view was taken by Prinsep and Hill, JJ., in a Calcutta case in which seventeen accused were convicted under this section under the following circumstances. In the Gya fair, the accused Lachman Pasi was caught by the Police in the act of picking a pocket, his confederate Thakur Pasi was pursued towards a house which was surrounded and searched, and in which Thakur Pasi and the other fifteen appellants were discovered. Some money and various articles were seized from their possession, but they were not proved to be stolen property. The prosecution proved the men to have no ostensible means of subsistence, some of the accused had been previously convicted of theft and others had been bound over to be of good behaviour. They were all residents of Oudh and were shown to have been intimately connected with one another, in the habit of visiting fairs together, and when arrested, many of them gave false names and addresses. One of them had been, moreover, actually caught picking pocket, but it was held that these circumstances created a great suspicion against the accused, but they fell short of the proof required to sustain a conviction under this section, and for which there must be evidence of a gang, of association with it, and that such association was for the purpose of habitually committing theft. The accused were consequently acquitted.(3)

4356. In another case, the nine accused were Khanjars, who with Pasis and Wudders are a well-known thieving race. Their encampment was searched by the police for stolen property. The appellants attacked the police, several members of which were hurt, and upon which several of the accused were convicted under section 332, and one of them for receiving stolen property. They were, moreover, convicted under this section and the evidence against them was: (*i*) that the accused had been for long seen to be almost or altogether continuously members of the same encampment; and (*ii*) that various cases of theft cropped up as this camp moved about from place to place. Some of the accused were previous convicts, and it was conceded by Straight, J., that the fact that, that person is keeping the company of convicted or habitually dishonest persons is some evidence, but not sufficient to warrant a conviction under this section, which could not be supported upon loose statement of the police, or of the persons who professed to have suffered on account of their depredations.

The learned judge then reversed the convictions and added: "Section 401 of the Code no doubt has excellent objects and uses; but it ought not to be resorted to when the persons sought to be brought within its four corners, might have been made responsible for distinct and individual offences; nor is it intended to affect them, unless an association for the habitual commission of theft or robbery is clearly made out I must add that a resort to the provisions of section 401 of the Penal Code by the police, for the purpose of sweeping into a wide net large numbers of persons whom they suspect, or who give them trouble, is not to be encouraged; and speaking for myself, I shall very closely scrutinize any cases of the kind that come before me.(4) The same view has been taken in the Punjab.(5) Indeed, it is a view so plainly deducible from the two

(3) *Mankura Pasi*, 27 C. 139.
(4) *Jahangira*, (1886) A W. N. 16.
(5) *Peera*, (1869) P. R. No. 37; *Afridi*, (1880) P. R. No. 9; *Ishar Das*, (1912) P. W. R. 36, 17 I C. 543; *Hadayata* (1915) P. R. No. 3; *Wasawa Singh*, (1916) P. L. R. 110, 35 I. C. 1003.

sections dealing with criminal association with habitual dacoits and robbers, that any divergence of opinions on the subject would have been surprising.

4357. In another case the police pounced upon an encampment in a jungle, arresting the three accused, the rest having fled leaving their bundles behind.

Altogether thirty-two accused were convicted under this section on the following facts found at the Sessions trial, namely: (*i*) that wherever this gang went, the adult males usually kept themselves out of sight while the women and children remained in camp; (*ii*) that two of the women had been previously convicted of offences against property; (*iii*) that on the date of the raid the men fled at sight of the police leaving their bundles behind; (*iv*) that for 40 days while this gang was wandering about, there were some 13 cases of offences against property committed in the neighbourhood of their encampment; (*v*) that of the articles so left, a ring found with a woman of the gang, was unquestionably stolen property. The High Court, however, acquitted all the accused, holding the evidence insufficient to bring home this offence to the accused on the following grounds. It was admitted that the evidence established that the accused did form a gang; it was equally clear that some of them were thieves, but it did not prove that they *habitually* committed theft or that the primary object of their association was theft.(6) They were in fact a *nomadic* band of vagabonds and marauders who probably lived by pillage and plunder, but of which there was no legal evidence.

As regards the several facts found proved by the Sessions Judge, the High Court held the first three points to be inconclusive, and as to (*iv*), some of the thefts had taken place since the accused were arrested and in any case, there was nothing to show that those offences increased or decreased with the presence or absence of the gang; and as to (*v*) all that it proved was that some one of the gang was a thief, but it did not necessarily make the whole body a gang of thieves. Of course, in cases of this kind the first thing to establish is a conspiracy, for then the acts and conduct of one become the acts and conduct of all.(7) Such a case was convicted in Bombay upon the following facts: (*i*) the 21 accused were all related; (*ii*) they belonged to a criminal tribe known as Bhamtas, (*iii*) who had made themselves adepts in running-train thefts, (*iv*) adopting a uniform method which the Police could recognize without difficulty; (*v*) they had been all convicted of such theft on several previous occasions—all of which points, which the Courts held, converged to the one conclusion that the accused were members of a gang of such thieves as this section was designed to punish.(8)

4358. And since the section penalizes criminal association for the purpose of habitually committing theft, it is not necessary that every person guilty of this offence should have actually taken part in any theft, since it is association and not theft that is punishable under the section.(9)

(6) *Ajita*, 9 A L. J. 565, 10 I. C. 23, 12 Cr. L. J. 204, following *Dukharan*, 7 O. C. 163; *Bonigiri*, 32 M 179.

(7) *Tukaram*, 14 Bom. L. R. 373; *Beja*, (1914) P. R. No. 13.

(8) *Tukaram*, 14 Bom. L. R. 373.

(9) *Beja*, (1914) P. R. No. 13.

If a person joins a gang knowing that it is a gang of thieves associated for the purpose of habitually committing theft, he would not be guilty of this offence, unless it is proved that in joining it he intended to become a fellow associate person and may have taken part with one or more members of a gang without himself becoming a member of that gang. To make him such member there must be proof of the community of purpose and intention.[10] Where the gang is a fluctuating body—as where one or two dacoits draw recruits from the locality in which they ply their operations, the men who come and go could not be punished under this section, inasmuch as they are not habitual associates of the dacoits who had merely enticed them to co-opt with them and in fact, there is no gang at all, since a gang must comprise at least five men whereas the number of men in the case supposed was less than that number.

4359. It should be added that where a person has been once convicted on a substantive charge, he could not be again convicted on the same facts under the last or this section.[11]

402. Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years and shall also be liable to fine.

Sessions. Cognizable Warrant. Not bail. Not comp.

Assembling for purpose of committing dacoity.

[*Person*—s. 11, but *see* ss. 82, 83.]

Synopsis.

(1) *Analogous Law* (4360).
(2) *Procedure and Practice* (4361).
(3) *Proof* (4362).
(4) *Charge* (4363).
(5) *Principle* (4364).
(6) *Assemblage for Dacoity* (4365-4366).

4360. Analogous Law.—This is another preventive section punishing the assemblage of five persons for the purpose of committing dacoity. An assemblage of less than that number for a like purpose is not, however, punishable, for it would then be a mere preparation to commit an offence which, unless otherwise so enacted, is not punishable. An assemblage of men sufficient for the purpose of dacoity is, however, an exception, which would have been punishable under section 400, but which being a distinct act of preparation is here specifically provided for.

4361. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable, and non-compoundable, and is exclusively triable by the Court of Session or the High Court.

4362. Proof.—The points requiring proof are:—

(1) That five or more persons had assembled.

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(10) *Wasawa Singh*, (1916) P. L. R. 110.

(11) *Kamal Fukeer*, 17 W. R. 50, 51; *Jahangira*, (1886) A. W. N. 16.

(2) That they had assembled for the purpose of committing dacoity.

(3) That the accused was one of them.

4363. Charge.—The charge, should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you were one of five (*or* more) persons assembled for the purpose of committing dacoity, and that you thereby committed an offence punishable under section 402 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

4364. Principle.—The group of sections dealing with dacoity include this, which marks the earliest stage in the commission of that crime. The next stage is preparation punishable under s. 399 which might lead to an attempt, which law treats as a completed offence. The offences of commission of dacoity, preparation for it, and assemblage for the same purpose have this in common, that they presume an intention or agreement to commit dacoity by five or more persons. A mere assembly without further preparation is not a perparation within the meaning of s. 399, but falls under this section. A person may not be guilty of dacoity, yet guilty of preparation, and not guilty of preparation, yet guilty of an assembly.(12)

4365. Assemblage for Dacoity.—There is nothing illegal in an assemblage of men—nor is it criminal to assemble for an illegal purpose—even for the purpose of committing a crime; but this section makes it both illegal and criminal to meet for the purpose of committing dacoity. But since the essence of the crime lies not in the assemblage of men as in the assemblage for the purpose of committing dacoity, it is on the prosecution to establish this purpose, but this could only be done by circumstantial evidence inevitably pointing to that purpose. In such cases the intention to commit a dacoity relates to a future act, and it is not possible in all cases to obtain or adduce evidence of actual intention. The only evidence that may be available in such cases is the evidence of such conduct and circumstances, from which the Court may justifiably infer the existence of an intent to commit dacoity.(13) It necessarily excludes a previous discussion as to the possibility of committing a dacoity; that is to say a confabulation which precedes a formed intention to engage on a dacoity.(14)

So where the five accused were arrested at about midnight on a road just outside the city of Agra, all heavily armed with guns and swords concealed under their clothes, to carry which none of the accused possessed licenses, they could give no explanation of their pre-

(12) *Romesh Chandra Banerjee*, 41 C. 350.

(13) S. 3, "Proved," Indian Evidence Act (I of 1872); followed in *Bholu*, 23 A. 124.

(14) *Bacliedta*, (1916) P. W. R. 7, 32 I. C. 833.

sence there at that hour of the night. The Court took judicial notice of the fact that at that time the district of Agra had become notorious as the scene of frequent dacoities. On these facts Knox and Burkitt, J. J., held that the facts were sufficient to hold that the accused had assembled for the purpose of committing dacoity and that their conviction under this section was consequently upheld.(15) The case before the Calcutta Court was worse. The police received information that a number of dacoits had assembled in temporary huts in a jungle adjoining a place where several dacoities had been committed. They thereupon sent inquiries to obtain information about the whereabouts of this gang. In the meantime, a dacoity was committed in the house of the prosecutor who identified one of the accused as amongst the dacoits. The villagers followed the steps of the dacoits and traced them to their haunt in the jungle. The police acted upon this trail and arrested the accused who confessed to living on the proceeds of dacoity, and having no other means of subsistence. It was naturally held to be a case sufficiently proved under this section.(16)

4366. Both these cases were cases of an assemblage immediately preceding a dacoity or at a time and place where a dacoity may be held to be imminent. And this seems to be the obvious intention of the section, which does not appear to apply to an assemblage of men to concert plans for dacoity yet remote and contingent. It presupposes a determination to commit a dacoity and an assemblage is nothing but lying in wait for a favourable chance to commit it.

Of Criminal Misappropriation of Property.

403. Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Any Mag Non-cog. Warrant. Bailable. Comp. with Court's sanction. Summary, if property does not exceed Rs. 50 in value.

Dishonest misappropriation of property.

Illustrations.

(*a*) *A* takes property belonging to *Z* out of *Z*'s possession, in good faith, believing at the time, when he takes it, that the property belongs to himself. *A* is not guilty of theft; but if *A*, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(*b*) *A*, being on friendly terms with *Z* goes into *Z*'s library in *Z*'s absence, and takes away a book without *Z*'s express consent. Here if *A* was under the impression that he had *Z*'s implied consent to take the book for the purpose of reading it, *A* has not committed theft. But if *A* afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(*c*) *A* and *B* being joint owners of a horse, *A* takes the horse out of *B*'s possession, intending to use it. Here, as *A* has a right to use the horse, he does not dishonestly misappropriate it. But, if *A* sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

(15) *Bholu*, 23 A. 124. (16) *Kendra Kumar*, 7 W. R. 61.

Illustration.

A finds a Government promissory note belonging to *Z*, bearing a blank endorsement. *A*, knowing that the note belongs to *Z*, pledges it with a banker as a security for a loan, intending at a future time to restore it to *Z*. *A* has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means, or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: It is sufficient if, at the time of appropriating it, he does not believe it to be his own property or in good faith believes that the real owner cannot be found.

Illustrations.

(*a*) *A* finds a rupee on the high-road, not knowing to whom the rupee belongs. *A* picks up the rupee. Here *A* has not committed the offence defined in this section.

(*b*) *A* finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(*c*) *A* finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. *A* knows that this person can direct him to the person in whose favour the cheque was drawn. *A* appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(*d*) *A* sees *Z* drop his purse with money in it. *A* picks up the purse with the intention of restoring it to *Z*, but afterwards appropriates it to his own use. *A* has committed an offence under this section.

(*e*) *A* finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to *Z* and appropriates it to his own use. *A* is guilty of an offence under this section.

(*f*) *A* finds a valuable ring, not knowing to whom it belongs. *A* sells it immediately without attempting to discover the owner. *A* is guilty of an offence under this section.

[*Moveable property*—s. 22. *Dishonestly*—s. 24.]

Synopsis.

(1) *Analogous Law* (4367, 4368).
(2) *Procedure and Practice* (4369, 4370).
(3) *Proof* (4371).
(4) *Charge* (4372).

(5) *Form of Charge* (4373).
(6) *Principle* (4374).
(7) *Meaning of Words* (4375).
(8) *What is Criminal Misappropriation* (4376—4388).
(9) *Cheating Distinguished* (4377, 4378).
(10) *Misappropriation is a Mental Act: How Proved* (4379-4381).
(11) *When Appropriation Becomes Dishonest* (4382, 4383).
(12) *Wrongful Conversion* (4384).
(13) *Temporary Misappropriation* (4386, 4387).
(14) *Appropriation or Conversion must be Dishonest* (4388).
(15) *Claim of Right* (4389-4391).
(16) *Legal Lien* (4390).
(17) *Lien Negatives Dishonesty* (4391).
(18) *Proof of Dishonesty* (4392-4394).
(19) *Property must have an Owner* (4395-4396).
(20) *No Property: No Misappropriation* (4397-4399).
(21) *Derelict Cattle* (4397).
(22) *Abandoned Property* (4398).
(23) *Property Not in Possession* (4399).
(24) *Appropriation of Lost Property* (4400-4402).
(25) *Derelict Property* (4400).
(26) *When Owner is Traceable and When he is Not* (4401).
(27) *Property Mislaid, but Not Lost* (4402).
(28) *Finder's Duty to Trace the Owner* (4403-4404).

4367. Analogous Law. This is a new offence carved out of theft as to which the framers observed: "If we call it theft, we speak the popular language, if we call it misappropriation of property not in possession, we avoid an anomaly, and maintain a line which, in the great majority of cases, is reasonable and expedient. On the whole we are inclined to maintain this line." The authors of the English Digest had suggested a similar distinction, and designated this offence a fraudulent appropriation, declaring that "where the taking is upon a finding or other casualty, the quality of the act depends upon the intention of the party at the time, and it is not theft unless the party took and removed the property with intent to despoil the owner, and fraudulently to appropriate the thing taken, although such owner be unknown."[17]

English Law.

4368. It was at one time the view of English Law that a person who dishonestly misappropriates property which he had originally come by honestly, could not be guilty of felony, for the first taking was lawful;[18] so much so that if A find the purse of B on the highway and carry it away *animo furandi*, yet it is not felony,[19] if the finder believes that B had lost it and that he cannot be found. This was decided in a leading case decided in 1849,[20] in which the accused had found a bank note on the high-road which gave no clue as to its owner. The accused appropriated it, but before he cashed it, he was informed that it belonged to the prosecutor, but nevertheless he cashed it and appropriated the money. He was indicted for larceny, and on a case reserved, Baron Parke reviewed the old authorities and stated the result to be

(17) Digest, Ch. XVIII, Art, 12, 14.
(18) 3 Inst., 108; 1 Hawk. P. C. C. 33; s. 2; Bac. Abr., tit. "Felony," (*c*).
(19) 1 Hale, P. C. 306.
(20) *Thurborn*, 18 L. J. M. C. 140.

"that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he take them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."

Applying these principles to the case of the accused he held that as the initial act was lawful, the subsequent conversion, "though the possession was accompanied by a dishonest intent, was still a lawful possession and good against all but the real owner, and the subsequent conversion was not, therefore, a trespass in this case more than the others, and consequently, no larceny."(21) Referring to this case Hill, J., in another case observed.(22) "Two things must be made out in order to establish a charge of larceny against the finder of a lost article. *First*, it must be shown that at the time of finding he had the felonious intent to appropriate the thing to his own use.....The other ingredient necessary is that, at the time of the finding, he had reasonable ground for believing that the owner might be discovered, and that reasonable belief may be the result of a previous knowledge, or may arise from the nature of the chattel found, or from there being some mark upon it; but it is not sufficient that the finder may think that by taking pains the owner *may* be found; there must be *immediate* means of finding him." This is then the English rule which has been followed in several cases.(23) But the cases insist that the property should have been lost and not *mislaid* under circumstances which would enable the owner to know where to look for and find it.(24) And so if there be any mark upon the property by which the owner may be traced, the finder, converting it to his own use instead of tracing the owner, would be guilty of larceny.(25)

In this respect this section lays down a rule at variance with the English Law.

4369. Procedure and Practice.—This offence is non-cognizable, but warrant should, ordinarily, issue in the first instance. It is bailable but non-compoundable, and is triable by any Magistrate, and may be tried summarily if the value of the property misappropriated does not exceed Rs. 50 in value.

4370. Misappropriation does not cease to be an offence because the complainant had given the accused time to pay. The High Court reversed an acquittal based upon this erroneous view of law.(1) The question whether a conviction under section 379 may justifiably be altered into one under this section or section 424 depends upon whether it would involve surprise or hardship to the accused. Such was the case of the accused who removed some trees in his actual possession but to which the complainant was jointly entitled. As there was no asportation, there was no theft,

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(21) *Thurborn*, 18 L. J. M. C. 140.
(22) *Christopher*, (1858) Bell C. C. 27.
(23) *Dixon*, 25 L. J. M. C. 39; *Shea*, 7 Cox, 147; *Christopher*, 28 L. J. M. C. 35; *Pierce*, 6 Cox. 117; *Moore*, 30 L. J. M. C. 77; *Glyde*, 37 L. J. M. C. 107; *Knight*, 12 Cox. 102; *Cartwright* v. *Green*, 8 Ves 405; *Matheus*, 12 Cox. 489; *Gardner*, 32 L. J. M. C. 35.
(24) *West*, 24 L. J. M. C. 4.
(25) *Pope*, 6 C. & P. 346; *Mole*, 1 C. & K. 417; *Preston*, 21 L. J. M. C. 41.
(1) *Nanhi Bahu*, 6 A. L. J. 758, 3 I C. 908.

but the High Court considered it prejudicial to the accused to alter the conviction to one under this section or section 424.[2]

It is permissible to the Court to infer misappropriation from the fact that the accused, who maintained the accounts and had charge of the money, had falsified the entries relating to the money or omitted to make them.[3]

4371. Proof.—Misappropriation may be inferred from proof of several false entries in the accounts relating to the amount charged.[4] The points requiring proof are:—

(1) That the property in question was moveable property.

(2) That the accused misappropriated or converted it to his own use.

(3) That he did so dishonestly.

4372. Charge. It was at one time held that misappropriation of each separate item of money with which a person is entrusted, is a separate offence, so that the facts connected with it should form the subject of a separate inquiry. The duty of the committing Magistrate was in such a case held to be to select certain distinct items, to frame his charges upon them, and to adduce evidence specially upon those items.[5] This is still good law except so far as it has been affected by section 222 (*ii*) of the Code of Criminal Procedure, 1898, which enacts that in the case of misappropriation of *money* it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, provided that the time included between the first and last of such dates shall not exceed one year. This clause is, necessarily, enabling, and it does not preclude specification of the items, if the accused is otherwise likely to be bewildered in his defence. For while the Code enables the Court to lump together in one charge a number of distinct items, it does not override "the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to Judges and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision (as s. 234 of the Procedure Code) is manifest, and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of Criminal Procedure."[6]

The subject of multifariousness in a charge is one more likely to arise under the offence of criminal breach of trust where the subject will be found more exhaustively set out.

4373. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name the accused*) as follows:—

(2) In *Subodhi* v. *Balarama*, 26 M. 481, Court altered it; but in *Thoppulan* v. *Sankaranarayana*, (1914) M. W. N. 483, 24 I. C. 176, it refused to alter it.

(3) *Appadurai Iyer*, 32 I. C. (M.) 158.

(4) *Ib.*

(5) *Cheitar*, 15 W. R. 5.

(6) *Per* Lord Halsbury, L. C., in *Subrahmania Ayyar*, (1901) 25 M. 61. P. C.

"That on or about the——day of——at——you dishonestly misappropriated (*or* converted to your own use) certain moveable property, to wit——belonging to A B, and thereby committed an offence punishable under section 403 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

4374. Principle.—This section lays down a rule at variance with the English Law, which looks only to the intention at the time the property is obtained. If the intention, then, was honest, it considers a subsequent dishonesty insufficient to convert legal possession into an illegal one (§ 4368). But this is obviously a too narrow a view of dishonesty, and its sole justification in England is only its hallowed antiquity. English Law regards such a case as one of larceny, or non-criminality. The Code assigns it an intermediate place between theft and a civil wrong. It is no doubt an offence, but as such it differs from theft as being both non-cognizable and bailable. And if it is not compoundable it is because it savours of theft, and may at times be even theft. All the same, there is a noticeable difference between it and ordinary theft. There is the initial honesty, there is the temptation, and then dishonesty. Explanation 2 is obviously intended to emphasize the fact that the Code departs from the English Law in its view of this crime (§ 4371).

4375. Meaning of Words.—"*Dishonestly*": This has been defined in s. 24. "*Misappropriates or converts to his own use*": The words "to appropriate" mean setting apart or assigning to a particular person or use, and "to misappropriate" mean to set apart for or assign to the wrong person or a wrong use, and this act must be done dishonestly.(7) The word "misappropriates" means nothing more than improperly setting apart for one's own use to the exclusion of the owner. If another uses it, it must be at the instance of the misappropriator. The word "converts" is used *ejusdem generis* with "misappropriates,"(8) and means nothing more than an appropriation of and dealing with the property of another without right, as if it were one's own property. It does not imply any alteration in its appearance.

4376. What is Criminal Misappropriation.—This section both defines the offence of criminal misappropriation as well as prescribes its punishment. It describes it rather in wide terms, because it is intended that if an act is criminal misappropriation and another higher offence as well, the accused would naturally be liable to punishment for that offence, this section being applied only when no other section is suited to the case. For example, a case of misappropriation is necessarily involved in the offence of criminal breach of trust. But the offence would then be punished as a criminal breach of trust and not as a criminal misappropriation. It may, again, be allied to theft, and may even amount to that offence, in which case it will have, of course, to be punished as a case of theft. The question whether the act is theft or misappropriation depends upon when the dishonesty began,—was it before or after the thing came into possession. This is a point of division as much between

(7) *Soban Lal*, 31 I. C. (M.) 651.

(8) It is taken from 3 Coke Inst. 108: 1 Hawk, c. 33, s. 2, where "converts to his own use" is used in the sense of turning it to one's own use. (From Lat. *convertere*, to turn).

the two offences of theft and criminal misappropriation in the Code, as between criminal misappropriation and a civil wrong under English Law.

So the words "dishonestly" qualifies the taking of property in section 378 while it qualifies "misappropriation" here. In theft the initial taking is wrongful, in criminal misappropriation it is indifferent and may even be innocent, but it becomes wrongful by a subsequent change of intention, or from knowledge of some new fact with which the party was not previously acquainted.(9) Misappropriation as such implies a wrong, for it means wrongful appropriation or use of a thing, and the term "appropriation"(10) would seem to suggest the taking to one's self to the exclusion of others. So that misappropriation approximates to wrongful taking or using of property, but not necessarily to one's own use though this should be the case if it is "converted" as distinct from being misappropriated. The latter term would appear to be wider than the former, for wrongful conversion suggests that the property was originally received for one purpose, but was afterwards diverted by the taker to his own use as opposed to the purpose for which it was taken. In short, wrongful conversion implies a breach of bailment as distinct from misappropriation in which there was no such relation originally.(11)

Cheating Distinguished.

4377. It is thus possible that a thing may be wrongfully converted as well misappropriated, but the fact that it is not wrongfully converted to one's use does not negative criminal liability, for the thing may be misappropriated without being converted to one's own use. The two concepts are intended to be supplementary and are not mutually exclusive or exhaustive. This may be illustrated. A Hindu girl having picked up a gold necklet made it over to a sweeper girl. The accused, who was a brother of the finder, represented to the latter that the necklet belonged to a Jat of his acquaintance, believing which the finder delivered it to him. This representation was false, and the question was, what offence the accused had committed, and it was held that the accused was guilty of this offence as in setting up the title of a fictitious person as owner, there was evidence that he misappropriated the necklet, as regards the true owner, and there was also evidence that he appropriated it to his own use, although there was no specific act amounting to conversion to his own use.(12) It may be asked why such an offence is not cheating? There was the finder in possession of the property. She was deceived into believing that the accused was entitled to its delivery, and acting in that belief she made the delivery. This case shows the danger of over-refinement in the classification of crimes. But the salutary provisions

(9) *Bhagiram* v. *Ahar Dome*, 15, C. 388 (400).

(10) From Lat. *ad*, to, and *proprius* (*proprius*), one's own, proper—set apart for a particular use or person.

(11) So 24 & 25 Vict., c. 96, s. 3 provides that "whosoever, being a bailee of any chattel, money or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny."

(12) *Ram Dyal*, (1886) P. R. No. 24.

of section 71 will always avert a failure of justice, though in such cases justice comes later on, for the immediate question turning upon such a difference may concern the power of the police to take cognizance of the offence, since while cheating is now cognizable, an offence under this section is not, and the distinction may at times have a practical bearing on the question.

4378. In ordinary cases, the distinction between the two offences would turn upon the absence of fraudulent or dishonest inducement which is the essence of cheating. But it is clear that there may be such inducement for delivery and consequent misappropriation, in which case the offence would probably be regarded as more appropriately cheating rather than criminal misappropriation. But between cheating and criminal misappropriation there is this difference that while deception is the essence of the one crime it is by no means the essence of the other.(13) There may be deception incidentally but it is not its essential element. Moreover, a person may quite honestly come into possession of the property in which case his taking would be honest thus excluding possibility of the application of section 415, but his subsequent retention may be dishonest thereby converting his taking into criminal misappropriation. Now, applying these principles to the case last cited, the accused may have honestly believed that the necklet belonged to his Jat acquaintance when he made the first representation, but having thus obtained delivery of it, he may have changed his mind and decided to keep what he may be in duty bound to deliver to its lawful owner.

This case is not unlike that of the illiterate boy of fourteen named Boucher, who having found a lost cheque, showed it to the prisoner who falsely told the boy that it was an old cheque and that he wished to show it to a friend, and so retained it. The boy demanded the cheque from the prisoner but the latter put him off with sundry excuses till the boy ceased asking for it. The cheque belonged to one Goldsmith who had offered a reward to its finder and the jury found that "the prisoner took the cheque from Boucher in the hope of getting the reward; and, if that is larceny, we find him guilty," and, upon a case reserved, it was held that these facts did not show any felonious taking. The mere withholding of the cheque in the circumstances did not amount to such a taking as is required to constitute the offence of larceny.(14) But in view of Explanation I, it is evident that such retention is sufficient to constitute misappropriation and if such a case arose in this country there can be no doubt but that the accused would be convicted under this section. In this case there was no appropriation to the use of the accused, but a simple misappropriation, within the meaning assigned to that term in this section.

Misappropriation is a Mental Act : How Proved.

4379. Strictly speaking, an appropriation is a mental act and implies an allocation of a thing as one's own. In this sense, appropriation may be completed, as soon as a person decides to set a thing apart to one's exclusive use. So it was observed by the

(13) *Raghubir*, 51 I. C. (A) 173, 20 Cr. L. J. 413.

(14) (1862) *Gardner*, L. & C. 243.

Punjab Chief Court: "There may be a misappropriation by a mental act without any expenditure of the money thus appropriated. The fact that the money has not been expended is a circumstance to be taken into account as evidence in favour of the view that there has been no mental appropriation, but the circumstance is not conclusive that there has been no such appropriation. Again, this must be established by some overt and visible act, but actual expenditure of the money is not the only proof of it.(15)

The accused, who was the servant of A, was entrusted with A's money for the purpose of purchasing grain at J. He left for J with the money and went off to H without giving any information to A of his departure, and subsequently gave false account of it. He was arrested at H and the whole of the money was found in his possession. It was contended for him that he could not be convicted of criminal breach of trust as a servant as the money had been found intact with him and there was no evidence that he had converted it to his own use. But it was held that the first possession being lawful the misappropriation consisted not in any actual expenditure of the money but in a mental act or intent to deprive the master of his property without any outward or visible trespass, and which was rightly inferred from the conduct of the accused.(16)

4380. Both criminal misappropriation and criminal breach of trust imply existence of property in a person other than the accused. It is of the essence of misappropriation that the property itself should not be at the absolute disposal of the accused.(17) If it is, there can be neither misappropriation nor criminal breach of trust, though it may then be a case of cheating. So there can be no trust when there is a loan, for a loan confers on the borrower a beneficial interest in the thing lent. The borrower may refuse to lend a thing but he cannot then be prosecuted for criminal breach of trust, though he may be for criminal misappropriation, if it is proved. But it cannot be inferred from a mere false denial of a loan, for it may amount to no more than an attempt to evade civil liability for the money or the chattel lent. It is undoubtedly evidence of that offence, but it is not conclusive.(18)

4381. It will be observed that though the section speaks of "misappropriation" thereby implying appropriation which is wrongful, its wrongfulness must not be judged by any standard other than that of dishonesty as laid down in sections 23 and 24. In other words, a misappropriation is only criminal if it is dishonest, and if it is not dishonest, it is not criminal, though it may be otherwise wrongful. Nothing then turns upon the use of the word "misappropriates" which as the illustrations and Explanation II make clear is merely used in the sense of "appropriates."

(15) *Per* Plowden, J., in *Kesho Ram*, (1889) P. R. No. 36; *Rambilas*, 38 M. 639; *Ram Byas Rai*, 47 I.C. (Pat.) 667, 19 Cr. L. J. 943.

(16) *Kesho Ram*, (1889) P. R. No. 36.

(17) *Hira Lal*, (1908) P. R. No 36.

(18) *Girji*, (1904) 6 Bom. L. R. 1093 (1094).

When Appropriation Becomes Dishonest.

4382. The appropriation must then be, in any case, made dishonestly, from which it follows that in order to be dishonest, the property must be appropriated or converted with the intention of causing wrongful gain to one person or wrongful loss to another, that is, with the intention to cause gain by unlawful means of property to which the person gaining it is not legally entitled, or the loss by unlawful means of property to which the person losing it is entitled (§§ 243-254). The gain or loss of property and the gain or loss of the possession of property are, however, not necessarily identical things, and the distinction is specially clear when the loss of possession is only temporary and is intended by such person who causes such loss to be temporary only. Where there is no intention to cause wrongful gain or wrongful loss of property, and merely an intention to deprive the owner temporarily of the use of property, there is no dishonesty. No doubt Explanation I refers to a temporary misappropriation, but it does not extend the meaning of an appropriation to wrongful gain or loss of possession of property as distinct from wrongful gain or loss of the property itself.[19] But the former may be evidence of an attempt to cause wrongful gain or loss of property.

So where the accused, a postal peon, while helping a sorter secreted two bearing letters, which were promptly recovered from his person. He confessed his intention to be to misappropriate the bearing fee due thereon: he was convicted of an attempt to commit this offence, and in affirming his conviction the Court said: "The intention of the accused was admittedly a dishonest intention, *viz.*, that of causing wrongful gain to himself and wrongful loss to the Post Office. To carry out that intention, he, for the time being, took the letters into his own personal possession and out of the possession of the Post Office, or, in other words, he appropriated the letters. The letters were, until delivery, property to the possession of which the Post Office was entitled, and should have been handed over in the ordinary course to the delivery peon, whose possession would, of course, in point of law, have continued to be that of the Post Office until such time as the letters were delivered. The accused, by taking possession of the letters with the dishonest intention which he admitted, was guilty, we consider, of the offence of stealing and of fraudulently appropriating the letters within the meaning of the section, and also of the offence of theft, and of attempt to commit misappropriation of the property within the meaning of the Penal Code."[20]

4383. Such a case is, of course, widely different from one in which the accused, a joint-proprietor of a certain property takes exclusive possession of it, though he might not have such title as to justify his possession.[21] On the other hand, the fact that the accused was lawfully in possession of the property does not negative his liability for his offence which depends upon an appropriation or conversion which is dishonest. So in a case where the accused, who was the judgment-debtor in a case, and as such, whose standing crops were attached

(19) *Jhandu*, (1886) P. R. No. 27.
(20) *Venkatasami*, 14 M. 229.
(21) *Parbutty Churn Chuckerbutty*, 14 W. R. 13 (14).

by his creditor, harvested them in spite of the attachment removing the crops against their being made available in execution of the decree, Benson, J., held both this section as well as section 424 applicable, but his colleague Davies, J., was content to affirm the conviction under the latter section.(22)

Wrongful Conversion.

4384. The terms "misappropriation" and "conversion" do not imply merely wrongful receipt of property, but receipt under circumstances so as to make the act one of conscious assertion of a right or title which vests it with the necessary element of criminality. The accused, an old thief, found a purse containing valuables lying on the floor of a temple during a religious fair, and which he picked up and concealed in his waist-cloth, and as he was making off with it he was arrested by the police, and on a search being made, the purse was found concealed in his *dhoti*. He did not appear to have opened it before his arrest. He was convicted of this offence, but the Court annulled his conviction, holding that his temporary possession of the purse did not amount to either misappropriation or wrongful conversion within the meaning of this section.

As Chatterji, J., put it: "Section 403 requires that the property should be shown to have been misappropriated or converted to his own use by the accused. The mere possession of the property is not sufficient for proving the charge without something to indicate the appropriation or conversion, though long possession without any attempt to find the owner, may amount to evidence of intention to do so. There is no proof of any overt act indicating conversion or appropriation to his own use, nor did any interval of time worth considering elapse between the taking and the arrest, to raise any presumption from the mere act of detention, of an intention to misappropriate or convert. Explanation 2 to s. 403, I think, makes the necessity of some positive proof of this sort quite clear. Illustration (*a*)shows that the picking up of a rupee, whose owner is not known, is not an offence. Similarly, illustration(*c*) shows that the finding of a purse with money belonging to an unknown owner is not an offence, but the appropriation of it to the finder's own use is necessary to complete it."(23)

Such was the case of a constable who had caught a strayed sheep intended for sacrifice, and on his transfer from the Police Station House to which he was attached, he took it with him.(24) Such again would be the case if the agent who was given a sum of money by the principal, failed to deliver it to him, and he could not be found when the principal wanted to call him to account for it.(25) The accused was found riding a mare with its filly following it. He was questioned by the lambarder of a village through which he passed and he made a false statement, whereupon he was prosecuted under this section, for misappropriation of a mare which he had seized while grazing out in the common. The accused defended himself by falsely stating

(22) *Obayya*, 22 M. 151.
(23) *Phuman*, (1908) P. R. No. 11.
(24) *Sarju Mallah*, 17 A. L. J. 145, 49 I. C. 778, 20 Cr. L. J. 218.
(25) *Gowkaran Lal*, 1 Pat. L. T. 200, 56 I. C. 775, 21 Cr. L. J. 519.

that he was taking the mare to the pond at S, which again was a false statement. It however appeared that he had seized the mare as he got tired on the way, and that he intended to ride her to his house upon reaching which he intended to set her free. His subsequent false statement was attributed to his fear, and as the act as proved was held not to amount to misappropriation he was acquitted.(1)

4385. Again, there is a difference between misappropriation and the mere non-fulfilment of a legal obligation. For instance, where the prisoner purchased hides of a certain value from the prosecutrix, but deducted from the price a sum on account of a former debt which the prosecutrix repudiated, the prisoner's act was held not to amount to misappropriation or criminal conversion within the meaning of this section.(2) The terms "misappropriation" and "conversion" have both reference to property as distinct from a claim to property, which being a legal obligation is a chose in action, the non-fulfilment of which constitutes a breach of contract but not a misappropriation.

Temporary Misappropriation.

4386. These were cases of chattel in which temporary possession was held to be excusable on the ground that it did not amount to a misappropriation. But such cases are to be distinguished from those in which the accused misappropriates a sum of money for a time intending to make it good eventually. But in this case, the money must have remained with the prosecutor for at least so long as to justify the Court to hold that the accused had converted the money to his own use. The accused was an income-tax clerk, and as such received a sum of money which he did not credit into the treasury for six months, when he made a false entry in the remittance book as to the date of receipt. He admitted having had the money for six months, but he pleaded that he intended to credit the amount as soon as he could without detection. He was convicted of this offence and his conviction was affirmed.(3) The case would have been the same even if the accused had been in private service. It is the duty of a servant receiving moneys for his master to account them to him, and if he mixes the collection with his own moneys and so applies his master's money to his own use dishonestly and falsifies the account so as to conceal his fraud, he would be guilty of this offence.(4) In this respect the English rule appears to be identical,(5) though the conviction in such cases there, would be had for larceny or embezzlement.

4387. In such a case, the question depends not so much upon the length of misappropriation as upon the intention and purpose of the accused. Of course, the lapse of time is evidence of dishonesty, but it may be coupled with the small amount of the money and also evidence of forgetfulness. The accused was the kurnam of a village, and as such received a sum of money from the head of the village for the purpose of remitting it to a Government Treasury. This was not his duty,

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(1) *Muhammada*, (1906) 7 P. L. R. 100.
(2) *Boystum Moochee*, 17 W. R. 11.
(3) *Rama Krishna*, 12 M. 49.
(4) *Kareem Bux*, 2 N. W. P. H. C. R. 30.
(5) *Proud*, L. & C. 97; *Tyree*, L. R. 1, C. C. R. 177.

but he undertook to make the remittance, but told the headman that it would be troublesome to remit it on the day of receipt. He retained it from 13th March to 8th May when the Tahsildar having held an inquiry into the arrears due by the villagers, the kurnam made the remittance. He was held to have committed this offence, though the High Court felt themselves precluded from quashing his acquittal (6)

Appropriation or Conversion must be Dishonest.

4388. Such questions depend upon the question whether the appropriation or conversion was dishonest. Now in order to be dishonest, an act must be something more than merely illegal, it follows that an act cannot be criminal under this section, if it is otherwise legitimate or legal. For instance, the managing member of a joint Hindu family is entitled under Hindu law to collect keep and sell the produce of the family lands, notwithstanding the wish of any of the coparceners to the contrary, such coparcener being only entitled to an account of the family income at the time of partition and not to the payment of a share of the produce, whenever it is collected. Consequently, if while the partition was going on, such manager sells the produce of the family lands still undivided, and failed to keep an account of the rents paid to him by tenants, he could not be convicted of criminal misappropriation on the ground that the sale of the produce had been opposed by the complainant coparcener.

As the Court said: "Such managing member may be liable to a charge of misappropriation if, after a division of property has taken place and the share of each member of the family has been ascertained, it is found that the manager has wrongfully applied to his own use the share that belongs to one of the other coparaceners, but so long as no account of produce or money has been taken, or the shares ascertained, no member of an undivided Hindu family has the right to claim any particular share or property as his separate property, and no prosecution against the manager for misappropriation would lie. The mere fact that there has been a general agreement to divide does not entitle one of the coparceners to claim any defined portion of the estate, nor does it even enable him to say that he is entitled to any *quantum* in an isolated item of the property, until division entrusts the property to the manager."(7)

But, of course, this case is no authority for holding that a person may not criminally misappropriate joint property, for the fact that the property was joint may lend colour to an assertion of good faith, thus repelling a charge of dishonesty; it is not of itself an answer to the charge. The accused Sania had removed certain property from the house of her husband's deceased brother which she claimed to be the joint-property of her husband and the deceased, and the removal of which she justified on the ground that she had removed it to prevent its being squandered by the widow of the deceased on her paramour. It was found that there was no sufficient evidence to justify any finding as to whether the property was joint as asserted by the accused, or separate as claimed by the prosecution. It was, however, held that

(6) *Madduri Krishnanima*, (1883) 1 Weir 455.

(7) *Anon*, (1880) 1 Weir 453 (454).

that question was immaterial as its appropriation was dishonest and so constituted an offence under this section.(8)

Presumably, in this case, the Court was of opinion that the plea of the accused that she had removed the property to save it from being wasted, had not been made out, but the plea was well worth considering, for the question whether the property was kept with a dishonest intention, or only on an erroneous belief that the prisoner was justified in keeping it, is material, for in the latter case, the act would not consititute the offence of criminal misappropriation.(9) This was the view taken by Jardine and Ranade, JJ., in a case in which the accused claimed to retain the money collected by him on behalf of the prosecutor in satisfaction of what was due to him under a decree against the former.

4389. Claim of Right.—This suggests the question: is a person guilty of no offence if he illegally converts to his own use money, believing that he had a right to it? It is apprehended that in such a case, the act of the accused would be sufficiently dishonest to amount to criminal misappropriation under this section. So it has been held by Jackson and Markby, JJ., that a servant who retains money which he was authorized to collect, and which he did collect from the debtor of his master, because money is due to him as wages, is guilty of criminal misappropriation. But in this case, the element of dishonesty was otherwise present. The accused who was a peon employed by the prosecutor to collect outstandings, sent him to do so. He realized a sum for which he passed an acknowledgment in his own name instead of the one signed by the prosecutor which he returned to him, stating that the debt was not recovered. It was ascertained that he had realized the amount, for which he was prosecuted, whereupon he defended himself by claiming to have paid himself his arrears of salary out of the sum so realized. He was discharged by the Joint Magistrate, but Jackson, J., in convicting him said: "It would be most mischievous if the law were understood to be as supposed by the Joint Magistrate, that servants employed in collecting their masters' debts were at liberty to keep back such debts, when collected, in satisfaction of claims of their own, and to inform their masters that the amounts so kept back had not been realized from their debtors."(10) But would it have made any difference if the accused had told the truth, refusing at the same time to deliver up the money and claiming to appropriate it in view of his wages overdue? It seems not, because no servant has the right to pay himself out of his master's money which he receives and retains for a specific purpose, and which he is bound to account to him. His position in such matters is not different from that of a trustee of the money which he is bound faithfully to account to him for whom he received it. The contrary view could only be supported on the assumption of a lien which no servant possesses in such cases.

Legal Lien.

4390. Such lien is no doubt declared in certain cases by law, and when it is so, the retention of property in assertion of the right of lien would then be not only

(8) *Pania, (Mt.)*, (1881) A. W. N. 85.
(9) *Khanderao*, (1894) B. U. C. 700.
(10) *Bissessur Roy*, 11 W. R. 51.

not illegal but is perfectly justifiable. Such lien is, for example, declared in favour of a bailee who has in accordance with the purpose of his bailment rendered any service involving the exercise of labour or skill in respect of the goods bailed and which he may, in the absence of a contract to the contrary, retain until he receives due remuneration for the service he has rendered in respect of them.(11) Such a right may be claimed by a diamond cutter who has spent labour on polishing a stone which he has a right to retain until he is paid for the services he has rendered.(12) The same right enures in favour of a tailor who is presumably entitled to a lien on the garments made by him in lieu of his wages. So bankers, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them, as such, but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect.(13) An agent is, in the absence of a contract to the contrary, entitled to retain goods, papers and other property, whether moveable or immoveable, of the principal received by him until the amount due to himself for commission disbursements and services in respect of the same has been paid or accounted for to him.(14) So the Indian Railways possess statutory liens conferred on them for recovery of rates, terminals and other charges.(15)

Lien Negatives Dishonesty.

4391. But these are exceptional cases in which a person is given a certain right of appropriation and which he may then exercise within the limits and for the purpose for which the right has been conferred. In such cases there can be no misappropriation; but between such cases and dishonesty there is a wide gulf, for it cannot be readily assumed that as soon as an act ceases to be legal, it becomes dishonest. In order to constitute dishonesty there must be an intention to cause gain or loss by unlawful means of property to which the person gaining is not legally entitled.(16) In other words, in order to constitute dishonesty there must be not only an unlawful means employed to cause an illegal gain or loss, but also an intention to cause such gain or loss. An act which falls short of this is not dishonest, howmuchsoever illegal it might be. The prisoner's house was searched on a charge of dacoity, and certain bonds evidencing debts were recovered from his possession. They did not belong to him and the complainant alleged that they had been stolen by dacoits. The prisoner said that he had picked them up at a ferry ghat. The case of dacoity having failed the prosecution laid the charge of criminal misappropriation of the bonds against the prisoner, but Glover and Loch, JJ., acquitted him holding that the mere possession of bonds which he had certainly picked up as alleged did not amount to criminal misappropriation, merely because the prisoner had made no effort to find out the owner. He had made no

(11) S. 170, Indian Contract Act (IX of 1872).
(12) *Ib.*, ill. (*a*).
(13) *Ib.*, s. 171.
(14) *Ib.*, s. 221.
(15) Indian Railways Act (IX of 1890) s. 55.
(16) Ss. 23. 24. Comm y.

attempt to realise the amount of the bond, or done any act which might be construed into a conversion of the property to his own use.[17]

The same view was taken in another case in which the accused had picked up a purse containing money from the floor of a temple, and which he put into his waist-cloth pocket. He was arrested almost immediately and before he could open it to examine its contents. It was held that the mere picking up of an article and taking possession of it for a time did not amount to dishonest appropriation or conversion so as to be punishable under this section. "Both appropriation and conversion include the substitution of one purpose for another as the object to which the object is to be devoted, and unless it is assumed that the petitioner picked up the bag with the intention of appropriating or converting it to his own use, a conviction under section 403 is justified only by the finding that he so appropriated or converted it after he had picked it up, neither the assumption nor the finding is, in my opinion, justified by the fact that that he had taken no steps to restore the bag to its owner when he was arrested. Having regard to the denseness of the crowd, the petitioner may very possibly have thought that the bag had remained on the ground for a considerable period before he found it, and may have thought it useless to proclaim the discovery at once."[18] The accused in this case had been twice before convicted of theft, but the Court agreed that that fact could not be taken into account in determining the criminality of the accused's act; for to do so would be to let in evidence of bad character which section 54 of the Indian Evidence Act[19] makes inadmissible.

4392. Proof of Dishonesty.—The question whether the act of the accused is dishonest so as to amount to criminal misappropriation under this section, is one of fact, and its determination must, therefore, depend upon the proved circumstances of each case. The fact that an act of the accused was dishonest and that it was connected with property, does not make it a dishonest misappropriation of property. That term implies something more than a mere non-fulfilment of an obligation. Where, for instance, the accused purchased some hides of the complainant and out of the price refused to pay a sum alleging it to have been taken in lieu of a former debt, and upon which he was prosecuted for this offence, it was held that it was a matter of trade between the prosecutor and the accused and that the latter could not be convicted of this offence.[20]

The accused had agreed to give his daughter in marriage to the complainant's son, whereupon the complainant delivered to him jewels, clothes and sweets against the betrothal. The accused retained the presents but broke off the match. The complainant demanded the return of his clothes and jewels which the accused refused. He was convicted of this offence but the High Court acquitted him in revision holding that the presents were retained because the accused had shown that the complainant was to blame for the failure of the ceremony and the accused felt justified in retaining the jewels as he had incurred expense and claimed compensation for breach of the contract. In other

(17) *Abdul*, 10 W. R. 23 A.
(18) *Phuman*, (1908) P. R. No. 11
(19) Act I of 1872.
(20) *Boystum Moochee*, 17 W. R. 11

words, his retention of them was not dishonest.(21) Other cases have been similarly decided upon the facts which call for no comment.(22) Money paid to a person by mistake may be the subject of criminal misappropriation, in the same way as money received for one purpose is misappropriated by being converted by the payee to his own use. The prisoner, a railway booking clerk, received from a passenger applying for a railway ticket Rs. 17 instead of 17 pice, which the prisoner received and kept being aware of the mistake under which it was paid to him. But on an inquiry being made he refunded the amount to the prosecutor. He was held to have brought himself within the penalties of this section.(23)

4393. But in England, it is an ancient doctrine that an innocent receipt of money and its fraudulent appropriation do not constitute larceny,(24) so that where a bag of money intended for one was delivered to and received by another and the latter kept the money consciously even exclaiming, "the biter has got bit: he has paid me double wages," it was held that inasmuch as the prisoner had not at the moment of receipt the *animus furandi*, he could not be convicted of larceny.(25) But this view proceeds upon the view of common law that there can be no larceny without trespass, and there can be no trespass where the prisoner has obtained lawful possession of the goods alleged to be stolen, or in other words, the thief must take the goods into his possession with the intention of depriving the owner of them. If he has got the goods lawfully into his possession before the intention of depriving the owner of them is formed, there is no larceny.(1)

This view sometimes leads to curious results. Suppose the prisoner asks the prosecutor for the loan of a shilling and the latter gives him a sovereign by mistake, which the prisoner receives, believing it to be a shilling. He discovers his mistake sometime afterwards, but then he decides to misappropriate it to his own use. Such a case arose, but upon a case reserved for the opinion of fourteen Judges, the Court was equally divided, seven being for affirming the conviction and the remaining seven for quashing it. The conviction therefore stood, but the point remained undecided.(2) But a similar point was disposed of in another case in which the prisoner applied for the withdrawal of 10*s.* out of the 11*s.* which stood to his credit in the Post Office Savings Bank. The postal clerk by mistake placed on the counter £8 16*s.* 10*d.*, which was the sum due to another customer. The amount was debited in the accused's pass-book, and the prisoner took away the money. He was found then to possess an *animus furandi* and eleven against four Judges held him guilty of larceny.(3)

(21) *Nasir Khan* v. *Fyaz Hassain*, 72 I. C. 348, (1922) A. I. R. (C.) 57, 24 Cr. L. J. 348.

(22) *Soban Lal*, 13 A. L. J. 1131, 31 I. C. 651, 16 Cr. L. J. 795; *Ram Khelawan*, 52 I. C. (Pat.) 430, 20 Cr. L. J. 654.

(23) *Sham Soondur*, 2 N. W. P. H. C. R. 475.

(24) *Per* Lord Coleridge, C. J., in *Flowers*, 16 Q. B. D. 643 (646).

(25) *Ib.*; to the same effect, Cockburn, C. J., in *Middleton*, L. R. 2 C. C. 38 (45); *Mucklow*, 1 Moo. C. C. 160; *Davies*, Dears C. C. 640; *Thurborn*, 1 Den. C. C. 387; *Glyde*, L. R. 1 C. C. 139.

(1) *Per* Cave, J., in *Ashwell*, 16 Q. B. D. 190 (200).

(2) *Ashwell*, 16 Q. B. D. 190 (226).

(3) *Middleton*, L. R. 2 C.C.R. 38; to the same effect, *Hollis*, 12 Q. B. D. 25; *Helire*, 18 Cox 267.

4394. In this country, such a question is as unnecessary as it is irrelevant (§§ 4367, 4368). An act at one time honest may at any other time become dishonest, so as to bring the offender within the penal visitation of this section. The *Shebait* or the priest of an idol being in charge of the property belonging to the idol is bound to use it for the purposes of that idol, and he would be guilty of criminal misappropriation if he dishonestly uses it on himself.(4) The accused met the prosecutrix in the Benares Railway Station. He had himself a ticket for the Benares Cantonment Station. He induced the prosecutrix to let him see if she had the right ticket for Ajudhia which she gave him to look at. He then surreptitiously changed that ticket for his which he delivered to her. He was promptly detected and gave up the ticket. The Sessions Judge convicted him of cheating under section 420, but Burkitt, J., held the offence to be one under this section, inasmuch as he had dishonestly misappropriated the ticket the prosecutrix had given him to look at.(5)

4395. Property must have an Owner.—Dishonest misappropriation of property implies appropriation by a person to which he is not entitled. Now property to which a person is not entitled must be property to which another person is entitled. If, therefore, a thing was *res nullius*, the accused could not by appropriating it, be said to have caused wrongful gain or wrongful loss, for "wrongful" is a relative term, and there can be no wrong where there is no infraction of a legal right. Consequently, no one could be convicted of theft, much less of this offence by appropriating a thing which was, or believed to be, ownerless. Property of the former kind has been sufficiently described in dealing with the subject of theft. Animals *ferræ naturæ*, fish in a navigable river or creek, or in the open sea are instances of such property. A human body, whether dead or alive, is also not property so as to be capable of theft or misappropriation.(6)

In this respect the present law is an improvement upon that prevailing during the days of slavery, when human beings were regarded as property and, as such, could be made the fit subjects of traffic and huckster. In those days a person seducing a slave might conceivably have been guilty of criminal misappropriation. Indeed, as has been elsewhere remarked, property is the creature of law, and objects may become or cease to be property in accordance with its mandate. For instance, water and gas were at one time not property, but they may now be both reduced into possession and then they may be the subject both of theft and criminal misappropriation. The term "property" as here used, does not merely mean a thing of value, but a thing which is capable of ownership, and in fact has an owner. So where the accused who professed to help the complainant in his case in Court, made off with a bundle of his cancelled cheques, which he was preparing to file in Court, it was held that though they had been honoured and cancelled, they were still property, even assuming that they were of no value further than the paper upon which they were written, and that as such, they could be made the subject of theft, misappropriation and criminal breach of trust, and as they had obviously evidentiary value the Court held it to be no case under section 95.(7)

(4) *Guru Siddheshvar*, (1897) B.U.C. 919.
(5) *Raza Hussain*, (1904) A. W. N. 9.
(6) *Ramadhin*, 25 A. 129.
(7) *Maula Buksh*, 27 A. 28.

4396. This was the view taken by Grose, J., of the paper and stamps of the notes of county bankers which had been paid off but which might have been re-issued. The question referred to the twelve Judges was whether such papers and stamps *in transitu* constituted property, and Grose, J., in delivering the judgment of the Court, said : "The question submitted in this case to the consideration of the Judges was, whether the paper and stamps are, under the circumstances of the case, the subjects of larceny at common law; or in other terms, whether they are the property of, and are of any value to, Messrs. Large and Co. (the county bankers) who were unquestionably the owners of them. These gentlemen had paid for the paper, the printing, and the stamps of these papers, which once existed, both in character and in value, as promissory notes. Their character and value as promissory notes were certainly extinct at the time they were stolen; but, even in this state, they bore about them a capability of being legally restored to their former character and pristine value. It was a capability in which these owners had a special interest and property. The act of re-issuing them would have immediately manifested their value as papers, for it would have saved their owners an expense of reprinting other notes, and of purchasing notes, to which expense, it was proved, they were put, on their being deprived of these papers, by the crime of the prisoner. In what sense or meaning, therefore, can it be said that these stamped papers were not the valuable property of their owners? They were indeed, only of value to those owners; but it is enough that they were of value to them, their value as to the rest of the world is immaterial. The Judges, therefore, are of opinion, that to the extent of the price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors; and that the prisoner has been legally convicted."[8]

Derelict Cattle.

4397. No Property: No Misappropriation.—The mere fact that a thing was capable of ownership, does not make it property so as to make its appropriation a punishable wrong. As an example of this may be mentioned a bull set at large in accordance with the religious usage of the Hindus, which would thereupon cease to be property within the meaning of the Code, inasmuch as not only was it not then the subject of ownership by any person, but the original owner having surrendered all his rights as its proprietor, it became a *nullius proprietas* and incapable of theft or misappropriation as even a *ferræ naturæ*.[9] Of course, a person abandoning his property in such a bull may again acquire property therein by bringing it under his control, but the mere fact that it receives some attention from the cowherd of its late liberator, and is daily fed by him by his direction, and is not used for breeding purposes without his permission, is not inconsistent with its total surrender.[10] Consequently, a person who killed it for food could not be charged with theft, criminal misappropriation or mischief, nor of any offence intended to protect rights in property,[11] though such a person may be conceivably guilty of other offences if his object was to

(8) *Clark's case*, 2 Leach. 1036 ; so the halves of bank-notes are property for they might be at any moment joined; *Mead*. 4 C. & P. 535; *Jones*, 1 Den C. C. 551.

(9) *Bandhu*, 8 A. 51; *Nihal*, 9 A. 349; *Romesh Chander Saynal* v. *Hira Mandal*, 17 C. 852 ; *Sita*, 18 B. 212, *Sarajul, Hayue*, 67 I. C. (Pat.) 497, 23 Cr. L. J. 401 (derelict cow) ; *Dwarka Dass* v. *Narasimhulu* 44 M. L. J. 128, (1923) A. I. R. (M.) 364.

(10) *Romesh Chunder Sanyal* v. *Hiru Mondul*, 17 C. 852.

(11) *Romesh Chunder Sanyal* v. *Hiru Mondul*, 17 C. 852.

wound the religious feelings of the Hindus, or if the killing was done in an unnecessarily public or offensive manner. But in such cases, the offence has nothing to do with rights in property and the accused might just as much be guilty of the offence if the bull he killed was his own (§§ 2655-2658).

Abandoned Property.

4398. The accused, who was in the service of the prosecutor, had been ordered by the latter to take several bags of waste paper belonging to them to their yard at Garden Reach in Calcutta and there burn and destroy them. The accused took the papers, but instead of burning them sold them in the market. It was held that the accused's act amounted to no offence,[12] presumably because the owner, having condemned the paper for destruction, had abandoned all property therein, and the bags were then *res nullius* as soon as they were handed to the accused for destruction. Such was the guiding principle of the case in which a consignment of rice lying unclaimed at the Kidderpore Docks was first advertised for sale, but being condemned as unfit for consumption, its sale was countermanded and it was delivered to the accused for destruction at the incinerator at Goragatcha. The accused took possession of the rice and sold a part of it for Rs. 1,000. He was prosecuted under section 409, but Hill, J., held that the rice was not "property" within the meaning of the section and the accused was discharged.[13] The accused went to see the complainant to whom the postman delivered a letter which he read and then threw on the table. The accused picked it up and later on sought to use it in a case against the complainant. The Court held that recipient had abandoned the letter as much as if he had thrown it into a waste paper basket.[14] It is submitted that that intention was not deducible from the mere fact of his laying it on the table. Where goods are delivered to the vendee the vendor transfers their ownership to him. He cannot afterwards prosecute him for this offence if the vendee denies their receipt and refuses to pay them.[15] There is nothing in the section to preclude partners from rendering themselves guilty of this offence.[16] A partner who is in possession of partnership assets, is bound to account for them to his other partners. If, therefore, he appropriates them to his own use in denial of the right of the other, he would be liable.

Property not in Possession.

4399. It will be observed that this offence materially differs from theft in that it may be committed in respect of property *not* in possession of any person. For example, a person could not be guilty of theft of two logs of wood which he found drifting in a river during a high flood and took possession of them. His conviction for theft was out of the question because he had reclaimed logs when they were in no one's possession. But he might have been convicted of this offence, but the fact that he had left them exposed unused in front of his house for several months, was held to negative his criminal intentions, and he was acquitted.[17]

(12) *Preo Nath Chowdhry*, 29 C. 489.
(13) *Wilkinson*, 2 C. W. N. 216.
(14) *Harris*, 40 A. 119.
(15) *Velayutham*, 72 I. C. (M) 172 ; 24 Cr. L. J. 332.
(16) *Nrigendra Lall* v. *Okhoy Coomar*, 21 W. R. 59, F.B., *Bhudhar Mal* v. *Ramchunder*, 1 Pat. L. T. 217, 55 I. C. 674, 21 Cr. L. J. 338.
(17) *Murugan*, (1883) 1 Weir 455.

Such a case may be saved by Explanation 2, to which no reference was made by the Court, but which is distinctly in point.

Explanation 2 (1) Derelict Property.

4400. Appropriation of Lost Property.—That explanation adopts the English rule as to a finder of property, but in a form much more restricted and qualified than that rule (§ 4368). It enacts that a finder may innocently acquire property in a thing if he has not the means of discovering the owner, or has after he has used reasonable means to communicate with the owner, kept it at his disposal for a reasonable time. Appended to this explanation there are six illustrations which are all taken from the English decided cases and many of which have the effect of overruling them so far as this country is concerned (§4368). But both the English and the rule here enacted coincide in excluding from the offence abandoned property. But the question in such a case is: When is a property abandoned?

As Rolfe, B. told the jury in a case in which the accused stood charged with stealing a gold chain, breast pin, eyeglass and pin: "If a man is possessed of a chattel, he does not lose the property in it, because he places or drops it in a field; nay, if he drops it in a street, it still remains his property. The only case where a party can be justified in converting it to his own use is, where it has fallen, where a party may fairly say that the owner has abandoned it, or if the party cannot be found to whom it belonged. If I had an apple and dropped it, it might be presumed that I abandoned it; but if I drop £500, the presumption is that I do not mean to abandon it. If I drop a thing where there is no reasonable means of finding out that it belongs to me then, though I am found out to be the owner, the party finding it would not be guilty of felony if he converted it to his own use, though he would be liable to an action of trover.[18] Illustration (*a*) is an example. A finds a rupee on the high road, not knowing to whom it belongs. He picks it up and converts it to his own use. He is not guilty of this offence. And it was so held in a case from which the illustration is drawn[19]

In that case it was laid down that the finder of a sovereign in the high road, who, at the time of finding, had no reasonable means of knowing who the owner was, but who at the time intended to appropriate it even if the owner should afterwards become known and to whom the owner became soon afterwards known, was not guilty of larceny, even though he refused to deliver it up to the owner. It will be probably so decided in this country in the case of money which carry on their face no indicia of individual ownership, and property which passes from hand to hand by mere delivery. So where the accused discovered some coins buried in his land which he had purchased and whereupon he was convicted of this offence, Couch, C. J., and Newton, J., annulled the conviction holding that "the rupees which were acquired were derelict and not in the possession of any person."[20] Such a case must, however, be distinguished from

(18) (1843), *Peters*, 1 C. & K. 245.

(19) *Glyde*, 37 L. J. M. C. 107, following (*per* Martin, B.) *Thurborn*, 18 L. J. M. C. 140.

(20) *Chodapa*, (1868) B. U. C. 8: *see* now s. 20, Treasure Trove Act (VI of 1878), under which omission to give notice is penal.

that presented in illustration (*b*) which is, again founded on English precedent,[21] the facts of which have been stated before.

(ii) When Owner is Traceable and when he is Not.

4401. That case was followed in another in which the prosecutor had lost a £10 Bank of England note in a hair-dresser's shop, and the jury found that he had dropped it in the shop of the prisoner who found it there, and who had then no knowledge nor a reasonable means of knowledge as to its owner, but that he acquired that knowledge subsequently, after which he converted it to his own use, that when he picked it up he intended to appropriate it, whoever might have been its owner, and that he believed at the time he found it that the owner could be discovered. On these facts it was held on a case reserved, that the prisoner was guilty of larceny.[22]

This case was decided upon the principle formulated in *Thurborn's case*,[23] in accordance with which though the note was lost, because it was dropped out of the owner's purse, property in it was not abandoned, nor was the owner without means of tracing the owner. So in the illustration, since the latter contains directions as to the owner, the finder is guilty because he had ready means of discovering the owner. The same principle pervades the next illustration which is also an English precedent,[24] in which[25] Parke, B., said: "Suppose a person finds a cheque in the street, and in the first instance, takes it up merely to see what it is; if afterwards he cashes it, and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it."[1] But this view is not quite reconcilable to that taken in another case decided in 1862[2] in which a lad aged fourteen by name Boucher, found a cheque on a road which he showed to the prisoner, he himself being illiterate. The prisoner told him that it was an old cheque and so put him off till he ceased demanding it back. The jury found that the prisoner knew that the cheque belonged to Goldsmith and that he retained it to earn a larger reward than the five shillings offered to its finder, and on a case reserved it was held that the mere withholding of the cheque under the circumstances did not amount to such a taking as is required to constitute the offence of larceny.[3]

It may be a question whether such a case would be covered by this exception. Could it be said that in retaining the cheque the finder was keeping it to restore it to the owner? He was but on terms which the owner may consider prohibitive. It is apprehended that retaining a cheque to enforce an extortionate demand may well be regarded as a punishable misappropriation. The next two illustrations (*d*) and (*e*) are also English cases.[4] They are both illustrations which did not form a part of the original draft but were subsequently added. They refer to two distinct cases depending upon the acquisition of knowledge as to the owner: such knowledge being in case (*d*) acquired contemporaneously with the

(21) *Thurston's case*, 18 L. J. M. C. 140.
(22) *Moore*, (1861) L, & C. 1.
(23) 18 L. J. M. C. 140.
(24) *Thurborn*, 18 L. J. M. C. 140, as adopted in *Merry* v. *Green*, 7 M. & W. 623; *Gardner*, L. &. C. 243.
(25) *Merry* v. *Green*, 7 M. &. W. 623.
(1) *Ib.*
(2) *Gardner*, (1862) L. & C. C. R. 243.
(3) *Gardner*, (1862) L. & C. C. R. 243.
(4) *West*, (1854) Dears C. C. R. 402.

finding: it being in the other case acquired afterwards. This difference marks the difference between criminality and non-criminality in English law, but it is wholly immaterial in the Code. In this respect illustration (*c*) is directly opposed to the English rule which was stated by Lord Hale to be that if *A* find the purse of *B* in the highway and take it and carry it away, with all the circumstances that usually prove the *animus furandi*, yet it is not felony.(5) But Lord Hale remarks that this doctrine must be understood to apply only to cases where the owner believes the goods to have been lost by the owner.

Property Mislaid but Not Lost.

4402. But there is a difference between the property lost and that which is merely mislaid. The rules applicable to the one case do not apply to the other. So in a case decided in 1854, the prosecutor left his purse containing money by mistake on the counter of a shop. A stranger asked if it belonged to the prisoner whereupon the latter put it into her pocket exclaiming, "yes, it is a wonder if it was gone before this." She concealed the purse, and the jury found that she had taken the purse then knowing that it did not belong to her and intending to appropriate it, but that she did not then know its true owner, whereupon the prisoner was convicted, and on a case reserved Jervis, C.J., said: "If there had been any evidence that the purse and its contents were lost property, properly so speaking, and the jury had so found, the jury ought further to have been asked whether the prisoner had reasonable means of finding the owner, or reasonably believed that the owner could not be found, but there is in this case no reason for supposing that the property was lost at all, or that the prisoner thought it was lost. On the contrary, the owner having left it at the stall, would naturally return for it when he missed it. There is a clear distinction between property lost and property merely mislaid, put down and left by mistake, as in this case under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. The question as to possession by finding therefore, does not arise."(6)

Illustration (*d*) puts the case of a man who knows the owner because he said he saw him drop the purse. When he picked it up he intended to return it to the owner, but afterwards his cupidity got the better of his honesty. He is consequently guilty of misappropriation. So Parke, B., said: "If the prisoner had seen the notes drop from the prosecutor, or if the notes had had the owner's name upon them, or there had been any marks which enabled the prisoner to know at the moment when he found the notes who the owner was, or that he could be discovered, it might have been within the principles laid down in *Reg* v. *Thurborn*"(7)—that is that the prisoner was guilty because he took with *animus furandi*. But even if the taking was innocent, as in the illustration (*c*) then the acquisition of subsequent knowledge of the owner would convert that possession into criminal misappropriation. So Parke, J. A. J., said in the case of the prisoner who had picked up a hat while he had his own on: "If a person pick up a thing when he knows that he can immediately find the owner, and instead of returning it to the owner, he converts it to his own use, this is felony."(8)

(5) 1 Hale P. C. 506 (2 East) P. C., c. 16, s. 99, p. 664; *Buckley* v. *Gross* 3 B. & S. 566.

(6) *West*, Dears C. C. 402.

(7) *Dixon*, (1855) Dears C. C. 580.

(8) *Pope* 6 C. & P. 346.

4403. Finder's Duty to Trace the Owner.—The last illustration which is also new, establishes a rule at variance with the English Law as expounded by Jervis, C.J., who said: "The finding of the jury was that the notes were lost; that the prisoner did not know the owner but that it was probable that he could have traced them. He was not bound to do that."(9) But he would have been bound to do it under the Code.(10) For explanation 2 makes it penal to appropriate derelict property "when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it." But according to Parke, B., the English rule is that "If a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them, that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."(11) The obligation cast on the finder to trace the owner is, therefore, a restriction on the right of a finder as understood in English Law. He is bound to discover the owner whether he has the means of discovering the owner or not. For in the latter case he must "use reasonable means to discover and give notice to the owner."

What reasonable means are, is no doubt declared to be a question of fact, but does it imply that the means must be readily available to him or does it cast upon him an obligation to discover the owner even when there is nothing to put him upon enquiry? Is the finder, for instance, bound to advertise for the owner of a lost thing? Is his failure to do so criminal? It appears to be sufficiently apparent that the obligation of the finder is limited by the means he has or are reasonable under the circumstances for discovering the owner. He is not bound to adopt extraordinary means for his discovery, nor is he bound to be out of pocket in discovering him by means of an advertisement. If the is anything in the property from which he is in a position to trace the owner, he is then bound to adopt *reasonable* means to discover him. He is not bound to scour the four seas in search of him, but to adopt such means as a reasonable man might be expected to adopt under the circumstances of the case. If, for instance, one finds a watch on a road, one may well expect to report the fact to the police or to make inquiries from persons in the habit of wearing such watches. If, on the other hand, one finds an article of inconsiderable value, the same inquiry would be naturally uncalled for. Indeed, it would not be unreasonable in such a case to suppose that the owner is not likely to be found unless of course, there are facts which point otherwise. In this connection the remarks of Rolfe, B., quoted before are relevant.

4404. The degree of care sufficient to be reasonable would seem to depend upon the nature and value of the property, the likelihood

(9) *Dixon*, (1855) Dears C. C. 580.
(10) *Chandaria*, (1911) P. W. R. 36, 11 I. C. 623.
(11) *Thurborn*, (1849) 18 L. J. M. C. 140.

of its being mislaid, lost or abandoned, and the means that are readily available, or may readily suggest themselves, for discovering its owner. In this respect there is clearly a distinction between a thing abandoned and a thing lost. So, Cockburn, C.J., told the jury that where property had been cast away or abandoned, any one finding it and taking it, acquired a right to it, which would be good even as against the former owner, if the latter should be minded to resume it; but that, when a thing had been accidentally lost, the property was not divested but remained in the owner who lost it.(12) The accused was convicted of this offence for having picked up a gold mohar in an open plain in a village adjoining a city, which she forthwith sold to a Shroff for Rs. 22-12. She was convicted under this section, but Candy and Fulton, JJ., acquitted her holding that "it cannot fairly be said that when accused sold the mohar she knew, or had the means of discovering, the owner, or that she omitted to use reasonable means to discover and give notice to the owner and did not keep the property a reasonable time to enable the owner to claim it. It might have been different, had the mohar been found on a thoroughfare, in which case the finder would naturally believe that the property had been recently lost, and that the owner would be discoverable. But in this case the mohar may have been lying undiscovered on the plain for weeks. It is a fair inference that the owner had given up all hope of recovering it, and had abandoned his right of ownership.(13)

Dishonest misappropriation of property possessed by deceased person at the time of his death.

Session. Pres. Mag or Mag. of 1st or 2nd class Non-cog. Warrant Bailable. Not comp.

404. Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine; and, if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustrations.

Z dies in possession of furniture and money. His servant *A*, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. *A* has committed the offence defined in this section.

[*Property* (moveable property)—ss. 27, 409, § 4066
Dishonestly misappropriates—s. 403.]

Synopsis.

(1) *Analogous Law* (4405).
(2) *Procedure and Practice* (4406).
(3) *Proof* (4407).
(4) *Form of Charge* (4408).
(5) *Principle* (4409).
(6) *Meaning of Words* (4410).
(7) *Despoliation of the Dead* (4411-4412).

(12) *Glyde*, L.R. 1 C.C. 139.

(13) *Per* Candy, J., in *Sita*, 18 B. 212.

4405. Analogous Law.—This section presents an aggravated case of the offence defined in the last section. It deals with the despoliation of the dead by two classes of persons: *first* by a stranger who is liable to imprisonment up to three years without the option of a fine, and *secondly* by a clerk or servant of the deceased, in which case the offender is liable to the enhanced penalty which may extend to seven years. In this respect, law measures the criminality in the same way as in the case of an offence under section 381, which also provides the same punishment.

4406. Procedure and Practice.—This offence is non-cognizable but warrant should, ordinarily, issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class. The Madras High Court pointed out that as this offence is non-compoundable, no Court can permit the withdrawal of a prosecution on a compromise made with the accused.(14)

4407. Proof.—The points requiring proof are:—

(1) That there was some moveable property.(15)

(2) That it was in the possession of a deceased person at the time of his death.

(3) That after his death it was not in the possession of any person legally entitled to its possession.

(4) That the accused misappropriated it or converted it to his own use.

(5) That he did so dishonestly.

(6) That he then knew of the facts mentioned in (2) and (3).

To which may be proved the following aggravating circumstance—

(7) That the accused was at the time of the death of the deceased employed as his clerk or servant.

4408. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you dishonestly misappropriated (or converted to your own use) certain property, to wit—knowing that such property was in the possession of A B, a deceased person, at the time of his death, and had not since been in the possession of any person legally entitled to such possession; (and that you were at the time of the death of the said A B employed by him as a clerk or servant) and that you thereby committed an offence punishable under section 404 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session or the High Court).

(14) 7 M. H. C. R. (App.) 34.
(15) *E. G.*, Conversion of rafters severed from the house; *Daud Khan*, (1925) A. 673.

"And I hereby direct that you be tried (by the said Court) on the said charge."

4409. Principle.—The section deals with the offence of criminal misappropriation committed in respect of property after its owner is dead and before it is taken possession of by his legal representative. It is an interval when it is exposed to the easy attacks of designing men, and law, consequently, deems it as a fit object of special protection, which it confers by prescribing specially deterrent punishment meted out to offenders according to the circumstances of their aggravation. As persons who were "clerks or servants" of the deceased, and, therefore, in his confidence, they are naturally visited with the same measure of punishment as if they had been guilty of robbing their late master (§ 4170). Others are also subject to enhanced penalty though not anything to the same extent.

The section is, of course, intended to punish only strangers and servants with no semblance of claim to the effects of the dead man. It is not intended to punish relatives who take possession of and deal with the deceased's effects under a claim of right as heirs or legal representatives of the deceased.(16)

4410. Meaning of words.—"*Dishonestly misappropriates or converts to his own use*": This phrase has been explained under the last section in which sense it has been used here (§ 4384). "*property knowing, etc.*: The word "moveable" before property is to be understood, for it is implied in the words "misappropriates or converts to his own use" and is expressly mentioned in the last section. The omission is obviously unintentional. "*Such property was in the possession of the deceased*": which means actual possession under a title though that title may not be flawless. "*And has not since been*": If it has passed into the possession of another—the offence will be one under section 403. Such possession must, however, be of a person *legally* entitled to it. "*Clerk or servant*": These words are used here in the same sense as in section 381.

4411. Despoliation of the Dead.—This section refers to criminal appropriation of property which was in possession of a deceased person at the time of his death, and before it has been delivered in possession of one legally entitled to it. This is a peculiar circumstance of aggravation, for a person may have been suddenly struck down at a time when he has no relation or friend to take care of his goods and when it behoves those who may then chance to be servants or neighbours, not to take advantage of the opportunity which his death offers them of pillaging his property. Such human ghouls have always been regarded as fit objects of extreme execration, social as well as legal, and this section deals with one aspect of their crime—that in which the act amounts to no more than criminal misappropriation. All the elements of that offence must necessarily be present in an offence

(16) *Karri Mangadu*, (1914) M. W. N. 791; 25 I. C. 514 *contra Ram Ditta*, (1910) P. L. R. 11; 6 I. C. 490 in which, however, there is no discussion of the point.

under this section.[17] For though the section prescribes a different penalty, the offence it refers to is the same. There must, consequently, be evidence of misappropriation or conversion to the accused's use of property which must be dishonest. But as has been pointed out under the last section, it is not necessary that the misappropriation as distinct from conversion should be to the use of the accused.

Where, therefore, the zamindar sent a servant to take possession of his tenant's land and goods, claiming them to be his by the right of purchase and for arrears of rent, and it was found that the land was rent-free and there had been no sale, the accused was convicted under this section, though he was shown to have "appropriated" the property on behalf of his master.[18] The section applies only to property in the possession of the deceased at the time of his death. The term "possession" must, however, be understood here as used in the sense in which it is defined in section 27 (§§ 274-277). Consequently, property in possession of a person's wife, clerk or servant would be in his possession, so that if a clerk or servant was entrusted with the custody of money by the deceased which he had at the time of his death, his misappropriation of it would be punishable under this section.[19]

4412. The term "property" is here used to denote only moveable property,[20] so that taking possession of immoveable property belonging to a person on his death would not be punishable under this section. For the meaning of clerk or servant see §§ 4167-4176

Of Criminal Breach of Trust.

405. Whoever being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Criminal breach of trust.

Illustrations.

(*a*) *A*, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. *A* has committed criminal breach of trust.

(*b*) *A* is a warehouse-keeper. *Z*, going on a journey, entrusts his furniture to *A*, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. *A* dishonestly sells the goods. *A* has committed criminal breach of trust.

(*c*) *A*, residing in Calcutta, is agent for *Z*, residing at Delhi. There is an express or implied contract between *A* and *Z*, that all sums remitted by *Z* to *A* shall be invested by *A* according to *Z*'s direction. *Z* remits a lakh of rupees to *A*,

(17) *Nobin Chunder Sircar*, 12 W. R. 39.
(18) *Ib.*
(19) *Erayet Hossain*, 11 W. R. 1.
(20) *Girdhar Dharamdas*. 6 B. H. C. R. 33; *Nobin Chunder Sircar*, 12 W. R. 39.

with direction to *A* to invest the same in Company's paper. *A* dishonestly disobeys the directions, and employs the money in his own business. *A* has committed criminal breach of trust.

(*d*) But if *A*, in the last illustration, not dishonestly but in good faith, believing that it would be more for *Z*'s advantage to hold shares in the Bank of Bengal disobeys *Z*'s directions, and buys shares in the bank of Bengal, for *Z*, instead of buying Company's paper, here, though *Z* should suffer loss, and should be entitled to bring a civil action against *A* on account of that loss, yet *A*, not having acted dishonestly, has not committed criminal breach of trust.

(*e*) *A*, a Revenue-officer, is entrusted with public money, and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. *A* dishonestly appropriates the money. *A* has committed criminal breach of trust.

(*f*) *A*, a carrier, is entrusted by *Z* with property to be carried by land or by water. *A* dishonestly misappropriates the property. *A* has committed criminal breach or trust.

Synopsis.

(1) *Analogous Law* (4413-4414).
(2) *Principle* (4415).
(3) *What is Criminal Breach of Trust* (4416-4420).
(4) *There must be a Trust* (4417-4419).
(5) *Trust may be Unlawful* (4420).
(6) *Debt but Not Trust* (4421-4424).
(7) *No Trust* (4425).
(8) *Dominion over Property* (4426).
(9) *Immoveable Property Excepted* (4427-4428).
(10) *Violation of Legal Duty or Contract* (4429-4435).
(11) *Violation of Legal Duty* (4430-4432).
(12) *Dishonest Use or Disposal* (4433-4435).
(13) *Confusion of Funds* (4436-4438).
(14) *Wilfully Suffering Dishonest Use or Disposal* (4439).
(15) *Civil Breach of Trust* (4440).
(16) *No Offence* (4441).

4413. Analogous Law.—This section defines the offence of criminal breach of trust, which closely corresponds to the English offence of embezzlement. This offence was not indictable at Common law, and was then only within the cognizance of the Star Chamber which undertook to punish every misdemeanour including those especially of public importance for which the law, as then understood, had provided no sufficient punishment. Thus corruption, breach of trust, and malfeasance in public affairs, or attempts to commit felony, seemed to have been reckoned not indictable at Common law, and came in consequence under the cognizance of the Star Chamber.[21] Embezzlement was subsequently made indictable by Statute [22] the latest of which [23] provides as follows:—

"S. 68. Whosoever, being a clerk or servant, or being employed for the purpose of or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be *delivered or* received or taken into pos-

(21) 1 Hallam's Const. His. 442, 443.
(22) 39 Geo. III. c. 85; 7 & 8 Geo. IV c. 29. s. 47; 9 Geo. IV, c. 55, s. 40; repealed and re-enacted in 24 & 25 Vict., c. 98, s. 68.
(23) 24 & 25 Vict., c. 96 (Larceny Act, 1861. s. 68.

session by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years or to be imprisoned.....and, if a male under the age of sixteen years with or without whipping."(24)

This Statute makes other provisions against embezzlements by officers in public service(25) or the Bank of England or Ireland(1) and other Statutes supplement it by extending its provisions to partners or joint owners of the partnership or joint property,(2) officers of customs(3) and local marine boards.(4)

4414. This section is far more exhaustive than all these Statutes extending as it does to all who may "in any manner be entrusted with property," whether they be clerks or servants, partners or other persons ordinarily holding a position of trust, or were only entrusted for once with property or dominion over property. The gist of the offence is dishonest misappropriation or conversion to the person's own use of property—in short, criminal misappropriation. This is thus a specific case of that offence committed by a person in the position of a trustee.

4415. Principle.—Following the scheme ordinarily followed in the Code, this section defines the offence while the four next sections prescribe the penalties graduated according to the nature and gravity of the crime. The offence of criminal breach of trust is a species of criminal misappropriation defined in section 403 and for which that section, and the next prescribe the punishments. Being, however, a misappropriation committed by a trustee law regards it as a distinct offence of peculiar gravity and as such requiring separate treatment. Of course, the peculiar aggravation of the offence lies in the confidence abused and in which respect this section is distinguishable from the generic offence of criminal misappropriation. The expediency of thus multiplying offences was doubted(5) but the Law Commissioners had no difficulty in vindicating their plan which was adopted by the Legislature. But all the same these offences though distinct are not to be treated as radically different from those which are violations of rights in property and which are all vulgarly spoken of as theft.

4416. What is a Criminal Breach of Trust.—The definition of the offence here called "criminal breach of trust" comprises generally the offence of criminal misappropriation committed by a person entrusted with property or any dominion over property. But it is not in all respects coincident with that offence. For the act may not be merely

(24) The words italicized are new: otherwise the section re-enacts 7 & 8 Geo. IV, c. 29, s. 47, in which the receipt was, moreover, stated to be "by virtue of such employment" as had the effect of restricting the offence to moneys only so received, as held in *Snowby*, 4 C & P. 390; *Thorley*, R. & M. 343; *Hawtin*, 7 C. & P. 781; *Mellish*, R. & R. 80; *Crow*, 1 Lewin 88—all of which are now overruled by the amended Statute cited in the text.

(25) Larceny Act (24 & 25 Vict, c. 96), s. 70.

(1) *Ib.*, s. 73.

(2) 31 & 32 Vict., c. 116, s. 1.

(3) 39 & 40 Vict., c. 36, s. 29.

(4) 57 & 58 Vict., c. 60, s. 248.

(5) First Rep., 551.

misappropriation or conversion to his own use, but also dishonest use or disposal of the property in violation of the trust or contract made regarding its disposal, or wilfully suffering another to do the same. In short then the two essential ingredients of the crime are (*i*) a trust, and (*ii*) its dishonest breach in the manner explained in the section.

(i) There must be a trust.

4417. In the first place then, there must be a trust connected with the use of property. A trust is defined to be an obligation annexed to the ownership of property and arising out of confidence reposed in an accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner.(6) But it is not in this narrow sense that the term has been used in this section, for it includes not only trustees, properly so called, but also those whose position is analogous to that of trustees, who become liable to the other by similar obligations arising out of a relationship implied by act and conduct which give rise to the same or similar confidence and duties.(7) Such would, for example, be the case of a partner entrusted with partnership property in which case he becomes liable for breach of trust, if he dishonestly uses the property in violation of the mode in which his trust was to be discharged, or of the agreement between the parties as to the use he was to make of the property.(8) In such a case the partner cannot plead that the property in respect of which he was tried was as much his own as of the other partner.

No doubt in ordinary cases a partner is authorized to receive and disburse money on behalf of the firm, and his appropriation of it cannot be deemed to be necessarily criminal, unless it is shown that there was an understanding between the partners that he would not so use it, or that he knew that such money could not upon the state of the firm's accounts fall to his share. So where a partner received money on behalf of the firm and omitted to enter it in the accounts so that the fact of the receipt could not be known to his co-partner, it was held that such omission, unless duly accounted for, was some proof of an intention by the partner to appropriate partnership assets to himself without the knowledge and consent of his co-partner, which *prima facie* was dishonest, and that his admission when detected and profession to credit the money to his share of profits did not exculpate him.(9)

4418. In England this point is now met by direct legislation(10) which enacts "that if any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money,.... shall steal or embezzle such money,....every such person shall be liable to be....tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership, or

(6) Indian Trusts Act (II of 1882), s. 3.

(7) So, under the English Statute, it is sufficient to allege that the accused was a trustee, and not that he was a trustee on some express trust created by an instrument in writing; *Piper*, (1902) 65 J. P. 10.

(8) *Negendro Lall Chatterjee* v. *Okhoy Coomar Shaw*, 21 W. R. 59, F. B., overruling *contra* in *Lall Chand Roy*, 9 W. R. 37; *Debi Prasad Bhagat* v. *Nagar Mull*, 35 C. 1108.

(9) *Karim Baksh* v. *Habibulla*, (1903) P. R. No. 10.

(10) 31 & 32 Vict., c. 116, s. 1.

his appointment required the treasurer to deliver an account and to pay over such moneys as may be found due upon the balance of such account. It was added that it was on the prosecution to prove that it was not the prisoner's duty to pay over the money at a particular time, and as it was impossible to fix any time the prisoner could not be convicted, but the Judges were unanimously of opinion that the conviction was right.[20]

442½. Debt but Not Trust.—Though the terms of the section are wide still it has due limits, and could not be extended to cases in which a person is entrusted with money only in a figurative sense, but property in it is intended to pass with delivery. Such, for instance, is the case of moneys advanced by a person to a contractor for building purposes in which case any misuse or misappropriation of the money could not be held to constitute criminal breach of trust. But in such a case it would be more correct to say that the money was paid and not entrusted to the contractor, though the payment may have been made for a specific purpose and on the strength of a certain assurance. So where money was paid to the accused on condition that he should use it only for the purchase of paddy to be sold at the market rate on the date of delivery and the accused misappropriated the money for which he had executed promissory notes in favour of the complainant, the Court held that the money had been merely advanced and not entrusted to the accused who could not, therefore, be prosecuted for criminal breach of trust because he used it to pay off his own debts.[21] The real question in such cases is not by what name the advance is made, but whether the property in money remains with the complainant or is parted with in favour of the accused.

The complainant owed money to the accused on a mortgage which he paid him in full satisfaction of the loan. The payment was endorsed on the deed by another. The accused took the deed, entered his house, saying that he would keep the money and return the deed. He then denied the payment. It was held that the money being paid in discharge of a debt, denial of its receipt did not contitute breach of trust.[22] But the accused in this case was presumably charged on the receipt of money. The case would have been sufficient if he had been charged on the deed which belonged to the complainant as soon as it was discharged and the non-return of which would have conceivably constituted criminal breach of trust. Such was the case of the accused who had left certain promissory notes with the complainant as security for a loan. He persuaded him to return them to him alleging that they were required to collect the money which he promised to pay the complainant. He sold the notes but did not pay the money. He was held guilty of this offence as well as of cheating.[23] Where the tenant paid a sum of money to the landlord for rent and the

(20) *Welch*, 2 C. & K. 296.

(21) *Wong Yone Wain*, 5 Bur. L.T. 11, 14 I. C. 653; *Naga Po Seik* 5 Bur. L. T. 143 F. B., 17 I. C. 824; *Hock Cheng & Co* v. *Tha Ka Do*, 6 Bur. L. T. 13 F. B., 19 I. C. 145; *Keymer*, 12 A. L. J. 730, 23 I.C. 492; *Nga Po Yant*, 7 Bur. L. T. 209, F. B., 24 I. C. 332.

(22) *Golam Hussain*, 22 C. W. N. 1005, 49 I. C. 343, 20 Cr. L. J. 151.

(23) *Venkatagurunatha*, 45 M. L. J. 133, 72 I. C. 612, (1923) A. I. R. (Mad.) 597.

latter appropriated it towards *swadeshi* subscription, the Court held it to constitute no offence.[24]

4422. So where the relation between the parties was that of banker and customer, which is in law that of debtor and creditor, the moneys due to the customer would be due simply as debts, so that if the banker fails in business or dishonestly withholds payment he could not be proceeded against under this section, since the money was fully at the disposal of the banker, and the latter in using it for his own purpose, could commit no criminal breach of trust.[25] But while it is settled law that the relation between banker and customer is simply that of debtor and creditor, still it is possible for a banker to be a trustee also, but in that case his position as such must be strictly proved. Such may, for example, be the case where the banker enters into a contract of a special nature to keep a certain sum intact and distinct from his other capitals in trade, in which case he would be as regards that fund a trustee. So it often happens that a certain money repayable at call is kept by a banker merely for safe custody, in which case he is a trustee of that money, though he may hold other moneys of a person in his general capacity as banker. So constituents dealing with a bank may entrust their scrip to it for safe custody and realization of divident or interest from time to time, in which case the banker holds the scrip as a trustee and is accountable to the customer as such. The fact is that a person may be both a banker as well as a trustee of the same person.

4423. It all depends upon the question in whom property in the fund vests. If the customer has the property and the banker a mere custody the latter is a trustee of the former. If, on the other hand, he is entitled to absolute disposal of the fund for the time being or for any limited time he is then a banker and not merely a trustee. Trust implies that the fund of which the banker is a trustee should be kept distinct and intact for a specific purpose and at the disposal of the *cestui que trust*. He should not be at liberty to mix it with his general working capital or to use it as such. The accused acted as a shroff of the regiment. He was in charge of Government moneys as well as of the moneys belonging to the regimental fund, officers and men. He was permitted to make loans to officers of the regiment which were repaid by reductions made out of their salary. But he was alleged to hold the Government money merely as a cashier and at the beck and call of the Commanding officer. He was so described in his agreement with the Commandant, and Chatterji, J., taking into consideration the oral evidence of the Commandant, and the fact that the accused had absconded, reluctantly yielded to the argument that his position was one of trustee. He was accordingly convicted, but let off with a nominal sentence.[1]

4424. The prisoner was the servant who had contracted to supply labour to a Railway Company for delivering coals to the Company's

(24) *Kumeda Charan Ghose*, 15 C. L. J. 512, 15 I. C. 656, 13 Cr. L. J. 512.

(25) *Ruashan Rai*, (1901) P. R. No. 32, following *Chandu* v. *Chanda Mal*, (1885) P. R. (Civ.) 95; *Nga Po Seik*, 6 L. B. R. 62 F. B., 17 I. C. 824, 13 Cr. L. J. 888.

(1) *Hira Lal*, (1908) P. R. 19.

customers. It was a part of the contract that W or his men should realize the price of coals so supplied and deliver to the Company's manager. W engaged the prisoner who conveyed the Company's coals to its customer and received a payment which he misappropriated and for which he was indicted. It was objected that the money was not received on the account of W, nor was his property, and upon a case reserved Campbell, C.J., said "This case depends entirely upon whether the evidence shows that the money was received in the name or on the account of his master, and this depends upon whether any privity exists between the carman and the Company. If there be such privity as to make the carman the agent of the Company in receiving the money, and he agreed to pay it to them, the money in his hands was not the money of the master but of the Company. The opinion of the majority of us is, that such privity is established, and that, therefore, the money was not received on account of the prosecutor, but on account of the Company. This being so, this conviction cannot be supported."(2)

The fact that the prosecutor had delivered the money to try the honesty of the prisoner does not affect his liability, if in fact he is guilty of breach under the circumstances described as criminal. The prisoner was a shopman in the service of the prosecutor who, suspecting embezzlement, formed a plan for detecting him, and marked the money in the till, and then gave three other marked pice to a confidant who paid them to the prisoner in payment of goods purchased from him which he misappropriated. It was contended that as the money had been marked and paid for the sole purpose of trying the fidelity of the prisoner, the delivery of them to the prisoner had not changed the possession of them, which it was contended, remained constructively with the prosecutor up to the moment when the embezzlement took place; and that, therefore, the charge should have been for a larceny at common law, and not for an embezzlement under the Statute. But it was held that the case was clearly one of breach of trust.(3) This view is perfectly sound and has been reiterated in several cases,(4) and it is consonant with the general principle applicable to such cases (§§ 243-254).

4425. No Trust.—If there was no trust, actual or constructive, there can be no breach of trust, whatever other offence the accused may have committed. So if of two servants employed by the prosecutor one A be employed to sell his goods, and B for another purpose with no authority to sell the goods, and if B should get behind the counter and sell goods which he had no authority to do and misappropriate the proceeds, he would be guilty of theft and not of this offence. Such a case is not different in principle from that of B stealing his master's goods and then selling them to evade detection. The accused, a Stationmaster wrongly collected an overcharge on sale of tickets. It was held that he could not be convicted of this offence, since the excess collection did not belong to the Railway.(5) Where the accused was employed by

(2) *Beaumont*, Dears C. C. 270.
(3) *Hedge's case*. 2 Leach 1033.
(4) *Whittinghams case*, 2 Leach 912; Hawkins, 1 Den. C. C. 584.
(5) *Kudart Nath*, 75 I. C. 79, (1923) A. I. R. (L.) 295: *Karimuddin*, 40 A. 565 (A marksman, doing the unauthorised work of a Stationmaster, overcharged a sum and misappropriated it).

the prosecutor merely to register orders for goods and receive payments made for goods so supplied, and had no authority to make or direct delivery of goods from his master's shop, his delivery of two articles to a customer entering up only one as delivered and paid for, the price of the other article being misappropriated, was held to constitute larceny and not criminal breach of trust.(6)

So, of course, there could be no criminal breach of trust against the accused, when he was only nominally the manager of a bogus Provident Institution, the real power and funds being in the hands and under the control of the proprietor or agent.(7) So the wife is, ordinarily, in joint possession of her husband's property, and she cannot be held to be a trustee of his goods, so that any disposal of property by her would not, it is said, be criminal breach of trust.(8) But it is difficult to see why the wife is not the bailee of her husband's goods. She is now so held in English law.(9) The wife is necessarily in charge of her husband's property. As such, she is entrusted with it, and if she should dishonestly dispose it of, she would be, it is submitted, as much guilty of criminal breach of trust as a servant or manager. There can, of course, be no breach of trust where there is only a contract and no trust, and as the distinction between the two is at times fine, regard must be had to the exact nature of the transaction which favours the basis of the charge. A person guilty of a breach of contract or of a quasi-contract cannot be visited with the penalty of this offence.(10)

Dominion over Property.

4426. A person who is entrusted with property possesses certain *indicia* of apparent ownership. He is in fact in charge of the property which is impressed with a trust. Otherwise, he is at liberty to use it in any way he chooses. A person who is entrusted with any dominion over property has not the same right over it. His dominion may be limited or unlimited, temporary or permanent. The manager of a mill, and an overseer have both such dominion over property. Neither of them is entrusted with the mill, but each has certain rights over it. As such, each possesses a certain dominion over it. If, therefore, either of them dishonestly converts to his own use that property it will amount to this offence. The prisoner was the miller of a mill in the county gaol, being paid a weekly salary as such out of the county rates, and it was his duty to direct persons who brought grain to be ground at the mill to obtain at the porter's lodge a ticket specifying the quantity of grain brought, and his duty there was to receive the grain with the ticket and the grinding fee and to account for it to the governor of the jail, who was in his turn responsible to the country treasurer. The accused received the grain in question without a ticket, and without directing the persons who brought it to obtain one, received the charges for grinding it, which he misappropriated. It was held

(6) *Wilson*, 9 C. & P. 27.
(7) *Kamal Krishna Bose*, 5 M. L. T. 141, 4 I. C. 1106.
(8) (1864) Weir (3rd Ed.) 266.
(9) *Per* Martin, B., in *Robson*, 31 L. J. M. C. 22, overruling *contra in Denmour*, 8 Cox 440.
(10) *Muku Lal Rai*, 96 I. C. (C). 501.

that he could not be convicted of embezzlement, as, though he had made an improper use of the mill by grinding the corn for his own benefit, he could not be said have received the money on behalf of his master.[11]

But such a case would be clearly within this clause, for the section is not restricted to embezzlement of money, and the phrase "Dominion over property" is wide enough to include such control. So such a dominion over property is acquired by a mortgagee in possession and by the mortgagor in possession in an English mortgage. If, therefore, such a person wilfully defaults and so causes it to be sold for arrears of Government revenue for the purpose of defrauding the mortgagee, and purchases it *benami*, he is liable to be punished for this offence.[12] In this view this offence may be committed as much in respect of moveable as of immoveable property. But the contrary has been laid down in two cases[13] in which this offence has been held to relate only to moveable property, that being the meaning of the term "property" as used in this connection in this and the subsequent sections relating to the same offence.

4427. Immoveable Property Excepted.—Both these cases were cases of pure trespass. In the Bombay case a person having died intestate, the Nazir was appointed to administer the estate and he deputed a subordinate to take possession of the house of the deceased. In the meantime one Girdhar had established himself in the house which he refused to vacate. He was convicted under section 404, but the Court held that section inapplicable, observing "that there seems to be much doubt whether immoveable property is within the meaning of section 404 of the Indian Penal Code; for, although as remarked by the referring Magistrate, property is the term used in the said section, the single illustration below the section refers to moveable property only, and the meaning and object of the section appears to be to prevent the unlawful appropriation of moveables between the decease of the owner and the time when the effects should, in ordinary course, be received by the heir or person authorized to receive them." This view was concurred in by Tucker and Gibbs, JJ., who disposed of the reference.[14]

More recently this case was followed by Beverley and Gordon, JJ., in a case in which the accused who was the Jemadar of an Indigo factory in charge of the Indigo plots had let out certain plots to ryots for his own benefit, and the sole question argued was whether such an act relating to land could amount to a criminal breach of trust. The learned Judges did not definitely commit themselves to any view but expressed the inclination of their mind to be in favour of the Bombay view, adding: "In this case the appellant was at most entrusted with the supervision or management of the factory lands, and the fact that he mismanaged the land does not in our opinion amount to a criminal offence under section 408. Be that as it may, we think that upon the

(11) *Harris*, 6 Cox. 363; *Cullum*, L. R. 2 C. C. 28.

(12) *Ram Manik Shaha* v. *Brindabun*, 5 W. R. (Cir.) 230.

(13) *Girdhar Dharamdas*, 6 B. H. C. R. 33: followed in *Jukdown Sinha*, 23 C. 372.

(14) *Girdhar Dharmadas*, 6 B. H. C. R. 33.

evidence the conviction cannot be sustained."[15] It may be added that the term "property" has undoubtedly been used by the Legislature to denote "moveable property" *e.g.*, in section 410-415. In section 410 which defines stolen property, the term "property" has been undoubtedly used to designate moveable property, for it speaks of property in connection with the offence of theft as of those in which the term used is ambiguous. Again, since these offences are only specific cases of theft it would be more appropriate to restrict the term only to moveable property.[16] The language of the section and also the fact that distinct sections provide for trespass favour the same view.

The accused, who was a forest guard, was convicted of this offence, because he had permitted a timber merchant to cut down and remove certain trees. The Court altered his conviction to one under section 379 on the ground that, trees being immoveable property, criminal breach of trust could not be committed in respect of them.[17] This view has been hesitatingly followed in a case in which the accused, who being appointed to watch a paddy field until the crop was ripe, cut and removed the crop as soon as it was ready. They were convicted of this offence, but on revision their conviction was supported either for this offence or under section 379 on the dual ground, that though when the crops were standing the accused was in charge of immoveable property till when they were severed, they still remained entrusted to him; and even if there was no continued trust, the Bombay case would support the accused's conviction under section 379.[18] As to the first reason it is submitted that what was entrusted was the standing crop: its cutting by the accused was never contemplated, and there could, therefore be no trust in respect of them.[19]

4428. The section does not require that the dominion over property should be a matter of contractual relationship, for it may be acquired in any manner so long as it is "entrusted" by another. The right thus acquired would partake of the nature of trust, though such dominion would, ordinarily, be acquired over immoveable property. But it may be equally as well acquired over moveable property, though in such a case it would be more correct to say that the property itself was entrusted to another. A certain municipality condemned a hackney pony as too diseased for work and as fit for destruction. For this purpose it came before a Magistrate who in the ordinary course would have ordered its destruction. But out of motives of humanity he made it over to the accused who professed to be the secretary of a Society for the maintenance of incurable animals. As a matter of fact, he alone constituted such Society. He took charge of the animal, and after keeping it for sometime and patching it up a little, sold it to another hackney driver for the work for which it had been already condemned. He was prosecuted for this offence, and the question

(15) *Jugdown Sinha*, 23 C. 372; dissented from in *Daud Khan*, (1925 A. 673.

(16) *Bhagu*, (1897) B. U. C. 928; *Durga Tewari*, 36 C. 758.

(17) *Bhagu*, (1897) B. U. C. 928; followed in *Durga Tewari*, 36 C. 758.

(18) *Durga Tewari*, 36 C. 758, following *Bhagu*, (1897) B. U. C. 928.

(19) *Rambilas*, 38 M. 639; *Kesho Ram*, (1889) P. R. No. 36.

raised on his behalf was that the accused could not be convicted of breach of trust, as there was no trust created in his favour, but it was held that a person who accepts a trust cannot turn round and dispute the title of his truster. Then it was said that the Magistrate had retained no property in the pony. But Blair, J., said, that as against the accused the Magistrate did retain a certain qualified property in the pony. It was true that there was no express agreement as to that or to any other effect, between the Magistrate and the accused, but the contract between them must be inferred from their position and surroundings. The pony had been manifestly made over to be maintained, with the implied promise to maintain and not to work it or to allow it to be worked. If the accused did not intend to fulfil that obligation he was bound to return it to the Magistrate, who had as against him property in the pony. His sale was, therefore, misappropriation of the pony, and both his conviction and sentence of three months rigorous imprisonment were consequently upheld.(20)

4429. Violation of Legal Duty or Contract.—A person may acquire dominion over property for a limited purpose, as in the case of the pawnee of goods, and he may then be guilty of this offence if he is guilty of the acts which constitute the crime. The question in such cases is: did the accused dishonestly misappropriate the property, or did he convert it to his own use, or did he dishonestly use or dispose of the property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied which he has made touching the discharge of such trust, or did he wilfully suffer any other person so to do? These acts imply the violation of (*i*) a legal duty, or (*ii*) legal contract, or (*iii*) criminal negligence enabling some other person to violate such legal duty or a legal contract. But the mere violation of such duty or contract is not criminal unless it was at the same time dishonest, and it manifested itself in some overt act, such as (*a*) misappropriation, (*b*) conversion to one's own use, (*c*) use or disposal of the poperty. The *mens rea* constituting criminality here consists then of dishonesty and violation of a legal or contractual obligation, but the act following upon such a state of mentality must be a positive commissive act.

(1) Violation of Legal Duty.

4430. In the first place, then, there must be the violation of a legal duty or a legal contract relating to the discharge of the trust. Such a violation must be, moreover, dishonest. The prosecutor entrusted some silver to the accused, who were silversmiths for the purpose of making certain ornaments. They alloyed it with copper, misappropriating an equal quantity of silver. It was held that they were guilty of criminal breach of trust and not cheating.(21) Why? Because they had contracted expressly or impliedly against adulteration, and in mixing the alloy they were guilty of violation of a legal contract touching the trust, and it was, moreover, dishonest and accompanied by misappropriation of property. The case was, therefore, one of criminal breach of trust,

(20) *Gouri Shankar*, (1894) A. W. N 197.

(21) *Babaji*, 4 B. H. C. R. 16.

and rightly so held. But if suppose, in such a case, the prosecutor had told the accused to use a certain quantity of good silver of their own in making the ornaments and the accused had then done what they did in the last case, then the offence would have been one of cheating and not of criminal breach of trust, because the prosecutor had then entrusted them with no property, for the property used was their own.

The accused was the servant of a liquor contractor and was, as such, entrusted with a certain quantity of liquor by his master to sell. For selling it he was allowed a certain quantity of the liquor for himself. He was liable to account for the remainder to his master who had forbidden its adulteration with water. The accused all the same adulterated it, and having sold it at the rate of unadulterated liquor, received an extra amount which he misappropriated to his own use. He was convicted of this offence, and it was held that his conviction was right, as he had dishonestly disposed of the property, in violation of a legal contract, which met all the requirements of this section.[22] So in another case the accused was given certain earrings to raise a loan of only Rs. 7, instead of which the accused pledged them for a larger amount, misappropriating the additional sum so raised. The facts were held to be sufficient to bring the offender within the scope of this section.[23] So a person may be guilty of this offence if he fails to account for the moneys received by him to another to whom he was bound in duty to render it. Such duty may be legal or conventional.

4431. The treasurer in a Bank or Government Treasury is bound to account to his official superior all sums received and paid out by him. The same obligation is cast upon other servants of Government who have in the course of their employment to receive and make payments. They would be, therefore, guilty of this offence if they, in violation of the direction of law convert to their own use property or money with which they are so entrusted within the course of their employment. But such direction of law, must be express and explicit, and it must prescribe the mode in which the property or money is to be used or disposed of. It cannot be assumed that because a certain person receives a payment on behalf of another he is bound to account to him for it *inslanter*, on pain of being charged for malversation if he fails to do so. In order to place a person under an obligation to account, there must be not only an obligation legally created, but it must, moreover, prescribe the mode in which it is to be discharged.

The accused was the servant of a baker and authorized to sell bread and collect bills, which he was ordered to pay on the evening of each day. The accused received three sums of such money on three different dates, but failed to pay them over to the baker, though he never denied their receipts. It was contended that as the prisoner had all along admitted receipt of the moneys, his mere omission to pay them was not embezzlement, but Coleridge, J., held that as it was the duty of the accused to account for and pay over all moneys received by him in the course of the day every evening, his wilful omission to do so was clearly

(22) *Jamsetji*, (1888) B. U. C. 395.

(23) *Gurumahanty*, (1894) 1 Weir 465; *Ramchand*, (1926) L. 385.

equivalent to a denial of the receipt of the money.[24] Of course, a person may not deny receipt of money and yet may go on misappropriating it. In such case the question is not what the accused said but what he did with the money which is the main point at issue.

4432. The mere violation of law or a legal contract is, however, only one element for consideration. The essential element is dishonesty. But for dishonesty the accused may pass off as a fool, though not a knave. But dishonesty stamps him as a knave, and it makes his act criminal if it is followed up by appropriation or use of the property to be presently considered (§§ 4433, 4434). The term "dishonestly" has been defined before,[25] and it has been there and since the subject of frequent references.[1] It has been used here in the same sense as in sections 378 and 403 as implying the intention of causing gain or loss by unlawful means of property to which a person gaining or losing is not or is entitled. The dishonesty must relate to the appropriation or wrongful conversion, and when it is only so, the offence is in substance criminal misappropriation. But where the dishonesty relates to the *use* or disposal of the trust property this offence may be completed, though there may be no criminal misappropriation. Where there is no evidence of it the accused cannot be convicted of this offence. Such was the case of the accused who was entrusted with certain property by Court. When called upon to produce it he evaded service and failed to produce it. It was held that he might be guilty of contempt of Court, but in the absence of proof of misappropriation he could not be convicted of this offence.[2].

(2) Dishonest Use or Disposal.

4433. The word "use" is of large import and may mean anything from a temporary employment to a permanent appropriation. But since it must be dishonest, it follows that the term as used here is restricted in its sense as meaning such employment as constitutes wrongful gain or wrongful loss. Where, therefore, the prosecutor gave his clothes to the accused, a washerman, to wash and the latter wore them and lent them to be worn by a man of low caste, so that it was rendered useless to the prosecutor, it was held that the act did not constitute dishonest use of the property within the meaning of this section.[3] The same view was taken of the pledgee of a turban who deteriorated it by wearing it.[4] In such cases the word "use" must be construed *ejusdem generis* with misappropriation, conversion or disposal of the property. So if a person keep his furniture with another for safe custody, and the other use it instead of keeping it, he could not be charged with criminal breach of trust, for such use is not dishonest, which it would be if it was pledged or lent on hire to another. The use or disposal of property is, therefore, by no means the most material

(24) *Jackson*, (1844) 1 C. & K. 384; *Lister*, 26 L. J. M. C. 62; *Chandra Prasad*, 5 Pat. 578 (V. P. clerk keeping money for more than 10 days, denying its receipt); *Devasikhamani*, 95 I. C. 943, (1926) M. 727 (Amin withholding receipts for 5 months); *Daga Shankar*, 29 O. C. 245, 94 I. C. 205, (1926) O. 398 (Non-crediting of moneys received).

(25) S. 24.

(1) *E.g.*, §§ 243-254.

(2) *Harnam Singh*, 16 A. L. J. 600, 47 I. C. 875, 19 Cr. L. J. 975.

(3) *Anon*, (1880) Weir (3rd Ed.) 269.

(4) *Anon*, 3 M. H. C. R. (App.) 6.

ingredient of the crime. But dishonesty is, and if it is present with the use for disposal of property, the only thing that then remains to complete the crime is the violation of a legal or conventional obligation. Indeed, it may even be added that in ordinary cases the presence of dishonesty implies the absence of a legal right, so that dishonest misappropriation would suffice to establish this offence, and of these dishonesty is all in all.

4434. Of course, dishonesty without use is not punishable, but there may be use without dishonesty, in which case there may even be a breach of trust, but it is not criminal.(5) The accused, a Police Sub-Inspector, was in charge of a cattle pound in which a pony was impounded which was put to sale. The Cattle Trespass Act,(6) under which the sale was held prohibits a police-officer from purchasing pound cattle directly or indirectly. The accused purchased the pony *benami*, but it was found that he had paid the approximate value of the animal. It was held that though the accused had disposed of the pony in violation of the direction of law, his act was not punishable under this section, because it was not dishonest,(7) which it would have been, if the price paid had been below its approximate value. So where the accused refused to deliver land which had been in fact mortgaged to them, but which they denied, it was held that the dispute was one of an ordinary civil nature and not one constituting this offence.(8) Such was held to be the case of a pleader who having the client's balance in his hand retained it towards his fee, though the recovery of it had become barred.(9)

So where a person withholds property on account of a *bona fide* dispute, there is no dishonesty, and consequently no offence. The accused was employed by the prosecutor and other persons to sell their paddy. The accused sold the prosecutor's paddy and realized the full price, but he withheld payment of a portion of the price on the ground that another person by name Naloo laid claim to it. The prosecutor charged him with this offence. Naloo was examined and he asserted his claim to the money withheld, but the Magistrate found his claim groundless. Naloo then brought a civil suit against the accused for recovery of the amount, but the latter was, before the disposal of the suit, convicted of this offence. It was found that there was a dispute as to the number of bags given by the prosecutor: Naloo claimed that some of the bags claimed by the prosecutor were his and given by him for sale to the accused. The High Court held that though this may be a false claim, still there was Naloo's civil suit to reckon with, and whether it was a false claim or not, the fact that there was a claim made, exculpated the accused who might have *bona fide* refused to deliver up money to the prosecutor when he was threatened with a hostile claim.(10) In this case, the hostile claim of Naloo was a reason and not a pretext for refusing payment, and such

(5) *Lanter*, (1913) A. C. 221; followed in *Gunanunda*, 29 C. W. N. 432, 86 I. C. 213, (1925) C. 613.
(6) S. 19, Act I of 1871.
(7) *Rajkristo Biswas*, 16 W. R. 52.
(8) *Jaffir Naik*, 2 B. H. C. R. 127.
(9) *Krishna Rao*, 6 N. L. R. 119, 73 I. C. 335, 24 Cr. L. J. 591.
(10) *Raj Kishore Patter* v. *Joy Krishna Sen*, 28 C. 362.

a case is conceivable. In that case the last case would be no authority for holding that the accused could not be convicted. But the verdict in the following case is by no means easy of comprehension.

The prosecutor employed the accused as his general agent in charge of petty suits instituted by his creditors against him. The prosecutor owed the accused Rs. 300. The latter had taken Rs. 32 on two occasions, and when called to account, falsely stated that he had paid it to a pleader as his fee. The Magistrate convicted him of this offence, but the High Court acquitted him holding that in view of the prosecutor's indebtedness to the accused "we do not think it can be held that the mere failure to give a correct and true account of the manner in which Rs. 32 was expended by the prosecutor's agent in numerous Small Cause Court proceedings necessarily implies a dishonest intention."(11) But it was not a case of a mere failure, and the prosecutor's indebtedness had nothing to do with the case.

4435. The fact is that the Code draws a distinction between a civil breach of contract and a criminal breach of contract. The last few cases cited were all instances of a civil breach, but in which the absence of dishonesty saved them from becoming criminal. Such was also the case of the accused who as President of a municipality, had drawn the pay of the municipal staff, but did not actually pay it out till a fortnight later. The money was in the neantime ready and available but not paid, and Scott and Jardine, JJ., thereupon held that the act disclosed no dishonesty, and that in the absence of dishonesty the accused could not be convicted of this offence. There was no doubt of the withholding of payment. It might be improper and might even amount to a civil breach of contract, but the offence required strict proof of dishonesty of which there was no vestige. The account books showed the money as duly received, it was not shown as paid out. There was the fact that the cash fell short of the Rs. 68, but it may well have been the result of a desire to hide the delay, but it was of itself no proof of dishonesty.(12) But, as the Court added, the case would have been different if the account books had been falsified, and the money withdrawn had not been shown as received, in which case the omission would have been suggestive of dishonesty.

This was apparently the *ratio decidendi* of another case in which the accused, who was the revenue patel, was made the intermediary for payment of two small sums of money to two other villagers who were entitled to receive them from Government. The accused received the sum, but did not pay them over to the persons to whom they were payable. But he got them to execute acknowledgments of their receipts promising to pay the amounts in eight days or so. The receipts were forwarded to the revenue authorities as vouchers of payment. The men never complained, but trusted in the honour of their patel to pay them, upon which the Court held that he could not be convicted of this offence, because he had duly discharged the trust reposed in him by the Collector by obtaining the receipts.(13) This case had been

(11) *Datta Ram*, 3 I. C. (B.) 285.
(12) *Ardeshir Merwanjee*, (1889) B. U. C. 484.
(13) *Ganpat Tapidas*, 10 B. 256.

animadverted upon by Irwin, C. J., of Upper Burma[14] who said: "The last reason I cannot endorse; I think that so far from fulfilling the trust reposed in him, he tried to deceive the Collector by submitting false evidence of payment." But why was it a false evidence? Suppose the patel had delivered the money and borrowed it instantly from the payees, would not the receipts have then been true? And what difference did it make if the same thing was understood both by the patel and the payees?

4436. Confusion of funds.—Mere retention of money does not necessarily raise a presumption of dishonest misappropriation. But it is one step in that direction.[15] If there is by law or contract a special place assigned for the keeping of money held on trust, the fact that it was not kept there, but was removed to another place would be a strong evidence of its dishonest use, but it will not be conclusive. But where no such separate place has been assigned the accused could not be charged with a misappropriation by mixing the trust money with his own and using it promiscuously. He is not then bound to earmark the identical coins, nor to assign them a separate place unless he is so obliged.[16] In such cases when the private and the trust money of a person is suffered to be held together, there may be a misappropriation, but it is then a matter of intent. The honest man would pay the sums to the proper recipient out of the mixed sum in his possession, while the dishonest one would simply form in his own mind the intention of not paying it. But so long as the matter is confined to intention the accused cannot be convicted. for his dishonesty cannot be proved. He must, then, do some overt act to establish it. Such act may consist of mere retention for such a length of time as would justify an inference that the accused did not intend to pay it.

Such was the case of the village headman who had been ordered by Government to collect plantain trees from the villagers and to pay for them at the rate of Rs. 15 per hundred. He collected them for three years, received their price, but did not pay it to the owners from whom he was supposed to have purchased the trees. He, on the other hand, collected the price of trees from those who could not supply them. The money was so retained for three years and it was held that the retention was for a sufficiently long time to constitute misappropriation.[17] Such was also the case of the income-tax clerk who received moneys, but failed to credit them into the treasury or in the remittance book, but took them home intending to credit them later on, and who was then convicted of criminal misappropriation.[18] But in this case, the accused was under a legal obligation to credit his receipts immediately into the treasury. His taking them home was then sufficient to constitute dishonest misappropriation.

(14) *Nga Tha Zani*, (1905) U. B. R. 19, following *Nga Hmut*, (1897-1901) U. B. R. 345.

(15) *Balthasar*, 41 C. 844; *Mathura Prasad*, 40 I. C. (A.) 303; distinguishing *Kadir Baksh*, 33 A. 249.

(16) *Lonier*, (1914) A. C. 221, 18 C. W. N. 98, P. C.

(17) *Nga Tha Zan*, (1905) U. B. R. 19; *Mathura Prasad*, 40 I. C. (A.) 303, distinguishing *Kader Baksh*, 33 A. 249.

(18) *Rama Krishna*, 12 M. 49; *Proud*, 31 J. M. C. 71; *Oliphant*, (1905) 2 K. B. 67, in which omission to account was shown to be in pursuance of a scheme of fraud; *see* s. 477-A, *post*.

4437. The fact that the accused had duly posted up the items received in the accounts, does not necessarily counteract criminality, though it is an indication of *bona fides*. The contrary was, however, laid down by Cresswell, J., in a case in which the prisoner was the master of a vessel owned by the prosecutors. He sold its cargo and received a price out of which he deducted a sum, which, on being questioned he falsely accounted for as due to short weight and the receipt of a part of the amount was admitted, but explained as appropriated in accordance with a mercantile custom, of which there was no evidence. But Cresswell, J., nevertheless held it to be no case of embezzlement, adding: "I think that this does not amount to embezzlement. Embezzlement necessarily involves secrecy; the concealment for instance, by the defendant of his having appropriated the money. If instead of denying his appropriation, a defendant immediately owns it, alleging a right or an excuse for retaining the sum detained, no matter, how frivolous the allegation, and although the fact itself on which the allegation rests were a mere falsification, as in the present case, and although it should turn out that there was no such difference as that asserted by the defendant between the tonnage as measured at Swansea and that at Plymouth, or that there was no such custom as that set up, I do not say to what species of offence this may amount, but, in my opinion, not to embezzlement."(19)

4438. It is submitted that the grounds for exoneration are here overstated. The question whether the explanation given by the accused is or is not sufficient, is a question of fact and not of law, and if it was *bona fide* believed by the accused it will probably be regarded as a sufficient defence; for if his act was *bona fide* it could not be dishonest.(20) Such was the case of the nazir of the Court of a Magistrate who was convicted of having criminally misappropriated a sum of Rs. 52-6-3. It appeared that his accounts were in order, but in accordance with an old practice the officials used to draw upon the accused for advances according to their requirements. This was purely a private matter, and the officials concerned, paid back the loans on receipt of the pay. He had made such advances when his cash was checked and disclosed the deficiency. The Magistrate ordered him to make it good and he did so. It was held that the accused could not be convicted therefor as there had been no dishonesty.(21)

So it was pointed out in another case of a salt daroga that the mere fact of there being a large deficit of salt in his charge is not sufficient to fasten on him criminal liability under section 409, for which there must be distinct proof of a criminal misappropriation. Such a person may have been negligent, but negligence may be a good ground for civil liability, but it does not suffice to establish a criminal charge of this magnitude.(22) Indeed, as was pointed out in a case, the correct entry may have been itself made to avert suspicion and in order to deceive,(23) "made with forethought and a view to this defence."(24)

(19) *Norman*, C. & M. 501.
(20) 1 Hale P. C. 507; 1 Hawk, P. C. C. 33, s. 8; *Farre's case*, Kel. 43; *Hall*, 3 C. & P. 409; *Holloway*, 5 C. & P. 524.
(21) *Imam Din*, (1902) P. L. R. 157.
(22) *Brinbadhur Putnaik*, 5 W. R. 21.
(23) *Lister*, D. & B. 118; overruling *Cread*, 1 C. & K. 63. To the same effect *Guelder*, Bell, C. C. 284.
(24) *Guelder*, Bell, C. C. 284.

On the other hand, the absence of an entry may appear to be accidental and due to carelessness in which case it will be no evidence of misappropriation.(25) All the same there are cases decided in England where the denial of receipt(1) or the absence of entry(2) is insisted upon as necessary to establish a charge of embezzlement. But though these are valuable tests of dishonesty they are not the *sine qua non* for a conviction.(3) There is, however, a wide difference between a mere omission to enter in the accounts or to account, for the receipt of money, and a wilful falsification of an account, for which the former may be consistent with innocence and the latter not.

4439. Wilfully Suffering Dishonest Use or Disposal.—Dishonesty may be proved or presumed from circumstances. But it cannot be assumed as a matter of course. The accused who was the tindal of a cargo-boat, was entrusted with 200 hides to be carried to a steamer. On delivery on the steamer twenty-two hides were missing upon which the accused was convicted of this offence. It was held that there was no evidence of dishonesty, nor could dishonesty be inferred from the mere fact that some of the hides disappeared from the boat. The accused may have been negligent, but he was not dishonest.(4) The crew or some of them may have committed the theft, but the accused could not be convicted unless there was evidence of at least wilful sufference which must at least amount to abetment. The accused was the mother of a child and to whom the prosecutor, a vaccinator, paid two annas as price of the lymph which he wanted to take out of the child whom he had recently vaccinated and whom the accused promised to take for that purpose to a village named. She failed to do so, and thereupon she was prosecuted for this offence, but the Court held it to be no case of criminal breach of trust.(5)

4440. Civil Breach of Trust.—Though the ingredients of this offence are somewhat broadly stated, there is no doubt as to their meaning. This group of sections was intended to punish an offence of which dishonesty is the essence. Any breach of trust is not an offence. It may be intentional without being dishonest, or it may appear dishonest without being really so. In such cases the Magistrate should be slow to move.(6) This caution is all the more necessary, since there is a natural desire to secure speedy justice by having recourse to criminal law, a flagrant example of which is the following case. The pawnee of certain jewels had obtained a decree for their sale. He made them over to the pawner and executed in his favour a receipt for full payment of the decree. Subsequently, he prosecuted him for criminal breach of trust alleging that his receipt was nominal, and that he had in fact entrusted the jewels to the accused to raise money on for payment of his decree. The Magistrate believed the story and convicted the accused, but on revision the High Court naturally threw out the case

(25) *Jones*, 7 C. & P. 833.
(1) *Per* Bolland, B., in *Jones*, 7 C. & P. 834.
(2) *Norman*, C. & M. 501.
(3) *Jackson*, 1 C. & R. 384; *Lister*, 26 L. J. M. C. 62.
(4) *Ramaya*, (1904) 10 Bur. L. R. 170.
(5) *Satawa*, (1891) B. U. C. 557.
(6) *Koorathalwar*, (1920) M. W. N. 346, 55 I. C. 469, 21 Cr. L. J. 309.

animadverting on the magisterial procedure of inquiring into the *bona fides* of a receipt on which even Civil Courts would not find it easy to decide.(7)

Another case equally instructive had to be decided by the Privy Council. There the accused was instructed to invest certain minor's money in a most remunerative way which he did by including it in the trading capital of a Bank of which he was a partner. He paid the interest due thereon and allowed even overdrafts on the minors' accounts. All of a sudden the minors' guardians demanded the money which the accused was unable to produce *in specie*. He, however, gave a sufficient security, but nevertheless he was convicted but the Privy Council had to interfere "not on any matter of form," but "that the facts did not on any just or legal view of them warrant a conviction."(8) The transition between such cases and those in which there is a doubt as to the trust or dishonesty or any other ingredient constituting the offence, is not gradual, though cases in which a payment due is merely delayed,(9) though not delayed beyond the possibility of mere negligence,(10) or where there is a claim of right, or a confusion of accounts (§ 4436),(11) and errors therein due to ignorance or negligence or a mistaken procedure,(12) fall into the same category. But as these cases relate to rather evidence than to the principle of the crime, they will be found discussed in the sequel.

4441. No Offence.—Two things are essential to constitute this offence. In the first place there must be a trust, and in the second place dishonesty. Where there is one and not the other it may be a case of civil breach of trust but not one imposing criminal liability. There remain cases in which there is no breach of trust at all. Such was the case of the pledgee of goods who had sub-pledged them to another which he was held fully entitled to do.(13) The accused was employed to collect certain dues out of which he was entitled to certain percentage as his commission. He had to deposit the balance in the treasury, but no period was fixed within which he was to do so. It was held that his retention of the money did not expose him to this charge.(14) If, of course, the prosecution fail to prove the trust, they fail in their first duty to bring the offence home to the accused.(15) The accused was the managing director of a Bank. As such, he drew certain Hundis on another bank the amount of which he credited in the floating account of his own bank. Some months later, he caused an entry to be made debiting the Bank with the cost of the Hundis he had purchased. It was clear that he had committed no criminal breach of trust.(16)

(7) *Gokavarapu*, (1916) 2 M. W. N. 158, 36 I. C. 866.

(8) *Lonier*, (1914) A. C. 221, 18 C. W. N. 98.

(9) *Balthasar*, 41 C. 844; *Kadir Baksh* 33 A. 249.

(10) *Mathura Prasad*, 40 I. C. (A.) 303.

(11) *Giles Seddon* v. *Loane*, 9 M. L. T. 20, 8 I. C. 325. For a case on the other side of the line, see *Daulat Rai*, (1915) P. R. No. 28, 29 I. C. 105.

(12) *Daulat Rai*, (1915) P. L. R. 162, 29 I. C. 86.

(13) *Sarju Prasad*, 9 O. L. J. 421, 71 I. C. 58, 24 Cr. L. J. 10, (1922) A. I. R. (Oudh) 280.

(14) *Nurul Hassan*, 56 I. C. Pat. 669, 21 Cr. L. J. 509.

(15) *Gour Narayan* v. *Til Bikram*, 25 C. W. N. 838, 65 I. C. 1004, 23 Cr. L. J. 220.

(16) *Daulat Rai*, (1915) P. W. R. 24, 29 I. C. 86, 16 Cr. L. J. 454.

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp.

Punishment for criminal breach of trust.

[*Criminal breach of trust*—s. 405.]

Synopsis.

(1) *Analogous Law* (4442).
(2) *Procedure and Practice* (4443-4449).
(3) *Venue* (4444).
(4) *Change in procedure since* 1898 (4445).
(5) *Charge affects only criminal breach of trust of money* (4446).
(6) *Forfeiture* (4450).
(7) *Proof* (4451).
(8) *Form of Charge* (4452, 4453).
(9) *Evidence of criminal breach of trust* (4454).
(10) *Burden of proof* (4455).
(11) *Breach of hire-purchase Agreement* (4456).
(12) *Breach of duty* (4457).

4442. Analogous Law.—This section prescribes punishment for the simple offence of criminal breach of trust—its three aggravated forms being dealt with in the three ensuing sections. Thus the next section deals with the offence committed by a carrier, wharfinger or warehouse-keeper, while section 408 deals with the same offence committed by a clerk or servant, and section 409 with a public servant. In all these cases the circumstance of aggravation is the position and nature of trust reposed in the accused, the abuse of which law esteems as specially flagrant and calling for commensurately enhanced punishment.

In this respect English Law is identical, for it also regards such cases as those of aggravated larceny.(17)

4443. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class. As this offence is non-compoundable, the Court has no power to recognize a compromise of the case made by the prosecutor with the accused, nor does the fact that the latter had given a bond to the former prevents his prosecution,(18) howmuchsoever scandalous may be the conduct of the prosecutor in turning round upon a person with whom he had compounded the case.(19) But in such a case, if the prosecutor is agreeable, the practice of the Courts is to permit the prosecutor to secure

(17) By bailee generally—24 & 25 Vict., c. 96, s. 3; *Wells*, 1 F. & F. 109; *De Banks*, 13 Q. B. D. 29; *Bellencontre*, (1891) 2 Q. B. 122; *Bunkall*, 33 L. J. M. C. 75; *Aden*, 12 Cox. 512; *Davies*, 10 Cox. 239. By clerks or servants—24 & 25 Vict., c. 96, s. 67; misappropriation by servants, 26 & 27 Vict., c. 103, s. 1 (*see* s. 38, *ante*): By public servant,—24 & 25 Vict., c. 96, s. 69. By customs officer—39 & 40 Vict., c. 36, s. 29.

(18) *Mayandi Pillai*, (1886) 1 Weir 462; *Ramasami Nadan*, (1883) 1 Weir 465.

(19) *Daly*, 9 C. & P. 342; *Bryant*, 27 J. P. 277 (289).

a discharge of the accused by offering no evidence.[20] Ordinarily, the criminal Court will not inquire into the benami character of a transaction. It will rest content by assuming the existence of title in one who had possession.[21]

Venue.

4444. One or two points relating to practice call for notice here. As regards the venue it has been held in England that a servant committing criminal breach of trust in respect of his master's money in Paris, cannot be tried in London where his employer suffered the loss in consequence of his embezzlement.[22] But on the point, the rule enacted in the Procedure Code is said to be wider.[23] So that if the master live at Cawnpur, and the servant commit criminal breach of trust in Manbhum, he may, it was held, be tried for the offence equally in both places.[24] But this view has been dissented from in Madras where the rule in consonance with the English Law is followed.[25] In any case where the place for account is fixed it is the place for trial for a breach of contract.[1] As has been remarked under section 403 (§ 4371), an offence under this section may consist of a number of specific items running over a number of years, and each one of them singly and all of them collectively may have been misappropriated so as to be properly made the subject of a prosecution. At one time there was a considerable diversity of views as to whether in such a case, it is legal for the prosecution to charge the accused for an aggregate of embezzlements, without specifying each item separately. This conflict was set at rest by the addition of the following clause to section 222 of the Procedure Code[2]:—

"S. 222. (2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234:

"Provided that the time included between the first and last of such dates shall not exceed one year."

Change in Procedure since 1898.

4445. Prior to this clause, the High Courts were by no means agreed as to the legality of charging a person for a general deficiency without specifying the particular items in account which were alleged to have been misappropriated. This is the rule of English Law,[3] and it was held to apply to the Code,[4] but in England there is a sharp conflict of view on the subject. For while there are cases which hold with Alderson, B., that "it is not sufficient to prove at the trial a general deficiency in account; some specific sum must be proved to be embezzled, in like manner as in larceny some

(20) *Roxburgh*, 12 Cox 8.
(21) *Harry Jones*, 28 C. W. N. 831.
(22) *Oliphant*, (1905) J. P. 175; to the same effect, *Rambilas*, 38 M. 639.
(23) S. 179, Cr. P. C.; *O'Brien*, 19 A. 111, followed in *Mahadeo*, 32 A. 397; *Langride* v. *Atkins*, 35 A. 29; *Assistant Sessions Judge* v. *Ramaswami*, 26 M. L. J. 235; dissented from in *Rambilas*, 38 M. 639; *Ganeshi Lal* v. *Nandkishore*, 34 A. 487.
(24) *O'Brien*, 19 A. 111.
(25) *Rambilas*, 38 M. 639; *Simhachalam* v. *Rati Kant Laha*, 21 C. W. N. 573.
(1) *Gunanunda*, 29 C. W. N. 432, 86 I. C. 213, (1925) C. 613.
(2) Act V of 1898.
(3) 2 Russ. Crimes, Bk. 4, c. 19, s. 4; *Lloyd Jones*, 8 C. & P. 228; *Wolstenholme*, 11 Cox 313.
(4) *Ramchand Govind*, 19 B. 749 (conceded *per* Jardine, J.).

particular article must be proved to have been stolen,"[5] there are as many and more cases in which the Judges have laid down the contrary.

Thus in one case Erle, J., combated the opposite view, adding: "I think that the offence is sufficiently made out within the meaning of the Statute, if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself, and that he absconded, or refused when called upon to account, leaving a portion of the gross sum deficient. There would be constant failure of justice if I were to decide otherwise, since it is impossible in cases like the present, where a number of different amounts of money have been received, to specify which sum or sums, or the part of which sum or sums have been embezzled."[6] This has been legalized by the Larceny Act, 1861.[7] But no such provision existed till the Procedure Code of 1898 which has now, by adding the clause, brought the law in line with the recent English view. This clause is in conformity with several cases so deciding,[8] while it has necessarily the effect of overruling those in which the specification of items was held to be essential.[9]

Charge Affects Only Criminal Breach of Trust of Money.

4446. Of course, clause 2 of s. 222 of the Procedure Code, manifestly deals only with *money*. It has no application to any other property. If, therefore, a person is accused of criminal breach of trust in respect of several things other than money, he would have to be separately charged with and tried for each thing separately, and it is illegal to try him for more than three things so misappropriated within the space of twelve calendar months.[10] In such cases, the obvious duty of the prosecution is to select three typical cases so as to bring the offender to justice without subjecting him to multifariousness. This is commendable even in the case of misappropriations of money,[11] though in such a case, it is permissible to pass in review all the items embezzled within the same period, provided that the accused is charged for misappropriation of an aggregate sum as now provided in cl. 2 of section 222 of the Procedure Code. But this is merely permissive and not obligatory, and if the accused has reason to object to the trial on the ground of multifariousness, the Court may see reason to confine the inquiry to a narrower compass, or even specify the items in respect of which the accused is to be tried, from which it, of course, follows that the accused cannot complain of multifariousness if, in addition to the charge being for a general deficiency, it specifies the items which is entirely to the accused's advantage.[12]

(5) *Per* Alderson, B., in *Lloyd Jones*, 8 C. & P. 288; followed *per* Williams, J., in *Chapman*, 1 C. & K. 119; *per* Bret, J., in *Wolstenholme*, 11 Cox. 313.

(6) *Lambert*, 2 Cox 309; to the same effect, *Moah*, 25 L. J. M. C. 66; *King*, 12 Cox 73. This is now provided by Statute 24 & 25 Vict., c. 96, s. 71, which overrules cases deciding otherwise.

(7) 24 & 25 Vict., c. 96, s. 71.

(8) *Kellie*, 17 A. 153; *Buddhu* v. *Babulal*, 18 A. 116; *Lachmi Narayan*, 14 C. 128.

(9) *Ram Chand* v. *Govind*, 19 B. 749; *Cheer*, 15 W. R. 5; *Luchmi Narain*, 14 C. 128; *Coverjee Hari Dass*, 24 C. 193; *Ekram Ally*, 2 C. W. N. 341.

(10) Criminal Procedure Code (V of 1898), s. 234.

(11) *Villikkat Govinda Menon*, (1883) Weir (3rd Ed.) 270.

(12) *Gulzari Lal*, 24 A. 254; *Ishtiaq Ahmad*, 27 A. 69; *Set Narain Tewari*, 32 C. 1085.

4447. But whether it is so or not, the prosecution have in any case to establish a *prima facie* case of criminality against the accused. They have, therefore, to overhaul the accounts generally with a view to see where and when the accused commenced embezzlement. And though in such a case, the charge must be confined to the specific sum of items charged, it is allowable to take in the other acts of embezzlements to prove that the items in dispute could not have been omitted or falsely entered by negligence or mistake.(13) So where on an indictment for embezzling three sums of money, the prosecution had tendered all the account books maintained by the accused in evidence, and the accused objected to the books being generally tendered in evidence, contending that the charge must be confined to the three items specified in the indictment, the Court overruled the objection and upheld the conviction.(14)

So in another case, the account-books were tendered to show that the accused had entered the individual items correctly, but had wrongly totalled them and that from week to week the same mistake was repeated. Williams, J., held that evidence of a series of similar errors, both before and after those which formed the subject of the indictment, was admissible. It was clear that the defence to the three charges would be that these were mere errors in casting up the accounts, and such defence naturally arising, any lawful means might be resorted to whereby such defence might be anticipated, and proved to be ill-founded; and evidence which was admissible for such a purpose was not the less so because it tends to prove the commission of other felonies by the prisoner.(15)

4448. The question of dishonesty is a question of fact and should be left to the jury who are the sole Judges of criminal intention.(16) The offence of the accused may be held proved from their refusal to return it or to account for it.(17) But the mere failure to return it will not of itself support it.(18)

A person charged with the misappropriation of a sum of money, cannot be convicted of the misappropriation of goods and *vice versa*.(19) Where, therefore, the accused was so charged, he was held entitled to show that the missing goods were never converted into money which he could have misappropriated. If in such a case, there is no evidence that the goods have been converted into cash, the Judge ought not to leave the question to the jury whether the goods have been converted into cash, for them to arrive at a conclusion by mere guess-work.(20) So where the prosecutor had delivered to the accused, an auctioneer, three pieces of furniture for sale, and the charge referred to the accused having misappropriated Rs. 109, being their sale proceeds, the Court quashed the conviction, holding that that amount had never been entrusted to the accused.(21) Then, again, the offence must be completed within the period charged. Where, therefore, the accused was charged for offences committed between the 17th August 1909 and 15th August 1910, and the evidence

(13) S. 15 ill. (*b*), Indian Evidence Act (I of 1872); *Proud*, L. & C. 97; *Richardson* 2 F. & F. 343.
(14) *Proud* L. & C. 97.
(15) *Richardson*, 2 F. & F. 343.
(16) *Drewett*, (1905) 69 J. P. 37.
(17) *Jagannath v. Deokinandan*, 29 I. C. (C.) 671.
(18) *Mathura Prasad*, 40 I. C. (A.) 303, 18 Cr. L. J. 655.
(19) *Bipra Das* v. *Niradamani*, 12 C. W. N. 577; *Balthasar*, 41 C. 844.
(20) *Clarke*, (1905) 69 J. P. 150.
(21) *Balthasar*, 41 C. 844.

pointed to the misappropriation having been made in February and May 1911, the Court acquitted the accused, holding that no offence had been committed between the dates charged.(22)

4449. Since this offence consists in misappropriation, etc., by a person *entrusted* with property, or dominion over property, it is necessary to establish a trust, though it is not necessary that the trust should be express or created by writing.(23) But if no case of trust is proved, the offence may be one under section 403, or under section 379,(24) but no case under this section could then be held to have been made out.

4450. Forfeiture.—A case in which the Court had on conviction for this offence, ordered the forfeiture of the rents and profits of the accused's estate,(25) has no significance now since the penalty of forfeiture is abolished.

4451. Proof.—The points requiring proof are:—

(1) That the accused was entrusted with property or with dominion over it.(1)

(2) That he—

(*a*) misappropriated, or
(*b*) converted to his own use, or
(*c*) used it, or
(*d*) disposed of it.

} Para 4375

(3) That he did so dishonestly.(2)

(4) That he did so in violation of—

(*i*) any direction of law prescribing the mode in which such trust was to be discharged, or

(*ii*) any legal contract, express or implied, which he has made touching the discharge of such trust; or

(5) That he wilfully suffered any person to do as in (2), (3) and (4) (*i*) or 4 (*ii*).

4452. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you being entrusted with——(*mention the property*) committed criminal breach of trust, and that you thereby committed an offence punishable under section 406 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

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(22) *Pramotha Nath Roy*, 17 C. W. N. 479, 19 I. C. 315.
(23) *Piper*, (1902) 95 J. P. 10.
(24) *Durga Tewari*, 36 C. 758.
(25) *Amrit Lal*, 29 A. 25; *Mohomed Akhbar*, 12 W. R. 17.
(1) *Piran*, 85 I. C. 839, (1923) L. 321. Property must not be worthless; *Singhleton* 29 C. W. N. 260, 86 I. C. 38, (1925) C. 501.
(2) This is the gist of the crime and must be clearly proved; *Bishambar*, 87 I. C. 962, (1925) O. 676; *Hay*, 28 O. C. 230, 88 I. C. 830, (1925) 469 (evidence in case of conspiracy).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4453. There is a clear distinction between this offence and other cognate offences, *e.g.*, theft or criminal misappropriation, or cheating. (sections 403 and 415). The accused against whom his creditor had sued out execution, seized his moveables which were deposited with one *A* for safe custody. *A* died, whereupon the accused took the property and appropriated it to his own use. He was convicted of this offence, but in revision his conviction was altered to one under section 379 in that *A's* possession was possession of the Court, and his removal therefrom with a dishonest intention constituted theft, and since he had never been entrusted with its possession, there could be no criminal breach of trust.(3) One set of account-books constitutes a single item of property, and would justify only a single charge, and the accused cannot be charged in respect of each account-book as a separate item of property.(4) The accused induced his employer to pay him sums of money which he falsely alleged were required to pay labourers in the owner's coffee plantation. He misappropriated them, and the question was whether the offence was cheating or one under section 408. But since there was an abuse of trust by a servant, the Court held section 408 more appropriate.(5)

4454. Evidence of Criminal Breach of Trust.—All the ingredients of this offence are set out in its definition in the last section, under which they will be found discussed (§§ 4416-4449). This section merely prescribes a penalty for that offence. As such, it punishes an offence which is not within the comprehension of sections 407-409 which deal with the same offence when committed by persons occupying a position of greater confidence. This section only deals with cases not otherwise provided for. But whether the offence necessarily falls under this or any other section relating to the same subject, it must necessarily possess the common ingredients specified in section 405. They require that there should be a trust, between one person and the accused, and that in pursuance of that trust, some property, whether moveable or immoveable should be made over to another, or that he should be assigned certain rights over it (§§ 4417-4426). That taking advantage of such possession or control the accused should have either misappropriated it (§§ 4379-4388), or converted it to his own use (§§ 4429-4438), or that he should have otherwise used it or disposed of it (§§ 4433, 4435) dishonestly, which must be in breach of the trust either constituted by violating a provision of law prescribing the manner in which the trust was to be discharged (§§ 4430-4432) or of any contract made with *cestui que trust* relating to its discharge (§ 4429).

Such contract must be *legal*, for if it is illegal no Court will punish for refusing to do an illlegal act. The contract may, however, be express or implied, but if implied, it must be necessarily so, for otherwise the accused may plead misunderstanding or mistake, the offence may be committed

(3) *Chunnoo*, 8 A. L. J. 656, 11 I. C. 142; but could the Court alter the offence on revision?—*Thoppulan*, v. *Sankrannarayana*, (1914) M. W. N. 483, 24 I. C. 176.

(4) *Promotha Nath Ray*, 17 C. W. N. 479.

(5) *Ramappa*, 22 M. L. J. 112, 13 I. C. 108; following *Q* v. *Cooke*, 40 L. J. M. C. 68.

either by the accused himself doing those acts which are pointed out as criminal, or "wilfully suffering" another person to do so, in which case there must be not only evidence of negligence or omission or dereliction of duty but of a conscious connivance of the act with full knowledge of its criminal character, or in short abetment. Such was held to be the case of the accused who was employed as the Municipal water works Inspector to supervise and check the distribution of water from the Municipal water works. He appropriated water for his own use and that of his tenants without payment. He was held guilty of criminal breach of trust under s. 408, in that, being entrusted with water for sale he misappropriated a part of it for his own use.(6) In another case the Sanitary Inspector of a Municipality had sold the rubbish and night soil instead of depositing it in a place fixed for it. He was convicted of this offence under s. 409,(7) (§§ 1023-1028).

4455. Burden of Proof.—As the offence consists of misappraprіation or misuse of the money, the burden of proof is on the prosecution to prove not only that property was delivered or money paid to the accused on trust, but that he criminally abused it by misappropriating or misapplying the money—or in other words, that he did *not* apply for the purpose for which it was given to him. So if the accused plead that he had paid the money he was called upon to account to the proper person(8) or give an account to an agent of his employer,(9) it is in the first place on the prosecution to prove that he had not paid the money or given the account. The mere fact that the payment was delayed is no ground for imputing a criminal intention(10) (§ 4436). Nor is the mere fact that the accused had mixed up the account of the prosecutor with his own, criminal.(11) The accused was instructed by the guardian of certain minors to collect and invest funds belonging to the minor so as to give him the largest yield. He mixed up the account of the minor with those of the Bank of which he was a partner. The amounts so received were credited to the minor's account and advances made thereon, sometimes the minor's account being even overdrawn.

The gist of the charge against accused was that he had mixed up the two accounts, and that he was unable to produce the money when called upon to do so, upon which Lord Shaw observed: "The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility which, of course, may be imposed by statute, a Court of justice cannot reach the conclusion that a crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty

(6) *Bimala Charan Roy*, 35 A. 361.
(7) *Heri Lal*, 45 A. 281.
(8) *Hari Dayon*, (1896) B. U. C. 872.
(9) *Ram Chandra Ganesh*, (1896) B. U. C. 860.
(10) *Balthasar*, 41 C. 844; *Mathura Prasad*, 40 I. C. (A.) 303; *Nurul Hassan*, 56 I. C. (Pat). 669, 21 Cr. L. J. 509.
(11) *Lanier*, (1914) A. C. 221, 18 C.W. N. 98 P. C.

mind."[12] Such was also the case of the accused who was the complainant's landlord, to whom the latter paid Rs. 90 as rent of his land. The accused took Rs. 25 therefrom, stating it was a *Swadeshi* subscription. He demanded Rs. 25 more and refused to give the complainant a receipt till it was paid. He was convicted under ss. 406 and 417; but in revision the Court quashed his conviction holding that an illegal demand did not amount to a crime.[13]

4456. Breach of Hire-purchase Agreement.—The accused had taken a motor car under the hire-purchase agreement stipulating that he "shall not during the hiring, assign, underlet, or part with the possession of the same in any way whatsoever." In violation of the agreement he mortgaged the car to three different persons who were given under their respective mortgages, either the right to recover possession of the car or to bring it to sale. He was convicted of this offence, and on appeal Beaman, J., doubted if he could be convicted, but on the case finally coming on for hearing before another Bench, his conviction was upheld on the ground that he had violated his contract and that his conduct was dishonest within the meaning of section 24, in that he had caused wrongful gain to himself and wrongful loss to the owner who would have to fight the mortgagees for his priority.[14] This decision is unquestionably right, since the property in the car being still with the complainant, the conduct of the accused was scarcely distinguishable from that if he had hired a car from a garage for a day and then sold it to another appropriating the proceeds. In other words, he was not the owner but a mere bailee of the car.[15]

In another case the accused received some jewellery on approval, promising the payment of price if accepted. He kept the goods but never paid the price. It was held that property in the goods did not pass to the accused because he had not paid the price, and that, therefore, his retention of them constituted an offence under this section.[16] But where the complainant had delivered a motor car to the accused on a hire-purchase agreement, there being an express agreement that the car was to remain the absolute property of the complainant till its full price was paid, he sued for the price and obtained a decree after which the accused sold the car. It was held that since the original contract became merged in the decree, the property in the car was no longer in the complainant, and that, therefore, its sale by the accused was not punishable under this section, though the accused might still be proceeded against under s. 206[17]

Breach of Duty.

4457. The accused in another case, was the Waterworks Inspector of the Cawnpur Municipality. He rented two houses, one of which he sublet, and to convenience the sub-lessee he secretly tapped the main and joined it on to the house, recovering the water tax from his sub-tenant which, of course, he appropriated to himself. The fact having become known he was convicted of this offence

(12) *Lanier*, (1914) A. C. 221, 18 C. W. N. 98 P. C.

(13) *Kumeda Charan Ghose*, 15 C. L. J. 515; distinguishing *Khoda Bux* v. *Bakaya*, 32 C. 948.

(14) *Selas Moses*, 17 Bom. L. R. 670; *Maung Mya Gyi* v. *Nga Po Shwe*, 7 Bur. L. T. 222, 24 I. C. 161; *Khitish Chandra* 51 C. 796; *Cadd*, 45 A. 288.

(15) But everything depends upon the contract; *Kedar Nath*, 73 I. C. 807, 24 Cr. L. J. 695.

(16) *Khitish Chandra*, 51 C. 796.

(17) *Cohen*, 40 I. C. (C.) 728, 18 Cr. L. J. 728.

and his conviction was upheld on the ground that in misappropriating the water he had committed an offence under s. 408, and as regards the water-tax his offence fell under this section.(18)

There can be, of course, no conviction, when there is a doubt as to the purpose for which the accused was entrusted with the money.(19)

For further commentary on this section, *see* s. 405.

Criminal breach of trust by carrier, etc.

407. Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp.

[*Criminal breach of trust*—s. 405.]

Synopsis.

(1) *Analogous Law* (4458).
(2) *Procedure and Practice* (4459).
(3) *Proof* (4460).
(4) *Form of Charge* (4461).
(5) *Criminal Breach of Trust by Carrier and Common Custodian* (4462-4463).
(6) *Wharfinger* (4464).
(7) *Warehouse-keeper* (4465).

4458. Analogous Law.—This section deals with bailees entrusted with storage or conveyance of goods. As such, the bailee being in sole charge of them for a special purpose and for which he is presumably paid, it lies with him to take special precautions for their safe custody. And his offence is for the same reason considered specially heinous if he abuses the special trust reposed in him and pilfers the very goods it is his duty to protect.

4459. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

4460. Proof.—The points requiring proof are:—

(1) That the accused was entrusted with property, or with dominion over property.

(2) That he was so entrusted as a carrier, wharfinger or warehouse-keeper.

(3) That he committed criminal breach of trust in respect of it.

4461. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

(18) *Bimala Charan Roy*, 35 A. 361. (19) *Duli Chand*, 38 I. C. (C.) 997.

"That on or about the——day of——at——you being entrusted with ———(*mention the property*) as a carrier or wharfinger or warehouse-keeper committed criminal breach of trust in respect of it, and that you thereby committed an offence punishable under s. 407 of the Indian Penal Coed, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4462. Criminal Breach of Trust by Carrier and Common Custodian.—This section prescribes an enhanced punishment for criminal breach of trust committed by a carrier, wharfinger or warehouse-keeper. The property that would be entrusted to these persons would naturally be moveable property, but it must be *entrusted* to them in their capacity as carrier, wharfinger or warehouse-keeper. A carrier must be, it is conceived, a common carrier as referred to in the Carriers Act,(20) and who is defined to be a person other than the Government, engaged in the business of transporting for hire property from place to place, by land or navigation, for all persons indiscriminately. The Indian Railways are carriers, though their liability is specially limited.(21) But these limitations affect only their civil liability. But they are "carriers" all the same for the purpose of this section. The liability of a person as carrier depends upon the liability he is under to deliver to a person named, goods *in specie*. He ceases to be a carrier, if he is entrusted with the duty or is at liberty to convert the article delivered to him into something else, before he returns it or delivers it to other persons to whom he is entrusted to deliver it.(22)

The prosecutor entrust his mare to the prisoner for sale on the following Wednesday. He sold the mare and absconded with the proceeds of sale. He was convicted as bailee of the money,(23) but Stephen, J., dissenting, held that bailment implied "a deposit of something to be returned *in specie*."(24) The prosecutor engaged the prisoner a carter, to bring him half a ton of coal from a coal-staith for which he gave him money. The prisoner brought the requisite quantity of coal in his own name, loaded them in his own cart, and while conveying them to the prosecutor abstracted a quantity therefrom, the residue being delivered as the coals purchased as required. It was held that he was liable as a bailee.(25) The same view was taken in another case in which the carter misappropriated the money before he ever purchased the coals.(1) If such cases arose under the Code the accused would be liable under the general provisions of section 406, but it is doubtful if he would be held to have been entrusted with the money as a *carrier*. No doubt the money was entrusted to the accused because he was a carrier, but then it was not to be conveyed *in specie*. Such a case arose where a carter was employed by the owner of a cargo of coals to load the coals in the carter's own carts from the ship, and to deliver

(20) Act III of 1865, moulded on The English Carriers Act, 1830 (11 Geo. IV & 1 Will. IV, c. 68).
(21) *Ib.*, s. 2.
(22) Indian Railways Act (IX of 1890) ss. 72-82.
(23) *De Banks*, 13 Q. B. D. 29 (31).
(24) *Ib.*, p. 32.
(25) *Bunkall*, 33 L. J. M. C. 75.
(1) *Aden*, 12 Cox 512.

specified quantities to certain persons. He sold two loads of the coals dishonestly to persons whose names were not mentioned by the owner and misappropriated the price. He was held liable as the bailee of the two loads.[2]

4463. Of course, a carrier may be entrusted with "property" of any kind, whether money or any other thing whether of value or otherwise. For instance, a carter may be engaged for treasury remittance, in which case he would be liable under this section if the money was *entrusted* to him, but not otherwise. Such a case may be conceived of a Sub-Treasury making a remittance to the Central Treasury of cash carried in carts, but which is in charge of the police guard and not of the carter, who is merely hired to carry the bullion but is not entrusted with its custody. The gist of the crime appears to be abuse of the confidence necessarily reposed in the carrier for the safe conveyance of property which is for that purpose delivered to him. If, therefore, a sealed box containing cash or valuables be entrusted to a carrier for conveyance from one place to another, and the carrier abstract its contents and deliver the box intact at its destination he would be liable for theft, but not for criminal breach of trust under this section. But the case would be otherwise if the carrier dishonestly misappropriates the whole box. The question whether the carrier's agents and servants are equally comprised in the term has not yet arisen, but they do not appear to be included in the term. They cannot be held to be *entrusted* with property *as* a carrier, nor is there any privity between them and the owner.

4464. Wharfinger.—The case of wharfingers and warehouse-keepers stands on the same footing and for the same reason. A wharfinger is the owner or keeper of a wharf, and a wharf[3] is a structure or platform of timber, masonry, iron, earth, or other material built on the shore of a harbour, river, canal, or the like, and usually extending from the shore to deep water, so that vessels may lie close together to receive and discharge cargo, passengers and the like.[4] A wharf is sometimes called a quay or a pier and the owner or possessor of such wharf usually charges a due called wharfage for its use. The wharfinger has necessarily charge of the goods at a critical stage in their transit when they are being loaded or unloaded and thus transferred from one carrier to another. It is also the stage when the goods require special protection as they are necessarily exposed to greater risks.

4465. Warehouse-keeper.—The last class of bailee mentioned is the warehouse-keeper who is the keeper of a warehouse, which is a house for keeping "ware,"[5] which means merchandise goods or commodities. A warehouse is thus what is ordinarily called godown in this country, and a warehouse-keeper is the keeper of a godown. A person who rents his warehouse to another is not the keeper of the warehouse which connotes a person who receives things for safe custody. The

(2) *Davies*, 10 Cox 239.
(3) From Swed; *Varf*, a shipbuilder's yard.
(4) Webster.
(5) Allied to *worth*, value.

cloak room of a railway station or hotel is such a warehouse, and the keeper thereof would be liable under this section for the offence of criminal breach of trust. So keepers of grain godowns are liable to those who store it in their charge. But if they merely rent a godown and store therein grain under their own lock and key, they cannot hold the owner liable because he was not entrusted with the property.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp.

Criminal breach of trust by clerk or servant.

408. Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Criminal breach of trust*—s. 405.]

Synopsis.

(1) *Analogous Law* (4466).
(2) *Procedure and Practice* (4467).
(3) *Proof* (4468).
(4) *Charge* (4469-4470).
(5) *Criminal Breach of Trust by Clerk or Servant* (4471).
(6) *Entrusted in Such Capacity* (4472-4475).
(7) *Servants' Commission* (4476-4478).
(8) *Abetment* (4479).

4466. Analogous Law.—Theft by a clerk or servant is an aggravated form of that offence punishable under section 381. A criminal breach of trust by the same person is similarly visited with the aggravated penalty here prescribed. It will be observed that in this respect this section is exactly the same as the last.

4467. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class. As has been observed under section 406 (§§ 4443-4451), this offence may be inquired into both at a place where it was actually committed as well as in that, where a person suffered a consequence of that offence. If, for instance, the master at Cawnpur send a servant to Manbhum with goods which he should misappropriate there, the master would be entitled to prosecute him at Cawnpur, and the accused cannot object that he should be tried at Manbhum where the alleged criminal breach of trust was committed.(6) The conviction of an accused by a Magistrate is not illegal merely because he had also committed an offence under s. 477-A which is exclusively triable by the Court of Session.(7)

(6) S. 179, Cr. P. C.; *O'Brien*. 19 A. 111; *Dina*, 6 L. 257.

(7) Which may be inferred by his failure to account for it; *Sona Meah*, 2 R. 476.

For other points relating to practice, reference should be made to §§ 4443-4451.

4468. Proof.—The points requiring proof are:—

(1) That the accused was the clerk or servant or employed as such.

(2) That as such he was entrusted with the property in question or with dominion over it.

(3) That he committed criminal breach of trust in respect of it.(7)

4469. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you being a clerk of A B (*or* servant, or employed as a clerk or servant by A B) and in such capacity entrusted with (*or* with dominion over) certain property, to wit——committed criminal breach of trust with respect to the said property, and thereby committed an offence punishable under section 408 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court). ....

"And I hereby direct that you be tried (by the said Court) on the said charge."

4470. A person who commits a criminal breach of trust and prepares a false account to shield himself cannot be separately charged under ss. 408 and 465 inasmuch as the falsification of accounts was an offence which formed part of the same transaction within the meaning of s. 235 of the Code of Criminal Procedure.(8) But the case would be different where the falsified accounts were unconnected with the specific sums in respect of which the criminal breach of trust was charged.(9) But in such a case it may be a question whether the joinder of two such unconnected charges was not illegal. The accused was given a cheque to clear certain goods from a railway. He cashed it, but when questioned about it on the following day, denied having done so. A few days later he persuaded the goods clerk to deliver him the goods promising him payment which he never made. He was tried for this offence and cheating, but his conviction was quashed on the ground of misjoinder of charges and a re-trial ordered.(10)

4471. Criminal Breach of Trust by Clerk or Servant.—This offence being an aggravated form of criminal breach of trust must naturally possess all the ingredients which are set out in section 405 and discussed thereunder (§§ 4416-4439). In addition to those elements the offence must be shown to have been committed by "a clerk or servant"

(7) S. 179, Cr. P.C.; *O'Brien*, 19 A. 111; *Dina*, 6 L. 257.

(8) *Lalji Bhauji*, 14 Bom. L. R. 306, 15 I. C. 645; distinguishing *Nathalal*, 4 Bom. L. R. 433; *Kasi Viswanathan*, 30 M. 328.

(9) *Nathalal*, 4 Bom. L. R. 433; *Kasi Viswanathan*, 30 M. 328.

(10) *Parmeshwar Lal*, 13 C. W. N. 1089, 4 I. C. 28.

or one employed as such. These words are not novel, for they occur also in section 381 where their meaning will be found to have been discussed (§§ 4167-4176). The phrase as used in that section somewhat differs, for it speaks of one who is "employed in the capacity of a clerk or servant," but this is only a verbal variation and does not differ from the shorter phraseology here adopted. A clerk is a word of wide import and ordinarily means a writer employed in an office, public or private, for maintaining accounts, recording minutes and transact other business under direction of a Court, superior official or an official superior, but who is not himself charged with any independent function.

A clerk is a ministerial subordinate, and, so long as his duties are clerical, he is a clerk, by whatsoever designation he may be officially or popularly known. An amanuensis, a typist or a copyist, a superintendent of an office, and other officials whose duty is to assist by their pen, officers in their public duties are clerks. They may or may not be legally appointed, but if they are "employed" as such—if they are *de facto* clerks—they answer the designation whatever informality or illegality may taint their appointment.(11) The question whether a person is a clerk or not may sometimes raise nice questions, but its collocation with the word "servant," obviates such discussion. For if a person fails to be a clerk he may still be a servant, which is a term implying an assistant of whatever grade or kind, including a clerk as well as other employees paid or unpaid. A servant must, however, be distinguished from an agent, for the former is within the rule; the latter is not. The distinction between the two terms has been already the subject of notice elsewhere, and it need not be again adverted to (§§ 4171-4172).

4472. Entrusted in Such Capacity.—Assuming then that a person stands to another in the relation of a clerk or servant the section requires that he should have been *in such capacity* entrusted with property or with any dominion over property. In this respect this section differs from section 381 which makes the clerk or servant liable to the higher punishment there provided without being in custody of the things he steals. If a clerk or servant is entrusted with property, but not in his capacity as such, he will be liable, but only for the simple offence punishable under s. 406. His greater liability depends upon the special trust reposed in him as a clerk or servant. It is not necessary that the property entrusted to him should have been within the scope of his legitimate duties, for it may have been entrusted to him "in any manner," but nevertheless the duty should have been assigned to him *in his capacity* as clerk or servant. This dispenses with the proof of the legality of the duty, but does not dispense with the proof of its delegation in that character. In short, it does not make a servant liable *qua* servant for all breaches of trust, but only those which he has committed in respect of property entrusted to him in that capacity.

Where the Head Clerk in a Government office was entrusted with certain stamps for custody and he made them over to the Nazir, who

(11) *Foulkes*, 44 L. J. M. C. 65.

misappropriated them, it was held that, whether his custody of the stamps was legal or illegal was immaterial so long as it was *qua* Nazir, since this section does not limit the mode in which a trust should arise, whether by specific order or by reason of its being a part of the proper duty of a public functionary.(12) He was, therefore, held liable as much under this section as under s. 409. Such a case is clearly distinguishable from one in which an official employs another as a "fag," in which case it cannot be said that the latter was necessarily entrusted with property in his capacity as clerk or servant. Such, indeed, was the case of the Court Inspector whose duty it was to receive and pay moneys received on various accounts either to the collectorate or to the parties entitled to receive them. Th Inspector delegated his duties to a constable and the question was whether the constable who was guilty of misappropriations should be dealt with under this section or section 409. It was conceded that the trust was not reposed in him in his capacity as a constable, and that the constable could not be therefore punished under section 409, but it was said that in delegating to him that duty the Court Inspector employed him as his "servant" under a special trust, and that, therefore, his offence was punishable under this section.(13)

4473. But why, it may be asked, was the constable his servant and not his agent for the special purpose for which he was illegally charged with that duty? Such a case is scarcely distinguishable from one in which, let us suppose, an officer employs his official clerk to check his washing. If the clerk took a fancy to some of his clothes he was entrusted with the duty of receiving and checking, could he be charged with this offence, because forsooth he had become his servant for that special purpose? Of course, it is easy to conceive of the case of a factotum who like a general in gentleman's household is assigned no particular duties and may be employed for any purpose as the occasion may demand. In that case the servant could not claim exoneration merely on the ground that the trust did not arise within the scope of his usual duties.

The accused who was a *Gomasta* of the complainant received certain sums of moneys aggregating Rs. 600 between 15th April and 30th June of a year for the purchase of wood. When questioned he falsely stated having purchased wood from various parties, but in fact he had purchased nothing. He was held to have been properly convicted under this section.(14) In this case there was a specific direction establishing the trust, but if the *Gomasta* had been in charge of the prosecutor's estate, and as such realized rent collections, and if he had been in general account with his employers and if as such he had been ordered to purchase wood, and had then made the false statement proved against him in the last case, he would not have been necessarily guilty of this offence, unless coupled with the false statement there was evidence of defalcation in the general balance. Compared to this the following is a clear case, illustrative of this offence. The accused

(12) *Ram Dhun Dey*, 13 W. R. 77.
(13) *Per* Glover and Seton-Karr, JJ., in *Banee Madhub Ghose*, 8 W. R. 1; but *see Karimuddin*, 40 A. 565.
(14) *Watson & Co.* v. *Golab Khan*, 10 W. R. 28.

was the servant of a company of coffee planters. Its manager gave him a sum for distribution to the garden coolies. He appropriated it and was convicted of this offence.[15] He might have been equally convicted of cheating for he had on various occasions induced the manager to pay him money which he had falsely induced him to believe was required for payment to the coolies. Where the accused was given some money to purchase paddy but he failed to purchase the paddy and misappropriated the money, he was convicted of this offence because he was the servant of a firm who had employed him for that purpose.[16]

4474. Again, the trust may be express or implied, but the liability of the accused is in either case the same. A servant employed for the purpose of collecting bills and giving receipts to the payee is charged with an express trust for that purpose.[17] If, on the other hand, he was employed for another purpose, but nevertheless collected bills on behalf of his employer, then he was his implied trustee for the sums so collected.[18] Such was the case of the accused who was the court agent of the prosecutors, who were zemindars and who was employed to pay into the treasury the land revenue and cesses due from them. The latter sent him a sum of Rs. 394-5 by post, but without any accompanying letter of advice. The accused acknowledged receipt of the money and the next day he sent a letter stating that he had paid the Government revenue, and enclosed therewith four Treasury chalans in which he had altered the figures of the amounts he had actually paid into the Treasury. He was convicted of forgery as well as this offence, but on appeal it was contended for him that there could be no conviction for criminal breach of trust as there was no evidence of trust express or implied, but the Court held that it was to be inferred from the remittance having been made on the last day, when the instalment fell due, and from the fact that the accused had made payments of small amounts and sent the chalans altered as vouchers of the payment on account of the instalment and as he had altered the chalans so as to show payments of larger sums it was clear that he had misappropriated the difference which brought his act within the purview of this section: "He had done completely all that was necessary to show that the amount had been duly appropriated to his employer's use by forwarding the altered *chalans* and falsely showing a deposit by him of the larger amount."[19]

4475. The same view was taken in another case in which, the prosecutor gave the accused certain blocks of wood-engraving to illustrate his catalogue of jewellery, which the accused surreptitiously used in illustrating the catalogue of another person, it was held that the use was dishonest because it caused wrongful gain to the other customer in saving him the cost of preparing the blocks, and it was so intended because the accused used them clandestinely. The question remained

(15) *Ramappa* 22 M. L. J. 112, 13 I. C. 108, 13 Cr. L. J. 15.

(16) *Pyo Gyi*, 10 L. B. R. 31, 51 I. C. 673; 20 Cr. L. J. 513; *cf. Narayanasawmi*, 9 M. L. T. 332, 9 I. C. 726, 12 Cr. L. J. 123.

(17) *Basiruddin*, 9 C. L. J. 257, 4 I. C. 48.

(18) S. 94, ill. (*b*). Indian Trusts Act, Act II of 1882.

(19) *Lolit Mohun Sarkar*, 22 C. 313.

whether in using the blocks the accused was guilty of any violation of contract express or implied, and it was so held because it was not possible for the complainant to permit the accused to embellish a rival tradesman's catalogue at his expense.[20] As compared to these the case of the Waterworks Inspector who tapped a Municipal main and effected a private connection with his house rented to a tenant from whom he realized a water-tax appropriating it himself presents no difficulty. As one in charge of the water supply, his misappropriation of the water of his employer for his own use rendered him liable to the penalties of this section; as one who had recovered the water-tax from his tenant he was guilty of the same offence punishable under s. 406, inasmuch as he had recovered it to pay to the Municipality but which he did not pay.[21]

4476. Servant's Commission.—The commission claimed from and paid by tradesmen raises a somewhat more difficult question, which was considered in a case in which the facts were these. The accused Imdad Khan was a superintendent of stores in Postal employ at Allahabad. It was his duty to receive and check the quality of stores and send them to outstations. He paid the contractors on bills signed by himself and countersigned by the Inspector-General. One such contractor was Tarini of Calcutta who supplied a certain cloth at the contract rate of Re. 1-12 6 per piece of eighteen yards. In January, 1881, the appellant rejected a consignment of this cloth received from Calcutta as being of an inferior quality. He then arranged with Tarini to procure the cloth locally and remit him his profit at one anna per piece. Thereafter the accused purchased the cloth at Allahabad, but Tarini billed for it at the contract rates which the accused cashed as before stated. It was contended by the prosecution that the accused purchased the cloth at a cheaper rate (*i.e.*, at Re. 1-6 a piece) and after remitting one anna a piece to Tarini as his profit he himself misappropriated the difference. It was, however, admitted that the cloth was of the requisite quality.

It was held that if the facts alleged had been proved, the accused would be undoubtedly guilty of criminal breach of trust under this section.[22] The Court then added: "If the account is an *open* one, that is, an account of which the items have never been checked or settled, and if the transaction amounts to a taxation of the bill and a reduction of the price by the servant, it is obvious that the servant obtains the reduction for his master; that the money in his hand always remains the master's property; and that, if he appropriates it he steals it. But if the master himself has settled the account with the tradesman for a specific sum, and he sends the servant with the money, and the servant, after making the payment, asks the tradesman for a present, then, if the servant takes the present, and keeps it, he is not guilty of stealing because he has no intention to steal; the money is given to him by a person whom he believes to have a right to give it. It may be that, according to the strict equitable doctrines of the Court of Chancery, the servant is bound to account to his master for the money. But, however this may be, his act is a very different matter from a criminal

(20) *Keshab Chandra Boral* v. *Nityanund Biswas*, 6 C. W. N. 203 (206).

(21) *Bimalacharan Roy*, 35 A. 361.

(22) *Imdad Khan*, 8 A. 120.

offence, and I do not think he can be convicted of criminal breach of trust merely because by a mere equitable doctrine of the Court of Chancery, it was obligatory on him to render an account."(23)

4477. This case once more illustrates the civil breach of trust from a breach which is criminal. That a servant cannot make a secret profit out of his position is a proposition which admits of no doubt. So Lord Cairns, L. C., said: "The rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can, in this Court acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. The Court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency." To which James, L. J., added: "That rule is an inflexible rule, and must be applied inexorably by this Court which is not entitled, in my judgment, to receive evidence, or suggestion, on argument as to whether the principal did or did not suffer any injury, in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that."(24)

4478. As this section is only confined to criminal breach of trust in respect of "property" entrusted to a clerk or servant, it follows that if what was entrusted to the accused was not "property", he could not be convicted of this offence. Instances have been already given before of objects which do not answer that designation (§§ 4078-4083). In all such cases there being no property there can be no dishonesty and there being no dishonesty there can be no theft, criminal misappropriation or criminal breach of trust or, indeed, any offence of which dishonesty is an essential ingredient.

4479. Abetment.—A person though not himself a clerk or servant may be convicted of abetment of this offence by a person who is so. But in such a case all the elements essential to consititute an abetment must be present. If, for instance, a person is charged for abetment of criminal breach of trust by a servant, it must be proved that what the accused had instigated the servant to do was criminal breach of trust and that he was aware of it.(25) If his act was innocent and the servant used it for the purpose of this crime, he could not be charged for this abetment.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

Criminal breach of trust by public servant or by banker, merchant or agent.

409. Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent,

(23) *Imdad Khan*, 8 A., 135.

(24) *Parker* v. *McKenna*, L. R. 10 Ch. 96, to the same effect, *Robinson* v. *Mollet*, L. R. 7 H. L. 812; *Hay's case*, L. R. 10 Ch. 593; *McKay's case*, 2 Ch. D. 1; *Panama and South Pacific Telegraph Co.* v. *India Rubber etc. Co.*, L. R. 10 Ch. 515.

(25) *Bal Gobinda Shaha*, 4 C. W. N. 309 (Head note inaccurate).

commits criminal breach of trust in respect of that property shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

[*Public servant*—s. 21. *Property*—s. 378 (§§ 4066-4088), s. 405 (§§ 4397-4427 *Criminal breach of trust*—s. 405.]

Synopsis.

(1) *Analogous Law* (4480).
(2) *Procedure and Practice* (4481).
(3) *Proof* (4482).
(4) *Form of Charge* (4483).
(5) *Principle* (4484).
(6) *Meaning of Words* (4485).
(7) *Criminal Breach of Trust by Public Servant and Others* (4486-4497).
(8) *By Public Servant* (4486-4490).
(9) *Banker* (4491).
(10) *Merchant* (4492).
(11) *Factor* (4493).
(12) *Broker* (4494).
(13) *Attorney* (4495).
(14) *Agent* (4496-4497).

4480. Analogous Law.—This is the last section of the set dealing with the offence of criminal breach of trust attended with aggravation. Of these this section prescribes the highest penalty. It is consequently deemed the worst type of the offence. But it is possible that the provisions of this section may overlap those of the last section, unless that section be restricted to apply only to a clerk or servant who is not a public servant or any of the rest. That it must be necessarily so is however evident. For if the offence falls under this section it must be necessarily excluded from the last and other sections prescribing a lower penalty : *Specialia generalibus derogant.*(1)

4481. Procedure and Practice.—This offence is cognizable, and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. For other points of practice, *see* section 406(§§ 4443-4451).

4482. Proof.—The points requiring proof are:—

(1) That the accused was either a public servant, a banker, a merchant, factor, or a broker, or an attorney or agent.

(2) That as such he was entrusted with the property in question or with any dominion over it.(2)

(3) That he committed criminal breach of trust in respect of it.

4483. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

(1) Things special take away from the things general."

(2) *Saiyid Mohiuddin*, 4 Pat. 488.

"That on or about the——day of——at——you being in any manner entrusted with property, to wit——(*or* with any dominion over property, to wit——) in your capacity of a public servant (*or* in the way of your business as a banker, merchant, factor, broker, attorney, *or* agent), committed criminal breach of trust in respect of that property, and that you thereby committed an offence punishable under section 409 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4484. Principle.—The persons brought under the lash of this section are those in whom the public have necessarily to place the utmost confidence. It is also necessary that person who necessarily wield large powers and execute varied duties in which they handle large properties should be above temptation in matters with which they are officially concerned. Such persons have, therefore, in all countries been the subject of stringent laws, as the mischief their misappropriations might cause is as unexpected as it is widespread. In the case of public servants in particular, the Government is primarily concerned in enforcing upon them a high standard of morality, which should be pattern to those who whether as bankers, factors or agents, are entrusted with equally important duties.

4485. Meaning of Words.—"*In his capacity of a public servant*": It need not, however, be his *legal* capacity or duties. "*Or in the way of his business*," *i.e.*, in the course of his trade in the ordinary course of his duties as such merchant, etc. "*Banker, merchant, factor, broker, attorney or agent*": All these persons are trusted agents employed by the public in their various business. As to the precise meanings of these terms, *see* below (§§ 4491-4497). "*In respect of that property*," that is to say, the property entrusted to them or over which they are entrusfed with any dominion.

4486. Criminal Breach of Trust by Public Servant and Others.—

(1) By Public Servant.

The special provisions of this section which prescribe the maximum penalty of transportation for life apply only to the six classes of persons specified as the "public servant", banker, merchant, factor, broker, attorney or agent. With the possible exception of a "public servant" all the rest are generally speaking agents of the public employed for the discharge of certain, often important, functions, and their duties are of a quasi-public character. In any case they are persons in whom the public have necessarily to repose abundant confidence, and a criminal breach of trust committed by them may often cause widespread misery: it certainly tends to shake public confidence in persons but for whom the administration of a country could not well be carried on.

Consequently, the section places in the forefront of those exposed to the penalties of this section—the public servants. But the section makes no distinction as regards the constitution of the crime and the apportionment of punishment. In all cases the section qualifies their liability only to property entrusted to them in their capacity of public servant or in the way of their business as banker, etc. Similar words

occur in the last section under which the limitation implied by their use has been pointed out (§§ 4472—4475). It will be observed that while these words define the capacity of the recipient there is nothing to define the capacity of the trustor. The persons entrusted with property must, therefore, answer a certain description and possess a certain capacity, but the person entrusting the property may be any one. This is manifest from the section, though it has been the subject of a reported case.(3)

4487. Any person may then create such a trust, and the trust may be created "in any manner." It is not necessary that it should be created in a *legal* manner or that it should be so accepted. It is sufficient if the trust is in fact created and accepted, the former trusting him as a public servant, etc., and the latter accepting the trust as such. It may not be legal or within the legitimate scope of his duties. But he becomes liable under this section by the mere fact of his acceptance. So where the Head Clerk of an office was legally entrusted with the custody of certain stamps, and the latter made them over to the *Nazir*, it was held that the latter had by his misappropriation brought himself within the mischief of this section.(4)

The same view was taken of the Police Moharir who was sent for by a traveller who had in his possession considerable property consisting of cash and gold coins, and who while at a *serai* believed himself to be dying and thereupon sent word to the Police station to take charge of his property. The accused who was the Thana Moharir went and took charge of it, and misappropriated it. The question was whether his offence fell under this section; in other words, was he entrusted with the property in his capacity as a public servant; and it was held that since the accused was empowered by section 95 of the Procedure Code of 1872 (now s. 149) to receive the property to prevent the commission of an offence, such as theft, by other persons taking advantage of the illness or death of the traveller, he must be deemed to have been entrusted with the property in his capacity as a public servant.(5)

In another case, the accused who was a clerk in the record-office of a collectorate abstracted a copy of a sale-certificate belonging to the person to whom he delivered it, and who was shown to have requisitioned it for production in another case. He was convicted under this section, but the question that exercised the Court was whether his doing a right thing in a wrong way was dishonest. It was conceded that the recipient was entitled to the return of his copy and would have got it back if he had applied for it in the regular way. It was, however, held that the Government was deprived of the small amount of court-fee which the applicant would have had to pay on his application for return of the document which in the view of Aikman, J., constituted the wrongful loss to Government.(6) But the learned Judge could not have been unaware of the fact that such applications

(3) *Ram Soondar Poddar*, 2 C. L. R. 515.
(4) *Ram Dhun Dey*, 13 W. R. 77
(5) *Bhag Singh* (1876) P. R. No 24.
(6) *Ganga Prasad*, 27 A. 260.

are exempt from court-fee. It was said that the accused might have received illegal gratification for doing the friendly act. But this was a mere surmise.

4488. The following case, however, presents no difficulty. The accused, a Sub-Post-Master was authorised to redeem cash certificates by payment of Rs. 8-2-6. He paid to a holder only Rs. 7-6-6. He was guilty of this offence.(7) The rubbish and night soil removed by the Municipal Sweepers is the property of the Municipality. Consequently, where the accused, a Sanitary Inspector, sold it and had it deposited on the soil of those from whom he had received payment he was convicted of this offence.(8) The accused was a subordinate in the Salt Department of Government. He was empowered to sell salt at a reduced rate to fish-curers who held tickets entitling them to the concession. He purchased salt himself at the reduced rate charging it to the account of the ticket-holders, thus defrauding Government of the difference in the two rates. It was held that inasmuch as he was entrusted with dominion over the salt entrusted to sell at reduced rates only to those who cured fish, his converting the salt to his own use would, if proved, be both dishonest and a violation of trust, and that, therefore, he would be guilty of this offence. As however the accused had been acquitted, the Court remanded the case for a re-trial.(9)

4489. Clearer still was the case of a constable who having been entrusted with the pay of his Police out station dishonestly misappropriated it.(10) The accused who was a cattle-pound Moharir realised Rs. 5 on account of pound-fee, but gave the payer a receipt for only Rs. 4 which amount he entered in his register. But before he could remit the amount into the Treasury the payer complained of the overcharge, and the accused having come to know of it altered the entries in the account book and the counterfoil of the receipt and remitted the full amount. It was held that the accused was guilty of an attempt to commit this offence.(11) But it is not explained why it was not the offence itself.

But though a person may have no jurisdiction to act in a particular transaction, still he must be entrusted and *prima facie* act in that capacity. For instance, in Madras there is a class of public servants called village shroffs, whose duty it is to realize and remit revenue payable in cash to Government. In certain other tracts such persons are called village patels, but their duties are the same. A shroff received grain from the ryots and in return granted receipts for the public revenue as if for money received. But he failed to remit the amount for which he had passed the money-receipts, and thereupon he was convicted under this section, but it was held that "the shroff could not receive the public revenues in kind; and the party who so delivered the grain did not thereby discharge himself from liability for the revenue," and that, therefore, he could not be convicted of this offence.(12) The facts of this case have not been fully reported, and it may be that the

(7) *Sita Ram*, 42 A. 204.
(8) *Hari Lal*, 45 A. 281.
(9) *Balayya*, (1894) 1 Weir 467 (468).
(10) *Subdar Meeah*, 3. W. R. 44.
(11) *Bhula*, (1893) B. U. C. 632.
(12) 4 M. H. C. R. (App.) 32.

accused had received grain conditionally. For, if he purchased the grain and paid for it receipts passed in satisfaction of revenue, they would be as good as if he had received the rents in cash, for which he would then be criminally liable under this section.

4490. As has been elsewhere pointed out by the present writer, the question in such cases depends upon the intention of the parties,[13] and so does also the question of criminality. In another case the village kurnam, who is also in practice a revenue agent of Government and as such in subordinate charge of the collection of revenue, realised moneys from certain ryots of the village as revenue due on unassessed lands, part of which have been cultivated by the ryots without leave and as cost of its demarcation, which he misappropriated. He was convicted under this section, but his conviction was quashed on appeal by the High Court, who appears to be of opinion that the moneys were not paid to him in his capacity as agent of Government or in trust for Government. Nor was he guilty of cheating as the ryots must clearly have known that the money was not to be paid to Government. The prisoner was, therefore, acquitted.[14]

(2) Banker

4491. Criminal breach of trust committed by a banker is subject to the same rule, provided that it is committed by him in "the way of his business". A banker is a person who conducts the business of banking, and banking is the business of a bank which is an establishment for the custody, loan, exchange or issue of money, and for facilitating the transmission of funds by drafts or bills of exchange. The share-holders of an incorporated bank and its directors are within the term. In other cases all partners of a banking concern would singly and collectively fall into that category. In the former case the directors have dominion over the property and management of the funds of the bank, so that if they dishonestly, that is, knowingly and intentionally pay dividends to the share-holders out of deposits when there were no profits, intending to cause gain to themselves or others to which they were not entitled or to cause wrongful loss to other persons, they would be guilty of this offence.[15] But the manager and accountant or assistant manager, though also bankers, do not fall within the comprehension of this section, as they are not persons who are entrusted with property, or with dominion over property as bankers or agents, though they may be guilty of abetment under this section read with section 109, by conspiring with the directors to commit breach of trust if they assist the Directors to obtain the sanction of the share-holders to the illegal payment of dividends, and do so for the dihonest purpose of causing wrongful gain or wrongful loss.

It was so held by Edge, C. J., in the case of Moss and several others, who were prosecuted under this section on the failure of the Himalaya Bank. That bank had been incorporated under the Indian Companies Act, and as such, it was bound to issue a biennial balance-

(13) 2 Gour's Law of Transfer (5th Ed.) p. 1066 § 1524.
(14) *Rangaswami Ayyangar*, (1888) 1 Weir 466.
(15) *Moss*, 16 A. 88.

sheet stating its general position in the form prescribed by the Act.[16] Amongst the particulars required to be stated in the balance-sheet were the nature of the debts due to the bank—whether good debts for which the Company holds security, and debts if any, considered doubtful and bad. The bank had as a matter of fact, thirteen lacs of bad and doubtful debts. The accused Munton and Wilson were the Directors of the bank, Moss was its Manager and Charles Greenway, Accountant and Officiating Manager. They were charged under this section, and the charge against them was that they had issued false balance-sheets suppressing mention of the bad debts and even declared a 10 per cent. dividend out of the profits, which was a myth. Their object was stated to be to defraud the share-holders and depositors into a belief that the bank was stable when it was in fact insolvent. Adverting to the liability of the four accused, the learned judge told the jury that while the Directors certainly fell within the designation of bankers, the Manager and Accountant did not, and that though they could not be charged under this section they might still be guilty of abetment. In the result the Directors were convicted of this offence and the Manager and Accountant of abetment.[17]

This view is consonant with that taken by Lord Campbell, C. J., in a case arising on failure of the British bank.[18] The accused, one Daulat Rai, was the Managing Director of the Hindustan Bank which was in distress. A debtor of the Bank executed in its favour certain Hundis for Rs. 30,000 payable after six months. The Bank being in need of ready money, the accused asked the Co-operative Bank to discount the Hundis which the Bank declined to do unless the accused cleared his own account with it. In order to secure ready money, the accused caused his son to apply to the Hindustan Bank for the loan of a sum equivalent to the accused's indebtedness to the Co-operative Bank. The accused sanctioned this loan on the security of his own moneys in the Bank and thus cleared his deft to the Co-operative Bank. He was acquitted of this offence on the ground that there had been no misappropriation.[19]

(3) Merchant.

4492. The liability of a "merchant" is stated to be the same as that of a banker. A merchant is one who deals in the purchase and sale of goods, or who traffics with foreign countries. Merchant is a generic term and includes a banker who is a merchant dealing in money or in exchange. But the term is used here to designate a dealer in goods, as distinct from a banker who deals in money and stock. The use of the term may raise the question whether it is wide enough to include even petty shopkeepers, and large manufacturers of goods. That the latter are included in the term is undoubted. But petty shopkeepers can scarcely be called merchants, which is a term ordinarily understood to denote a person who traffics on a large scale. The section would apply to manu-

(16) *Moss*, 16 A. 88.

(17) *Moss*, 16 A. 88. The Bank was registered under Act X of 1866; now *see* Act VI of 1882. To the same effect, *Daulat Rai*, (1915) P. R. No. 28, 29 I. C. 105.

(18) *Esdaile*, 1 F. & F. 213; *Burch* 4 F. & F. 407; *Burnes* v. *Pennell*, 2 H. L. C. 497.

(19) *Daulat Rai*, (1915) P. L. R. 164. 29 I. C. 75, 16 Cr. L. J. 443.

facturers sending out goods on commission sale, dealers in raw materials supplying manufacturers and the like. There is scarcely any trust between an ordinary shopkeeper and his customer.

(4) Factor.

4493. Factors and brokers are intermediaries through whom merchants transact their business. A factor[20] is literally a person who does anything for another, and so in law the term means one who transacts business for another. The term is, however, used here to denote a mercantile agent who buys and sells goods and transacts business for others on commission. A factor may be a home factor or a foreign factor. He differs from a broker in that he buys and sells in his own name, and he is entrusted with the possession and control of goods, which a broker is not.[21] A factor may be a mere consignee of goods, in which case he is as much a merchant as a factor, and of course, also an agent for the purpose of his delegated duties. Sometimes he is so constituted under a power of attorney. But whether he is so empowered or not, he retains the right as factor to sell goods consigned to him in his own name.[22] A factor is, in short, a commission agent, and as Pollock, C. B., said: "As soon as it appears to be a branch of a party's business to sell the goods of others on commission, that establishes him to be a factor."[23] Being placed in possession of goods by a distant principal, he is placed in a position of special trust and responsibilities in respect of the goods entrusted to him. He is bound to exercise *uberrimoe fides* in dealing with his principal. And this section consequently provides a specially deterrent sentence in case of his breach of trust.

(5) Broker.

4494. In this respect there is little to choose between a factor and a broker, except that a broker being not in possession of his principal's goods does not occupy the same position of trust as a factor. But nevertheless he is an agent employed to settle contracts and bargains between two dealers in matters of trade and business, commerce and navigation, and it is his duty to faithfully communicate the terms and intentions of both parties and bring them both in contact for the purpose of transacting business. A broker may be employed by one party or both for a business transaction. In certain localities he is entrusted with large sums to make payments, as in the case of purchase of stocks and shares and bills of exchange. Even in the case of dealings with other commodities, a practice has grown up in this country of making payments through a broker, who has thus become an indispensable middleman, who is an impartial agent of both parties to a bargain, and who is equally paid by both a small commission on the business concluded through him.

(6) Attorney.

4495. An attorney[24] is also an agent but appointed for a special purpose. He is a person appointed by another to do something in his absence, and as such, he pos-

(20) Lat. *facere*, to do—*factor*, a doer.

(21) This distinction was pointed out by Chitty, J., in *Stevens* v. *Bileer*, 25 Ch. D. 31 (34); following *ex parte Dixon* 4 Ch. D. 133 (137).

(22) *Per* Pollock, C. B., in *Whitfield* v. *Brand*, 16 M. & W. 282; *Semenza* v. *Brinsley*, 18 C. B. N. S. 467.

(23) *Ib.*

(24) From Lat. *attornare*, to attorn, to commit business to another—lit., a substitute, a proxy.

sesses all the powers which are necessary for transacting that business, and such powers are usually reduced to writing in a document called the "power-of-attorney." An attorney may be public or private. A private attorney is a person appointed by another to transact any business for him out of Court. Pleader's clerks are, for example, called attorneys. Public attorneys, or as they are more popularly called attorneys-at-law are practitioners in a Court of law, legally qualified to act on the retainer of clients for the purpose of prosecuting and defending suits and cases. As such, they are a class of lawyers, but that is naturally a more general term and includes also counsellors who are a class distinct from attorneys, whose duties are confined to carry on the practical and formal parts of the suit. In England, since 1873, attorneys are by Statute called solicitors. Such attorneys correspond to the procurators of civil law,[25] and the proctors of the ecclesiastical and admiralty Courts. They are called law agents in Scotland.[1]

4496. An agent is a person employed to do any act for another, or to represent another in dealings with third persons.[2] The term "agent" is thus a term of wide import and includes all agents whether factors, brokers or attorneys, who are all agents appointed for special purposes. An agent is for the purpose of the business within the scope of his authority an *alter ego* of his principal, and they mutually stand to each other in the position of active confidence. The term "agent" as used here is wide enough to include not only agents expressly constituted, but also those who become or are employed in the capacity of agent. If, for example, a person requests another to carry a sum of money for payment to another he is for that purpose his agent, so that, should he misappropriate the amount he would be liable under this section. Public servants are in a sense agents of Government, but it is not in that sense that the term has been used here. It is rather used as implying a representative in business. Where the functions and duties of an agent are not defined, it would not perhaps be easy to prove if an act was in the way of his business. And even if it was, there still remains the question—was he an agent, or only a clerk or servant within the meaning of the last section. Now a servant may be an agent, and ordinarily an agent must be a servant. The question may arise whether in such a case the act in question was done by him as a servant or as an agent.

(7) Agent.

4497. The decided cases do not appear to have referred to this distinction. Take, for instance, the following case already noticed (§§ 4473-4475). The accused was the agent of the prosecutor who was a zemindar, and had as such to pay periodically a certain Government revenue into the Treasury. The accused ordinarily resided at Khulna, and was in charge of the prosecutor's court cases. He was also in the habit of paying into the Treasury the land revenue due from his master. He misappropriated a part of the money sent to

(25) In Scotland they were so called by the Procurators (Scotland) Act, 1865, repealed by the Law Agents Act, 1873 (36 & 37 Vict, c. 63, s. 25).

(1) Law Agents Act (36 & 37 Vict., c. 63).

(2) Indian Contract Act (IX of 1872). s. 182.

him for this purpose. He was convicted under this section.[3] But the High Court referred to it as a conviction under section 408,[4] which is, so far as the report goes, unintelligible. The case was clearly one for conviction under this section, and if so, the conviction could not have been sustained under section 408. In this case the agent was presumably authorized to act under a general power of attorney. When it is so, all acts performed in pursuance of such authorization will be deemed to have been done in his capacity as an agent. But other acts are not thereby excluded. For a person may act as an agent without a written power-of-attorney, and in that case the question is merely one of evidence and legal inference. A trustee or manager of a temple is presumably to be so regarded.

The accused was the manager of a temple appointed by the temple committee under the Religious Endowment Act, 1863.[5] With the assistance of confederates he broke into the temple one night and stole therefrom a large number of jewels. He was convicted of housebreaking and theft by a servant, but on appeal it was contended for him that he could not be convicted of either offence inasmuch as he was himself in possession of the temple jewels, and he was convicted of stealing. This contention prevailed and the Court held that "the right view appears to be that the deity is regarded as the owner of the temple property, and the trustee or the manager appointed by the committee is the agent of the deity subject to the committee's control. The prisoner was, therefore, in possession of the temple and its jewels, and if he has made away with the property, his offence is criminal breach of trust by an agent punishable under section 409 of the Indian Penal Code."[6]

Of the Receiving of Stolen Property

Stolen property.

410. Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property," whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

[*British India*—s. 15. *Possession*—*cf.* s. 27. *Theft*—s. 378. *Extortion*—s. 383. *Robbery*—s. 390. *Criminal misappropriation*—s. 403. *Criminal breach of trust*—s. 405.]

(3) *Lolit Mohan Sarkar*, 22 C. 313 (318).
(4) *Ib.*, pp. 318, 319.
(5) Act XX of 1863.
(6) *Per* Collins, C. J., and Parker, J., in *Mathusami Pillai*, (1895) 1 Weir 432 (433, 434).

Synopsis.

(1) *Analogous Law* (4498-4501).
(2) *Meaning of Words* (4502).
(3) *What is Stolen property* (4503-4504).
(4) *Possession transferred* (4505).
(5) *Changed property* (4506-4507).
(6) *Stolen property reverting to lawful possessor* (4508-4511).
(7) *Not Stolen property* (4512).

4498. Analogous Law.—The words "whether the transfer has been made or the misappropriation or breach of trust has been committed within or without British India" were inserted by the Amending Act of 1882,[7] in consequence of the defect in the Indian law pointed out by Sargent, C. J., and Melvill, J., in the case of *Moorga Chetty*,[8] who was a clerk in the employment of a mercantile firm at Port Louis in Mauritius, and who cashed certain bills in Bombay which were shown to have been extracted at Port Louis, whereupon it was held that the bills of exchange having been stolen at Mauritius, in which island the Indian Penal Code was not in force, they could not be regarded as "stolen property" within the provisions of this section, so as to render the recipient at Bombay liable under the next section, and that the High Court of Bombay had, therefore, no jurisdiction; and the conviction was consequently quashed. This amendment has necessarily the effect of overruling that case, and those in which a similar view was taken.[9]

The amendment makes the criminal acts of persons like Moorga Chetty clearly criminal, and it is now no longer possible for the accused to say that he is not amenable to the British Courts for such acts done in foreign territory since whoever, whether a British subject or a foreigner, is in possession of stolen property, may be tried for it, in British India.[10] Two other minor amendments have been made in this section. Originally the words enacted were "or in respect of which the offence of criminal breach of trust, etc." But this necessitated proof of the substantive offence of criminal breach of trust in each case, and consequently, the words "offence of" were omitted by the same Act of 1882,[11] but there still remained the "the" as a disturbing element, till it was also removed by the Amending Act of 1891.[12]

4499. In England the receiving of stolen property was originally a bare misdemeanour and as a misdemeanour was triable where any one of several acts constituting it had been done,[13] a receiver could be dealt with wherever the accused had had the goods, and was in custody.[14] But by the Statute of 1691[15] receivers were declared

(7) Indian Penal Code Amendment Act (VIII of 1882), s. 9.
(8) (1881), 5 B. 338, F. B.
(9) *Moorga Chetty*, 5 B. 338, F. B., *Hakim*, (1881) P. R. No. 5; *Au*, (1883) P. R. No. 4; *Saminada*, (1888) P. R. No. 22.
(10) *Jaffar Ali*, (1894) P. R. No. 30
(11) Act VIII of 1882, s. 9.
(12) Repealing and Amending Act (XII of 1891).
(13) *Per* Abbot, C. J., in *Burdett*, 1 St. Tr. (N. S.) 146.
(14) Com. Dig. Action (N. G.)
(15) 3 & 4 Will. & M. C. C., s. 4.

to be accessories after the fact, and misdemeanour was then held to be merged in the felony.[16] But as an accessory could not be tried except with or after the felony, the law as to receivers still remained defective, and accordingly a Statute was passed in 1708,[17] that as for a misdemeanour, the receiver might be prosecuted apart from the thief, but only when the thief was not amenable to justice.[18] This created fresh difficulties which were, however, removed by the Act of 1772.[19] The present law of receivers is governed by the Larceny Act 1861,[20] which makes receiving stolen property an independent felony, the receiver being triable independently of the thief. The provisions of this Statute run thus:—

"S. 95. Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting or disposing whereof is made a misdemeanour by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted or disposed of shall be guilty of a misdemeanour, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanour shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver, being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for any term exceeding seven years..... or to be imprisoned, if a male under the age of sixteen years, with or without whipping."

4500. It will be noticed that as this section is worded, it includes as stolen property a chattel obtained even by cheating, and in this respect the definition of the term as enacted in this section is narrower, as it excludes from that category things obtained by cheating.

4501. This section does not define an offence but only a term used in defining it. The term "stolen property" as here defined does, however, presuppose the commission of the offence of theft and its other derivative offences, but it does not presuppose the existence of an offender—for there may be a receiver of stolen property without there being a thief—as in the case of theft committed through an innocent person. The words "the offence of" before "criminal breach of trust" were omitted to provide against such contingency (§ 4498).

4502. Meaning of Words.—"*Property*": This word has been certainly used to denote only "moveable property." "*Possession whereof has been transferred*": This does not mean that the receiver should receive directly from the thief. All it implies is that the receiver should receive property which has been obtained by theft. In this case an innocent intermediate transferee does not purge the property of its taint as stolen property which it continues to be in the hands of all subsequent transferees, except the person legally entitled to its possession. "*Whether the transfer has been made, etc.*," i.e., whether the substantive offence of theft or the subsidiary offence of receiving was committed within or without British India. "*If such property subsequently comes into possession*": This should be satisfied if the property comes into his possession, whether actual or constructive, though it may be afterwards delivered to the receiver to detect his crime.

(16) 12 East. P. C. 744.
(17) 7 Anne, c. 21.
(18) Foster, Cr. L. J. 374.
(19) 22 Geo. III, c. 55; *Bulwer's case*, 7 Rep., 4; Thomas & Fraser's Ed., pp. 52, 53.
(20) 24 & 25 Vict., c. 96, s. 91; which re-enacts 7 & 8 Geo IV, c. 29, s. 54.

4503. What is Stolen Property?—The definition of stolen property here adopted follows the definition of the substantive offence of theft, which it is intended to unravel and prevent. As that offence is defined to be the dishonest taking of property out of the *possession* of any person, so this offence is the receipt of property, the *possession* of which has been transferred by theft and the other allied offences. The word "possession" is used here in its largest sense as implying custody or control, whether temporary or permanent, or exclusive of or jointly with the thief, nor is manual possession necessary. The prosecutor went to a public house with a prostitute named Duncan. He felt a tug at his watch and it was gone. He charged the prisoner with its theft. He left the place and went into the prostitute's room, where the prisoner asked him what he should give if the watch were found. He promised a reward, and thereupon the prisoner promised to restore the watch to Duncan and took her to his house where his accomplice Holland placed the watch on the table. Holland claimed the promised reward from the prosecutor which he paid, after which Holland absconded, but the prisoner was tried as a receiver, and the jury were told that if the prisoner knew of the watch as having been stolen by Holland and if he knew of its being in his possession under the prisoner's absolute control, so that the watch would be forthcoming if the prisoner ordered it, there was ample evidence to convict him of receiving stolen property. The jury found the prisoner guilty, holding that though the watch was in Holland's hand it was in the prisoner's absolute control, and on a case reserved the Judges upheld this conviction. It was held that manual possession was unnecessary to constitute receipt of stolen goods, and the possession of the receiver may be jointly with the thief. The jury might have found that either Holland or the prisoner was the thief, and that in the former case the latter only acted as the former's agent in restoring the watch to the prosecutor, but there was evidence and it justified the finding of the jury in deciding as they did.(21)

4504. Where several persons live in the same house, it may be a question whether the possession of one is the possession of all, and *vice versa*. Stolen property consisting of a considerable quantity of cloth weighing about five maunds, was discovered on search by the police in a locked room in a house belonging to, and inhabited by, a joint Hindu family, composed of a father, a son and a grandson. The son was found to be the managing member of the family, and the key of the room in which the stolen property was found was produced by him. The circumstances were such that it was very improbable that the cloth could possibly have been placed where it was found, without the connivance of some or all of the members of the family. It was conceded that if the only fact proved against the petitioner was that he was the managing member of the family, it would not have supported the conviction. But there were other facts: the size of the missing bale weighing five maunds which could not have been got into the house surreptitiously, the fact that the room of the house in which it was found was locked, and that the key was produced by the peti-

(21) *Smith*, Dears, C. C. 494; to the same effect, *Rogers*, 37 L. J. M. C. 83.

tioner, which taken in conjunction with the other facts justified his conviction under section 411 (§ 4531).[22]

4505. Possession Transferred.—Property, the possession of which has been transferred by theft and the other offences, is designated stolen property. It is, therefore, a term which equally applies to property in the hands of the thief as of a receiver other than the thief. As regards property acquired by theft, extortion and robbery, the property is called stolen property the moment there is asportation. The property of a thief who runs away with stolen property is properly so-called, though there has not been "transfer" in the real sense of the term, and though his possession is insecure. But insecurity of possession is an incident of all stolen property, and its transfer does not demand complete transmutation of possession which is not even the incident of a legal transfer. Indeed, the gist of the term lies in the intention as will be seen presently (§ 4550).

This section merely specifies the attributes of stolen property, which, however, by themselves do not constitute an offence. In order to do so the presence of other elements mentioned in the next section is necessary. As it is, transfer of possession is only necessary if the property be the proceeds of theft, extortion or robbery. It is not necessary where the property is acquired by criminal misappropriation or criminal breach of trust, in which case the transfer of possession may be perfectly legal, and so long as it is so, the property so possessed could not be designated "stolen." It only acquires that character as soon as the possession becomes wrongful by reason of the act or intention which constitutes either of those offences. The question where the principal offence was committed is now immaterial for the present purpose (§ 4515). The result of this clause is that if a thief commit an offence, say in Nepal[23] or Rajkote, he might be tried for the act in British India as the receiver of stolen property, though he could not be tried here for theft without extradition.[24] In such case, it is no defence for the accused that he is a foreign subject and that the property was stolen by himself, and that he was not therefore, liable to be tried, convicted or punished by the British Court for theft;[25] in short, that he could not be convicted for an act indirectly for which he could not have been legally tried directly. The reply is that the offence of stolen property is a continuing one, and it is, therefore, justifiable anywhere the offender may be found.[1]

4506. Changed Property.—Since the only property the possession of which has been transferred by theft, etc., is designated stolen property, it follows that if the property is changed, converted or altered, so as to destroy its original identity it ceases to be stolen property. So where A and B were charged, the one for stealing and the other for receiving six notes of £ 100 each, and the only evidence against the receiver was that A had stolen the notes and changed them into other notes of 20*l* each, of which he gave a number to B, who knew that they

(22) *Budhlal*, 29 A. 598.
(23) *Sunker Gope*, 6 C. 307, *Adivigadu*, 1 M. 171; *Lakhy Govind*, 1 B. 50
(24) *Abdul Latib*, 10 B. 186.
(25) *Jafar Ali*, (1894) P. R. 30.
(1) S. 180, E, Cr. P. C.

were the proceeds of A's theft, it was held that he must be acquitted of receiving, as he had not been charged with receiving the proceeds, but with receiving "the said promissory notes," which the notes in B's possession were not.(2) But in this case the decision turned upon the defective indictment. But suppose the indictment had referred to the proceeds of the theft, could B have pleaded exoneration on the ground that the property in his hands was not stolen property? He could clearly do so, as indeed, was held in the case of a person who had received the money obtained by cashing forged cheques, in which case the Court held that since this section defines only property acquired by theft, etc., to be stolen property, it does not comprise other property into which the stolen property may be converted.(3)

But something must also depend upon the nature of the change. For if, suppose, a thief steal a sheep and deliver its mutton to an accomplice, the latter could not plead in defence against his indictment for receiving, that he had received only the mutton, though the thing stolen was a sheep.(4) So if the thief steal ornaments of gold and silver which he should melt down after the stealing, disposing of the bullion to a confederate, the latter could not be heard to say that what he had received was not stolen property. But in such cases, the substance of the property remained the same and only its form had undergone a change. But if, suppose, in the last case, the thief had purchased a horse with the notes or ornaments he had stolen, and then made it over to a receiver, the horse could not be held to be stolen property, nor could the receiver be convicted for receiving it, even though he may be shown to have possessed the knowledge that the horse had been purchased from the proceeds of theft.

4507. This section, it will be noted, confines the definition of stolen property only to the property which was the actual subject-matter of theft. It excludes all property which the stolen property has been converted into or exchanged for.(5) It was, accordingly, there held that an ingot obtained by melting down stolen jewellery cannot be regarded as stolen property.(6) But the question whether the property still remains stolen property depends upon the nature of conversion. As in the case before cited, where notes of one denomination were exchanged into those of other value, the exchange was so complete as to have completely destroyed the identity of the original property. In such a case the receiver could not be convicted under the next section, even though he may be shown to have received the property with the knowledge that it was the proceeds of theft. But the case would be different, if the *corpus* remaining the same, merely the appearance or form is altered, in which case it remains the same property in spite of the alteration in its appearance.

(2) *Walkley*, 4 C. & P. 132.

(3) *Monmohun Roy*, 24 W. R. 33 (35). It is there pointed out that the Code contains no provision similar to 24 & 25 Vict., c. 96, s. 38, which makes the receiving of money obtained upon or in virtue of forged instrument, a felony punishable with 14 years' imprisonment. Under the Code mere receipt of such money apart from abetment is not punishable.

(4) *Cowell*, 2 East. P. C. 617, 781, *Chepple*, 9 C. & P. 355.

(5) *Subha Chand*, (1881) P. R. No. 39

(6) *Ib.*

The case is the same as if a person were to steal another's cigarette case and rub out his crest thereon to prevent its identification.

4508. Stolen Property Reverting to Lawful Possessor.—Property once stolen retains that character so long as it remains out of the possession of the person lawfully entitled to it. Hence, as an owner may commit theft of his own property (§ 4098), so he may be also in possession of stolen property which is his own. This is obvious from the fact that the three offences of theft, extortion and robbery are intended only to protect possession and not ownership. But in the case of property misappropriated "if such property subsequently comes into the possession of a person legally entitled to the possession thereof" must mean the owner as distinct from the person in possession. This is evident from the fact that the possession of a misappropriator is not *ab initio* wrongful. It becomes wrongful only with the change of intention. Consequently, legal possession of property may, with the change of intention, be converted into stolen property.

4509. But in either case the section is on one point clear. Neither a subsequent consent nor ratification suffices to alter the character of stolen property. For instance, if a person steal one's property, and afterwards pay for it, upon which the owner allows him to retain it, the property which was stolen still retains its character despite the subsequent consent of the owner. This is the inevitable consequence of the policy of law which does not permit the owner to compound with the thief. The result of this is that property once "stolen" remains stolen for ever afterwards, irrespective and independently of the volition of its lawful possessor till it reverts to him. But the principle of this doctrine must not be carried too far. For, if, suppose, in the last case the owner had actually taken hold of the stolen thing and then sold or gifted it to the thief, could it then be said that it was still stolen because it was infected with the taint of the original theft? If not, what difference does it make if the thing was delivered to the thief not by manual delivery but by a mental direction.

4510. That in such a case, the possession of the thief becomes legalized, was the view of the Judges to whom a case on the following facts was referred for opinion. On a theft of his property the owner found his goods in the pockets of the thief, whereupon he hailed a policeman who seized them, but afterwards by the direction of the owner restored them to him for sale, which he then sold to the prisoner, upon his paying their price to the owner. The prisoner was indicted for receiving stolen goods, but on a case reserved, the conviction was quashed. Lord Campbell, C.J., observing: "I do not see how it could be supported unless the doctrine was laid down that if at any period of the history of a chattel, which had been stolen and has been restored to the owner, who has long had it in his possession, the same chattel should be received from the owner by a person who knew that it had been once stolen, such a receiving would be an offence within the Statute. I think, such a receiving could never be said to be an offence within the Statute, any more than it could make the receiver an accessory at common law to the felony. If an article once stolen has been restored to the master of that article, and he, having

had it fully in his possession bails it for any particular purpose, how can any person, who receives the article from the bailee, be said to be guilty of receiving stolen goods within the meaning of the Act? ——(In this case) the owner had possession of the goods just as much as if he had taken them into his own hands, and had delivered them from his own possession to another person for a particular purpose. He was the bailor of the goods subsequently to the theft, and the other person was the bailee. After that, the goods are carried by the theft by the direction of the master of the goods, to the prisoner who receives them. That is not a receiving within the meaning of the Act."(7) This case then justifies the three following deductions: (*i*) Stolen property loses its character the moment it reverts to its lawful possessor; (*ii*) such possession may be actual or constructive; and (*iii*) for this purpose it is sufficiently in the possession of the person if it was placed under his direction.

4511. This case was followed in another in which the prosecutors were a firm of carriers who received the goods in question for conveyance to the consignee. While they were awaiting despatch, a servant of the carriers changed the label directing them to the prisoner, but the superintendent of the prosecutor detected the fraud and ordered two detectives to accompany the consignment. The parcel was delivered to the prisoner under circumstances which clearly shewed knowledge on his part that it had been stolen. The prisoner was indicted for receiving stolen goods and the carriers' servant who had changed the label, for larceny, to which he pleaded not guilty. It was held that as the consignors had resumed possession of the goods, the property ceased to be stolen property, and that its receipt by the prisoner could not, therefore, constitute receipt of stolen property. As Pollock, B., put it: "It is, of course, frequently the case that when it is found that a person has stolen property he is watched; but the owner of the property, if he wishes to catch the receiver, does not resume possession of the stolen goods; here the owners have done so, and the result is that the conviction must be quashed."(8) This view would appear to be in conformity with the language of the section which speaks of the property subsequently coming into the possession of the person legally entitled to its possession.

4512. Not Stolen Property.—Property acquired by a fraudulent transfer is not stolen property, since whatever may be the object, ownership therein is transferred by consent. The creditor of a person applied for the latter's insolvency. The debtor transferred some of his property to the accused to prevent its falling into the hands of the Receiver. The creditor complained that its recipient was either the thief or the receiver of stolen property. He was of course neither, and it was so held.(9)

Session. Pres. Mag or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Non-comp. Summary. if property valued at Rs. 50 or less.

Dishonestly receiving stolen property.

411. Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either

(7) *Dolan*, Dears C. C. 436; *Schmidt*, 35 L. J. M. C. 94; *Miller*, 6 Cox 353; *Villensky*, (1892) 2 Q. B. 597.

(8) *Villensky*, (1892) 2 Q. B. 597 (599, 600); following *Dolan*, Dears C. C. 436; *Schmidt*, 35 L. J. M. C. 94.

(9) *Bulchand*, 8 S. L. R. 55, 25 I. C. 1003, 16 Cr. L. J. 675.

description for a term which may extend to three years, or with fine, or with both.

[*Dishonestly*—s 24. *Reason to believe*—s. 26. *Stolen property*—s. 410.]

Synopsis.

(1) *Analogous Law* (4513).
(2) *Procedure and Practice* (4514).
(3) *Venue* (4515-4517).
(4) *Restitution of Stolen Property* (4518-4521).
(5) *Proof* (4522-4526).
(6) *Sentence* (4525).
(7) *Charge* (4527).
(8) *Principle* (4528).
(9) *Meaning of Words* (4529).
(10) *Dishonestly Receiving Stolen Property* (4530).
(11) *Exclusive Possession Necessary* (4531-4534).
(12) *Joint Family* (4535).
(13) *Husband and Wife* (4536-4539).
(14) *What is Dishonest Receipt* (4540).
(15) *Knowledge of or Belief in Stolen Property* (4541-4548).
(16) *Nature of the property* (4545).
(17) *Circumstances of Sale* (4546).
(18) *Price Paid* (4547).
(19) *Retaining with Guilty Knowledge* (4549-4550).
(20) *Presumption from Recent Possession* (4551-4560).
(21) *Degrees of Presumption* (4552).
(22) *Nature of Presumption how Determined* (4557).
(23) *No Offence If Property Abandoned or Ownerless* (4561).

4513. Analogous Law.—The mere possession of stolen property is not and cannot be an offence. In order to be an offence it must be received or retained dishonestly, and with the knowledge, or sufficient cause for belief that it was stolen property. Such knowledge is essential under the Larceny Act, 1861,[10] the provisions of which have been already set out under the last section (§§ 4499-4501). This is another section dealing with what the draftsmen termed "subsequent" abetment and what is known as succession after the fact.

4514. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class, and summarily if the value of the property stolen does not exceed rupees fifty.[11] A person found in possession of stolen property belonging to different owners, cannot be convicted of separate offences in respect of each owner unless there is evidence to prove that he had received it at different times.[12]

4515. Venue.—A charge under this and cognate sections may be inquired into either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of

(10) 24 & 25 Vict., c. 91, s. 95.
(11) S. 260 (*f*), Cr. P. C.
(12) *Shco Charan*, 45 A. 885; *Munna*, 83 I. C. 481, (1925) O. 298.

whose jurisdiction any of them were at any time dishonestly received or retained.(13) A person cannot be subjected to the double conviction for theft and receiving stolen property in respect of the same property and the same act,(14) though of course, there is nothing to prevent a person from being convicted of receiving stolen property, though the person be the thief as well, and for which the Court have no jurisdiction to try him.(15) But this naturally implies that the accused received or retained the property in British India. For, a person not proved to be a British subject, could not be tried in British India for the proceeds of a theft committed in British India, which he had removed to and was found in possession of in a native state.

This was laid down in a case in which the facts were these. The three accused were shown to have taken part in a dacoity committed in a British village separated from the Gwalior territory by a river. The police pursued the robbers into that State and found them and the booty which they had carried across to their hiding place. The accused were extradited for trial into British territory. It was not shown whether they were British subjects or subjects of the state of Gwalior. The case of dacoity against them fell through for want of credible evidence, and the Judge was left on his hands with the case of receiving stolen property for which they were convicted. They appealed to the High Court, but Edge, C. J., held that they could not be tried in British India for receiving or retaining stolen property out of British India. They were accordingly acquitted.(16)

4516. In cases of receiving stolen property a person cannot be tried at any place in British India for possessing such property in British India, but he can be tried only by the Court within the local limits of whose jurisdiction the stolen property was found. Consequently, to make it legal to punish at A, it must be proved that the prisoner either committed the theft at A, or that he was there found in possession of stolen property. If, therefore, it is shown that B committed the theft at A and the prisoner was found in possession of the property at C he could not be tried at A, though B found at C may be so tried there.(17) As regards the joinder of charges in the case of a person found in possession of different articles of stolen property, the question depends not upon whether the things belonged to different owners but upon whether the accused had received them at different times. For in the former case, it may be that the prisoner may have received at one time all the properties which may be the subject of several thefts.(18)

Where, however, he has received the several articles with distinct notice of their being proceeds of distinct thefts, the mere fact that they were received at one time would not consolidate his crimes. As it was put in a case: suppose the thief were to say to the receiver: "Here is a coat stolen from A, take this," and the receiver took it, and also: "Here is a ring stolen from B, take this," and the receiver took it.(19) The question

(13) *Sheo Charan*, 45 A., 485; *Munwa*, 83 I. C 481, (1925) O. 298. s. 180, ill. (*b*).

(14) *Sreemunt Adup*, 2 W. R. 63; *Seeb Churn Haree*, 11 W. R. 12.

(15) *Lakhya Govind*, 1 B. 50; *Sunkur Gope*, 6 C. 307; *Jafer Ali*, (1894) P.R. No. 30.

(16) *Kripal Singh*, 9 A. 523; cf. *Pirtai*, 10 B. H. C. R. 356.

(17) *Ghusoo Khan*, 5 W. R, 49; *Moheswari*, 18 C. W. N. 1178; s. 180, ill. (*b*), Cr. P. C.

(18) *Makhan*, 15 A. 317.

(19) *Semble in Ishan Muchi*, 15 C. 511.

here depends upon the construction of the language used in section 235 of the Procedure Code, which depends upon whether the several acts were so connected together so as to form the same transaction. So where stolen goods apparently of two thefts were found on an accused person at one and the same search and there was no proof of two distinct acts of receiving it, it was held that there could not be two convictions under this section.(20)

4517. Amended s. 239 of the Code of Criminal Procedure now expressly permits the joint trial of a person accused of theft, extortion or criminal misappropriation and one accused of receiving or retaining or assisting in the disposal or concealment of property, possession of which is alleged to have been transferred by any such offence committed by the first named person, or of abetment of or attempting to commit any such last-named offence.(21) It also authorizes the joint trial of persons accused of offences under this and s. 414.(22) Before the present amendment the test was whether the two offences were committed "in the same transaction."(23) This clause was held to imply a community of purpose and object evidenced by the proximity of time and place.(24) This threw on the prosecution an additional burden which they were at times unable to sustain in consequence of which the entire proceedings had to be quashed.(25) The same consideration determined the legality of trial of two or more persons accused of receiving stolen property which was shown to be the proceeds of the same theft. The recent amendment of the section brings the Indian rule in line with the English rule on the subject.(1)

Restitution of Stolen Property.

4518. The subject of this offence suggests a point which, though relating to procedure, often arises in practice, and to which some allusion has been made before (§§ 4123-4124). For this purpose property is divided into cash and bills or notes payable to bearer, and other property not so negotiable. As regards the former, the property is ordinarily inseparable with possession; but as regards the latter it remains in the person from whom it is stolen.(2) But even in the case of the former, fraud on the part of the holder of it will destroy his right to the bill.(3) But otherwise the holder for the time being is the owner of such property, and the fact that the complaint establishes it to be a clear case of theft, does not give him any better title over a *bona fide* holder. But if the same property be anything, except cash or currency note or a negotiable instrument payable to bearer, the rule is that as between the first owner and the subsequent *bona fide* purchaser, the latter must suffer, the property being on the conviction of the receiver

(20) *Kaur*, (1907) P.W.R. Cr. 4.
(21) S. 239 (*e*), Cr. P. C.
(22) S. 239 (*f*), Cr. P. C.
(23) *A. David*, 6 C. L. R. 245; *Man Mohan Roy*, 19 C. W. N. 672; 26 I. C. 307; *Keshav*, 6 Bom. L. R. 361; *Balabhai*, 6, Bom. L. R. 516; *Bhima*, 38 A. 311; *Nga So Shat*, 4 Bur. L. T. 263, 13 I. C. 395; *contra in Sunder Singh*, (1905) P. R. No. 3, 2 Cr. L. J. 37; *Govindarajulu*, (1914) M. W. N. 352, 23 I. C. 208; *Ram Pershad*, 2 R. 80.
(24) *Man Mohan Roy*, 19 C. W. N. 672, 26 I. C. 307.
(25) *Subramani*, 25 M. 61 P. C; *Bhagat Singh*, 5 P. L. R. 372.
(1) *Reardon*, L. R. 1 C. C. 31.
(2) *Anon*, 1 N. W. P. H. C. R. 298.
(3) *Collector of Salem*, 1 M.H.C.R. 233.

returned to the complainant.(4) In this respect the English rule is the same and is now enacted as follows:—

"If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly, receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided, that if it shall appear before any award or order made that any valuable security shall have been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bona fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of in such case the Court shall not award or order the restitution of such security: Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent, entrusted with the possession of goods or documents of title to goods, for any misdemeanour against this Act.(5).

4519. Under this rule so far as regards the thief law makes no distinction between negotiable property or otherwise, the thief being liable to restore not only the thing stolen but anything into which he may have converted it, so that where the thief stole a bill of exchange for £100 and a considerable sum of money *in specie*, and it appeared that with a part of the proceeds of the theft the thief had purchased a horse, the Court ordered delivery of the horse by way of restitution.(6) And this is clearly provided by the explanation to s. 517 of the Procedure Code which extends the conception of "property" to include anything into which it is converted or for which it is exchanged. But the power of the Court is confined to restitution only to this extent and no further. For instance, if the thief in the last case had been found in possession of the horse, but there had been no evidence of its purchase from the stolen money, then the Court could not have ordered restitution, though the horse may not have been worth more than the value of the stolen property.(7) But in such a case it is open to the prosecutor to maintain a separate suit, the right to which is, of course, in no way affected by the summary powers of the Court.

4520. So far then as the thief himself is concerned, his liability to restitution is unaffected by the nature of the property. But the distinction between property which is negotiable and other property becomes material where the rights of the third party intervene. In that case the rule is that a negotiable property payable to bearer and discharged by the payee cannot be recovered by the owner, though if the property

(4) *Bhara Mull*, (1871) P. R. No. 37: *Gardi Singh*, (1872) P. R. No. 7; *Hussa*, (1873) P. R. No. 8, in which, however, an exception is made in the case of sale in market overt, while in *Kishen Kour*, (1878) P. R. No. 20, the purchaser is held entitled to the property in a summary proceeding under what is now s. 517, Cr. P. C.

(5) 24 & 25 Vict., c. 96, s. 100; taken from 7 & 8, Geo. IV, c. 29, s. 57, and 9 Geo. IV, c. 55, s. 50 (1).

(6) *Powel*, 7 C. & P. 640.

(7) *The City of London*, 27 L. J. M. C. 231.

be non-negotiable the rule is different. So where a prisoner was indicted for stealing a £10 bank-note, which had been paid and cancelled by the Bank, it was held that the order to restore could not be made.(8) The same view has been taken in this country of a currency note cashed at a Government Treasury, property in which passes on delivery, which if stolen and cashed, the owner cannot recover from a *bona fide* transferee without notice.(9) But where the thief was convicted of stealing certain pieces of plush, the property of A, which were sold by the thief to B, who was a *bona fide* purchaser without notice of the thief, and in fact who had purchased it from the thief believing him to be A's agent, it was held that the property in the plush revested in A on the thief's conviction and who thereupon became entitled to restitution.(10) And this rule has been followed in this country.

4521. The powers of the Court under section 517 of the Procedure Code are as limited as those of the English Court, and they are defined by that section to be limited to "the disposal of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence." The property which has been produced before the Court or is in its custody calls for no comment, for such property being under the physical control of the Court must be disposed of by it on the termination of the proceedings. The question, however, as to what is comprised in the rest of the clause may not be always manifest, and has much exercised the Courts in a case in which the Magistrate had ordered confiscation of the press held to have been used for the printing of a seditious newspaper, which order was intended to be upheld on the ground that the press had been used for the commission of the offence of sedition, but it was held that that provision had only reference to the offences relating to property or documents and not to such an offence as sedition, that in any case it could not be said that the press had been used for the commission of the offence of sedition, for the press was a remote instrument, and in this view the order for confiscation was quashed.(11)

Again, section 517 presupposes the commission of an offence, and no order can be legally passed under that section for delivery of the property to any person other than its previous possessor, if the evidence discloses no offence and the accused has to be discharged or acquitted.(12) In such a case the Court has no power to act under section 523 of the Procedure Code, for that section does not apply to property which is produced before it in the course of an inquiry or trial under a search-warrant issued by itself under section 96 of the Code, but applies only to property seized by the police of their own motion in the exercise of the powers conferred on them by law, as for example, sections 51, 54, 164 and 165.(13)

For further commentary, *see* s. 379.

(8) *Stanton*, 7 C. & P. 431.
(9) *Collector of Salem*, 7 M. H. C. R. 233.
(10) *Woolez*, 8 Cox 337; *Macklini*, 5 Cox 216; *Goldsmith*, 12 Cox 594.
(11) *Abinash Chandra Bhattacharjee*, 11 C. W. N. 1046.
(12) *Devidin Durga Prasad, In re*, 22 B. 844: *Amra Nathu*, (1890) B. U. C. 500.
(13) *Ratanlal*, 17 B. 748; *Devidin Durgaprasad, In re*, 22 B. 844.

4522. Proof.—It has been remarked before, that the same person cannot be subjected to a double conviction for theft and receiving in respect of the same act. But there is nothing against his being tried for the two offences, but his conviction must be only for one offence, the accused being then acquitted of the other,[14] unless the Court elects to convict him in the alternative. This alternative has an advantage when there is no evidence of theft against the accused, since the Indian Evidence Act provides that "The Court may presume that a man who is in possession of stolen goods soon after the theft, is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession."[15] But the accused cannot be called upon to account for his possession till the Court makes that presumption, which it would be justified to make under circumstances to be presently considered (§§ 4551-4556). It would then be no misdirection for the Judge to tell the jury that if the prisoner could not account for his possession it was their duty to convict him.[16] It is, however, clearly a misdirection to tell the jury merely to find whether the property was stolen, and whether it was retained by the accused.[17] A proper charge to the jury must direct them to find: (*i*) whether the property was stolen;(*ii*) whether it was dishonestly retained; and (*iii*) whether the accused knew or had reason to believe the same to be stolen property. Unless these questions are found by the jury in the affirmative, the accused could not legally be convicted of an offence under this section.[18]

4523. There can be no conviction for receiving unless there is evidence of theft; it is not necessary that the thief should have been traced or convicted, but what is necessary is that there must be proof that a theft took place and that the property charged is the proceeds of such theft.[19] This must be proved by independent evidence, though the record of conviction for theft, if any, may be filed as corroborative evidence. But it is no evidence against the accused.

4524. It is to be noted that section 414 of the Code is closely analogous to this section, and a person may be charged with and tried for this offence and also in the alternative. So where two or more persons assist in the concealment of property, they may be separately charged with and convicted of the two offences. As the Procedure Code provides:—

"S. 239. (*i*) Several stolen sacks of corn are made over to *A* and *B*, who know that they are stolen property, for the purpose of concealing them. *A* and *B* thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. *A* and *B* may be separately charged with and convicted of offences under sections 411 and 414 of the Indian Penal Code." (20).

(14) (1864) 1 W. R. (Cr. Cir.) 2.

(15) Indian Evidence Act (I of 1872). s. 114, ill. (*a*).

(16) *Narain Bugdee*, 5 W. R. 3 (Head-note inaccurate).

(17) *Balya Somya*, 15 B. 369; *Karatuka* 42 C. L. J. 212, 90 I. C. 542, (1925) C 1241.

(18) *Ib.*; general principle followed in *Tajee Pramanik*, 25 C. 711; *Ghansham Das*, 26 P. L. R. 165.

(19) *R.* v. *Ballard*, 12 Cr. A. R. 1; *Hira*, 9 A. L. J. 370, 14 I. C. 606; *Sankara Narayana*, 4 L. W. 53, 35 I. C. 488; *Samachari*, 45 M. L. J. 728; *Maung Gyi* 1 R. 520; Lal Singh, (1911) P. L. R. 113, 24 I. C. 833, 15 Cr. L. J. 521; *Yasin Khan*, 19 N. L. R. 176, 75 I. C. 544, 24 Cr. L. J. 960.

(20) S. 239, ill. (j), Cr. P. C.

4525. Sentence.—There would be fewer thieves if there were fewer receivers of stolen property. The latter made thieving profitable and its detection difficult and at times impossible. The receiver must be, therefore, held responsible in the same degree as the thief. A first offender may now be dealt with under s. 562 of the Code of Criminal Procedure.(21)

4526. The points requiring proof under this section are:—

(1) The commission of theft, extortion, robbery, criminal misappropriation or criminal breach of trust.

(2) That the possession of the property in question was transferred by theft, extortion or by robbery, or that it had been acquired by criminal misappropriation or criminal breach of trust.

(3) That the accused received or retained such property.(22)

(4) That he did so dishonestly.

(5) That he knew or had reason to believe that it was stolen property.

4527. Charge.—The charge should specify the name of the owner or the lawful possessor of the stolen property. A charge that the accused dishonestly received stolen property knowing it to be stolen, in having had in his possession clothes and brass pots worth two rupees and six annas, and in not being able to account satisfactorily for the manner in which he obtained possession of them, was held to be defective, though the Court did not interfere with the conviction,(23) but the case was not argued for the accused and it was not contended that the defect had prejudiced the accused. Of course, since dishonesty and knowledge or reasonable belief on the part of the accused that the property he received was stolen property, are two of the essential elements of this offence, they must be both set out in the charge.(24) A person charged for theft and in the alternative for receiving, cannot be convicted for receiving if the Judge charged the jury on the case for theft without adverting to the other charge for receiving.(25)

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you dishonestly received (*or* retained) stolen property, to wit——(*specify it*) belonging to A B. knowing or having reason to believe the same to be stolen property, and that you thereby committed an offence punishable under section 411 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

(21) Overruling *Kabir Shah*, (1923) A. I. R. (Pat.) 297, decided under the unamended section. Security for good behaviour from an offender aged 14½ years—*Tagar Nath* 6 Pat. L. T. 294; (1923) Pat. 297.

(22) *Ram Autar*, 47 A. 51v (Exclusive possession must be proved against the member of a joint family).

(23) *Balnath*, 1 B. H. C. R. 95.

(24) 4 W. R. (Cr. L.) 11.

(25) *R.* v. *Evans*, 12 Cr. A. R. 8, 85 L. J. (K. B.) 1186.

"And I hereby direct that you be tried (by the said Court,) on the said charge."

4528. Principle.—Thieving obtains encouragement from the facility thieves possess of disburthening themselves of their goods. But for the aid of a receiver the avocation of a thief would be fraught with manifest perils. The receiver is, therefore, an ally of the thief, and of the two probably not the less culpable, because it is he who usually profits most by the proceeds of theft without incurring the same risk of detection. Law, therefore, regards his offence as equally great and the punishment provided here for receiving is, therefore, the same as for simple theft. Three things are, however, necessary to constitute theft: (*i*) dishonesty; (*ii*) knowledge of the property being stolen; and (*iii*) the fact that it is stolen. In this respect he possesses all the essential elements of the substantive crime; and thus the thief and the receiver are regarded as *particeps criminis*, the one receiving aid and encouragement from the other.

4529. Meaning of Words.—"*Receives or retains any stolen property*": To begin with, the property must be stolen and it must be "received or retained." It is thus possible for property to be received innocently and retained dishonestly. "*Knowing or having reason to believe*": These words are stronger than the words "suspect" and involve the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property[1] (§§ 4541-4543).

4530. Dishonestly Receiving Stolen Property.—Three things are essential to constitute this offence: (*i*) the property must be stolen; (*ii*) it must have been received or retained "dishonestly"; and (*iii*) it must have been received or retained "knowing or having reason to believe" it to be stolen property. There can be obviously no offence of receiving unless the property in respect of which the offence of receiving is alleged answers the description of "stolen property" as given in the last section. That section makes it sufficiently clear that stolen property must have been acquired by theft or criminal misappropriation or other offences allied to them (§§ 4503,4504). As this fact has to be established against the accused, it is necessary to prove all the circumstances constituting the property as stolen property. The fact that it had been shown to be so in a proceeding against the thief is insufficient; and, indeed, not even relevant, for those proceedings cannot affect the offence of the accused who was no party to them. He is entitled to have the question tried in his presence, and for this purpose it is incumbent upon the prosecution to prove all the facts to support its character as stolen property.[2] If the principal offender has confessed, his evidence would be relevant against the receiver,[3] but being an accomplice, his evidence would then require corroboration,[4] though this is merely a rule of judicial caution and not of law.[5]

(1) *Rango Timaji*, 6 B. 402 (403).
(2) *Mataya*, (1888) B. U. C. 416; *Baldeo Pershad*, 2 N. P. W. H. C. R. 187; *Burke*, 6 A. 224; *Ishan Chandra Chandra*, 21 C. 328.
(3) *Haslam*, 1 Leach, 418.
(4) Indian Evidence Act (I of 1872) s. 114, ill. (*b*); *Robinson*, 4 F. & F. 43.
(5) Indian Evidence Act (I of 1872), s. 133.

The Court trying the receiver is not bound to be guided by the proceedings against the thief, nor is it, indeed, permissible for it to rely upon the judgment in that case as affording any strength to the case against the receiver. The case against him may be proved by the evidence adduced in the former case; but it must be adduced afresh giving him an opportunity of cross-examining the witnesses and of showing that the property in respect of which he was charged was not stolen property. Assuming, however, that the property is proved to be stolen, it does not necessarily follow that the accused is necessarily to be convicted as its receiver. For there yet remain two more vital questions to be considered: Did he receive or retain it dishonestly, and knowing or having reason to believe it to be stolen property. These two elements are necessarily inter-related, though they are not necessarily interdependent. They necessarily exclude other aiders and abettors, such as, for instance, a person who negotiates for the sale of goods which he knows to have been stolen, who cannot consequently be convicted of receiving or retaining stolen property unless he is also shown to have been in possession of the property in the sense of having joint or exclusive control over it.(6)

4531. Exclusive Possession Necessary.—Dishonest receipt and retention implies possession, and such possession to be criminal must be actual and exclusive, for criminal liability does not attach to constructive possession, as of the *Karta* of a joint Hindu family, who though presumed to be in possession of the entire family property, could not on that assumption be held criminally liable for stolen goods brought into the house by other members of the family. From this it follows that where property is found in a house in the possession of more than one inmate, none of them could be said to be in possession of it for the purpose of this offence unless there is evidence of exclusive conscious control against them(7) (§ 277). If, therefore, a person is shown to stand in such relation to stolen property as falls short of possession by him of such property, his manner of dealing with the property may warrant a charge of assisting in concealing or disposing of or making away with the property with a guilty knowledge within the meaning of section 414, but it would not justify a conviction under this section.(8) Such possession cannot be inferred from the mere fact that the accused showed the police certain hiding places in grass and water-courses where the incriminating property was concealed.(9)

This case was followed by Edge, C.J., and Banerji, J., in a case in which the accused had pointed out a spot in the field, not his own, where certain stolen property was found, and dug up the property therefrom. It was held that this evidence was wholly insufficient to sustain a conviction under this section for which there must have been the further evidence to prove that the accused had himself concealed the article in the place where it was found. "It is not sufficient for a conviction that the accused pointed out the stolen article, if it is left doubtful whether the

(6) *R.* v. *Watson*, (1916) 2 K. B. 385.
(7) *Muhamad Ali Shet*, (1908) 4 M.L.T 415; *Sharafat*, 57 I.C. 913 21 Cr. L.J. 673; *Bashir Ahmad*, 22 O.C. 256, 54 I. C. 245, 21 Cr. L. J. 40; *Farukh Husain*, 24 O. C. 294, 67 I. C. 588, 23 Cr. L. J. 428 (*Khushi Ram*, 20 A. L. J. 162, (1922) A. I. R. (A.) 83, 67 I. C. 388, 23 Cr. L. J. 385; *Ganeshi Lal*, 4 L. L. J. 484.
(8) *Khoma*, (1879) P. R. No. 31.
(9) *Kinkar*, (1881) A. W. N. 94.

accused or some other person concealed the stolen article, or that the accused obtained in some other way information that the stolen property was in the place where it was found.(10) In another case the accused was convicted for the theft of a bullock whose skin he pointed out as buried in the land which was not in his exclusive possession, but his conviction was quashed on the ground that the shed in which it was found belonged to or was in possession of several persons other than the accused and that the giving of information by the accused that it lay buried there was not conclusive of the guilt of the accused under this section as it was not inconsistent with his being the thief or the receiver.(11)

4532. But in these cases the confessions of the accused supplementing the fact of possession were rejected as either extorted or unreliable, but had they been admitted, the result might have been different. Such was the case of the accused who being charged with the murder of a boy for the sake of his ornaments confessed about the boy being with him immediately before his death, which he explained as due to a fall from his house. He admitted having thrown his corpse into a tank from which it was subsequently recovered. He also produced the ornaments which the boy wore from a hole near the tank. There was no evidence of murder and the medical evidence was to the effect that the boy might have been intentionally or accidentally strangled. It was held that though there was not sufficient legal evidence of murder, the evidence as to the finding of the ornaments justified his conviction under this section.(12) Even where the property is found in a house of which the accused is an adult male member it does not necessarily follow that he was in possession of it, nor indeed that all the inmates were conjointly in such possession. Even in such a case the necessity of tracing exclusive possession to an individual member remains.(13) Such possession may be proved by evidence of exclusive control, as where a separate room is allotted to an individual member of the family, for which he possessed the key and from which the stolen property was recovered,(14) or other facts leading to the same conclusion. The true test of receipt, on a trial for receiving stolen property, is control.(15)

4533. The word "possession" in this connexion obviously means conscious possession, for any other possession could not be taken into account in charging a person with criminal liability. As has been, indeed, expressly provided for in the section, such possession must be both dishonest as well as with knowledge or belief in the stolen character of the property. So, while it is provided in the Indian Evidence Act that the Court may presume that a man who is in possession

(10) *Gobinda*, 17 A. 576; followed in *Paimullah*, 16 C. W. N. 238, 12 I. C. 783; *Hakiman*, (1905) P.R. No. 20; *Pir Baksh*; (1912) P. L. R. 46, 13 I. C. 220; *Mehru*, (1913) P. W. R. 32, 21 I. C. 474; *Buta* (1917) P. R. No. 1, 39 I. C. 330; *Umar*, 3 S. L. R. 136, 4 I. C. 481.

(11) *Hakiman*, (1905) P. L. R. 196; *Hamada*, 1 P. W. R. Cr. 1; *Rullia Ram*, 5 L. L. J. 325, (1923) A. I. R. (L.) 438, *Indar Singh*, 5 L. L. J. 87, 73 I. C. 331, 24 Cr. L. J. 587.

(12) *Nirmal Das*, 22 A. 445; *Malhari*, 6 B. 731.

(13) *Rajani Kanto Kar*, 8 C. W. N. 22.

(14) *Budh Lall*, 29 A. 598.

(15) *R. v. Gleed*, 12 Cr. A. R. 32; *Sew-Dhar*, 40 C. 990.

of stolen goods soon after the theft is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession; [16] it is also provided that in so presuming the Court shall have regard to such a fact as the following: "A shopkeeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continuously receiving rupees in the course of his business.[17]

4534. The question whether the facts and circumstances of a case warranted a finding as to a possession being exclusive is one of fact. The prisoner was indicted for being the receiver of a stolen hat and a watch, the theft of which the principal offender, *A*, had confessed to. It was proved that in consequence of information received a policeman went to the lodgings of the prisoner and asked him if *A* had brought a hat there, to which the prisoner replied in the affirmative and then fetched the hat out of a box in the corner of his bedroom. He was then questioned about the missing watch which he said had been pawned at a certain shop, which was, however, not the case. The prisoner then sent for a boy and asked him for the watch and he brought it and made it over to the policeman. The prisoner lived in a common lodging-house, and it was contended for him that as he had no exclusive possession of the room in which he lived there was no evidence of exclusive possession of the hat; and as for the watch all that had been proved against him was that he knew where it was, which was insufficient; but on a case reserved it was held that there was sufficient evidence to go to a jury.[18]

Where, however, the stolen property was found in the camp of a party of refugees, it was held that it was not proved in whose possession it was to justify the conviction of anyone of them for theft.[19] The accused was convicted under this section the fact proved being that the stolen oxen were taken to his well and put up there for the night, and that he subsequently promised to have them restored to the complainant, but did not do so. It was held that it was sufficient to support the conviction as there was nothing to show that the oxen were taken to his well with his knowledge.[20] In another case certain stolen goods were consigned from one railway station to another. The accused delivered the railway receipt to the railway office and paid for the freight, but before he could obtain manual delivery he was arrested. It was held that the production of the railway receipt established the possession of the accused, and as the other ingredients were proved, his conviction under this section was right.[21]

4535. Joint Family.—Though members of a Hindu joint family are deemed to be in possession of everything belonging to them, such possession is not sufficiently conscious and exclusive to render all members criminally liable under this section. Consequently, the mere fact that possession of a stolen article is traced to such a house is not of

(16) Indian Evidence Act (I of 1872), s. 114, ill. (*a*).
(17) *Ib.*
(18) *Hobson*, Dears C. C. 400.
(19) *Nagshwe E. Eik*, 1 Bur. L. R. 379
(20) *Ahmada*, (1905) P. L. R. 145
(21) *Sewdhar*, 40 C. 990.

itself sufficient to warrant any presumption of criminality against any of its inmates,[22] unless there is evidence to show that they knew of its character and exercised sufficient control to constitute possession (§§ 277, 278). Such was held to be the case of the accused who was the head of the family, of which the only other male member was his son and a stolen cloth was found in his house worn by his daughter and a *chadar* was found concealed in the thatch of the house where he lived, upon which the Court held him *prima facie* responsible as being in possession of them.[23]

4536. Husband and Wife.—Criminal law does not esteem the husband and wife as one person, and it holds each individually liable for his or her acts shown to be criminal. But the wife living in coverture with her husband is deemed to live in the house of which the husband is in possession, but it does not extend the presumption to the extent of making him criminally liable for the stolen goods that may be found therein.[24] There is, however, a presumption that the house occupied by a married couple is in the possession of the husband rather than the wife, but it is presumption too weak to support his criminal liability for any stolen article found therein, nor would in such a case the wife be criminally liable under this section for her connivance and assistance given to her husband in concealing the goods, though in such a case she may bring herself within the terms of section 414. Such was the case of the accused whose husband used to steal oil of the railway Company in whose service he was, and of which information being laid, the accused removed a quantity of the stolen oil and buried it in the ground. She was convicted both under this section as well as section 414, but the Court held that the ground urged in support of her conviction under this section, that the property was found in the house in which she lived was wholly inadequate, for it constituted the possession of the husband rather than of the wife. It was true that the wife assisted in concealing the stolen property when a search was being made for it, but that might have been done from a desire to screen her husband. The Court therefore quashed her conviction under this section maintaining only that under section 414.[25]

4537. In a case against husband and wife the question must then be decided in accordance with the general law which determines individual possession. There is, however, this much to be inferred from the relationship that the wife is the agent of, and must be deemed to have subordinated her will to that of the husband. A wife, in her husband's absence, and without his knowledge, received stolen goods, and paid money on account of them. The thief and the husband afterwards met, and the husband learning of the sale to his wife, agreed on the price to be paid for them, paying the balance to the thief. He was convicted for receiving, and on a case reserved his conviction was affirmed, the Court observing that the contract for the sale of goods was not complete until the husband and the thief met; the husband

(22) *Muhammad Ali Shet*, 19 M. L. J. 301, 4 I. C. 163.

(23) *Musai Kamat*, 1 Pat L. T. 431, 58 I. C. 341, 21 Cr. L. J. 757.

(24) *Khu Shi Ram*, 20 A. L. J. 162, 67 I. C. 338, 23 Cr. L. J. 386.

(25) *De Silva*, 5 N. W. P. H. C. R. 120.

then acquired a guilty knowledge, and ratified the receipt, which amounted to a receipt at that time with guilty knowledge. As Blackburn, J., put it: "If a thief were to leave stolen goods with a pawnbroker's apprentice in the absence of the master, and the pawnbroker on his return, being told of the circumstances, and knowing that the goods were stolen, were to say, 'It is all right; put them away,' no one could doubt that he would be rightly convicted of receiving stolen property."(1) The case would be different if the transaction being completed, the husband came to hear of it and he then acquiesced without taking any active part in it.(2)

4538. In England, a *feme covert* is presumed to be so much under the power and authority of her husband that she is exempt from punishment for a theft or burglary committed in the company of her husband which the law presumes a coercion.(3) But no such presumption is made in the case of receiving stolen property.(4) So where the husband and wife were jointly charged for receiving stolen sugar and the evidence against the wife was that she and her daughter had washed it away, and that she thought it a hard case that she and her husband should be at a loss of four or five pounds, Coltman, J., told the jury that "if the husband received the property, knowing it to be stolen, and if the wife received it from him with the like knowledge and with the purpose of aiding and assisting him in the object which he had in view in receiving it, by turning it to pecuniary profit or in other like manner, although *prima facie* she might be supposed to be acting under the coercion of her husband, that was rebutted by the active part which she took in the matter with the intention above mentioned. But if the part she took was merely for the purpose of concealing her husband's guilt, and screening him from the consequences, then she ought to be acquitted. A wife cannot be convicted of harbouring her husband when he has committed a felony, and the mere circumstance of her attempting to conceal what may lead to her detection appears to come within the same rule." The jury acquitted the wife.(5)

4539. There is, however, one point upon which the Engisih Law on this subject differs from this section. Under English Law the wife can not steal her husband's goods, even though she may have committed adultery, (s. 378) the consequence of which is that the adulterer cannot be convicted of receiving goods which she had removed from her husband though he may be indicated for common law misdemeanour.(6)

What is Dishonest Receipt ?

4540. The use of the word "dishonest" in this connection is important, as it implies that the receiver had received the property not in the ordinary course of business or out of his own necessity but with the intention of causing wrongful gain or loss within the meaning of those terms as

(1) *Woodward*, 31 L. J. M. C. 91.
(2) *Dring*, 7 Cox 283.
(3) 1 Hale, P. C. 44, 516; 1 Hawk, P. C. C. 1. s. 14.
(4) The contrary is implied by the marginal note in *Archer*, R. & M. C. C. 143: but which is inaccurate, for all that was there laid down is that the wife can not be convicted conjointly with her husband when there is nothing to show that she was present at the time of receipt or that she countenanced their reception—thus placing the wife on the same level with a stranger.
(5) *M'Clarens*, 3 Cox 425.
(6) *Kenny*, 2 Q. B. D. 307; *Streeter* [1900] 2 Q. B. 601.

defined in the Code.[7] It is not of the essence of dishonesty that the receiver should obtain the property for the purpose of wrongful gain to himself. It is equally within the term if he receives it for the purpose of assisting the thief or for the purpose of concealing it, although by so doing he gains no profit or advantage for himself.[8] The fact that he receives it with that intention is sufficient to constitute receipt, though he may not succeed in his attempt and may be detected immediately.

Dishonesty is a phase of the mind and must be inferred from circumstances. But the circumstances must be sufficient to justify an inference that the receiving or retention of the property was dishonest. It is a question of fact and not of law,[9] being an inference deducible from the facts and probabilities of each case. There can, however, be no dishonesty when there is no knowledge of the stolen character of the property; for dishonesty implies a wrong and an intention to do a wrong, and therefore there can be no such intention without the knowledge or belief that the property is stolen property. Of course, there may be such knowledge or belief and no dishonesty; as where a person seizes property in order to make it over to its lawful owner, or where one seizes it and retains it under a *bona fide* claim of right (§ 4090). Again, there may be "dishonesty" without the knowledge or belief essential to constitute this offence. Such may be the case where the thief is himself defrauded, as where one steals a diamond ring which the receiver dishonestly pronounces to be paste. He may know not of the theft, but may intend to cheat the thief, in which case there would be dishonesty though without knowledge of the property being stolen.

4541. Knowledge of or Belief in Stolen property.—The dishonesty of receipt must then be connected with the knowledge of or belief in the stolen property.[10] Such knowledge or belief must refer to the property received as being the property stolen. In other words, the receiver must receive the identical property stolen (§ 423), of which he must possess that knowledge. To begin with then, there must be stolen property as defined in section 410. If the property was not stolen the accused could not be convicted of this offence, although at the time of receiving it he erroneously believed it to be stolen property.[11]

4542. If, however, the property is shown to have been stolen property, there arises then the question whether, when receiving or retaining it, he knew or had reason to believe it to be stolen property. The words "knowledge" and "belief" are here used *ejusdem generis*, as both implying the existence and presence of facts or circumstances from which the accused was either made aware, or ought to have been made aware, of the nature of the property. So Bramwell, B., in one case told the jury that "the knowledge charged in the indictment need not be such knowledge as would be acquired if the prisoner had actually seen the lead stolen; it is sufficient if you think the circumstances accompanying the transaction were such as to make the prisoner believe that it had been stolen."[12]

(7) Ss. 23, 24.
(8) *Richardson*, 6 C. & P. 935; *Davis*, 6 C. & P. 177.
(9) *Guzzala Hanuman*, 26 M. 467.
(10) *Arjan Das*, 76 I. C. 963, (1923) A. I. R. (L.) 340.
(11) *Issup*, (1888) B. U. C. 3289.
(12) *White*, 1 F. & F. 665.

The word "knowledge" in this connection means merely mental cognition and not visual perception. It merely implies that the receiver had such facts brought to his notice as could not but have led him to believe that the property was stolen and could not have been honestly obtained. Consequently, both knowledge and belief imply the presence of certain facts from which the accused might have drawn the inevitable conclusion. And this must be proved by the prosecution. As Melvill J., put it referring to the case before him. "It lay upon the prosecution to prove that the accused person knew or had reason to believe that the bullock was stolen property. It was not sufficient to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. The word 'believe' in section 414, Indian Penal Code, is a very much stronger word than 'suspect,' and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property."(13)

4543. The facts of the case in which these observations occur were these: A bullock stolen from its owner was sold by a person to another for Rs. 16 on the guarantee of the accused that it was the property of the seller. It was shown that the seller was so poor that he had to leave the village during the famine to earn his livelihood elsewhere. There were no other circumstances evidencing guilty knowledge, and the Court found it impossible from this single circumstance to hold that the accused had sufficient reason to feel convinced that the seller could not have acquired the means of purchasing a bullock of the value of Rs. 16. He was accordingly acquitted.(14) The mere fact that a person pointed out the place where the stolen property was found does not justify a Court in coming to a conclusion that that person had received, retained or rendered assistance in concealing it. The mere knowledge of the place of concealment does not necessarily lead to the conclusion that the person having such knowledge actually received the articles stolen or participated in the act of its concealment.(15)

4544. But in this connection it is well to observe that for the purpose of the present section it is not necessary to establish actual knowledge or belief in the mind of the accused that the property he was receiving was stolen property; it being sufficient if it is shown that *he had reason* to believe it to be stolen property. This is then an offence in which criminality is based merely upon a *presumed* knowledge and belief though it may be at variance with the actual state of the accused's mind. But then, when it is said that the accused must have had reason to believe, what is intended and implied is that the facts and circumstances must be such as should have been sufficient to induce that belief in the mind of the accused, and not that they were sufficient to induce such belief in the mind of any prudent and reasonable man.

(13) *Rango Timaji*, 6 B. 402; *Kanniappa*, (1913) M. W. N. 696; *Muhammad Ibrahim*, 32 I. C. (A.) 153.

(14) *Rango Timaji*, 6 B. 402; followed *per* Batty, J., in *Jethalal*, 29 B. 449.

(15) *Gobinda*, 17 A. 576; *Hakiman*, (1905) P. R. No. 20, 2 Cr. L. J. 230; *Buta Singh*, (1917) P. R. No. 1, 39 I. C. 330, 18 Cr. L. J. 490.

The latter test is often resorted to in civil law, but it has no place in the criminal jurisprudence of this country. All the same it is a test which naturally forces itself upon the mind of the Judge inquiring into the state of the accused's mind. But it is a fallacious reasoning, as Bacon pointed out: "The human mind," he said, "has this property, that it readily supposes a greater order and conformity in things than it finds; and although many things in nature are singular and entirely dissimilar, yet the mind is still imagining parallels, correspondences and relations between them which have no existence."(16) This is a propensity which, in dealing with this offence, cannot be too carefully watched, for the inquiry that had to be made is not the inquiry whether the accused, as a reasonable man should have believed, but only whether the accused as he was constituted must have believed that the property he was receiving was stolen property. The ordinary and usual tests applied to such cases are: (*i*) the nature of the property; (*ii*) the circumstances attending the sale; and (*iii*) the price paid as compared with its value.

(i) Nature of the Property.

4545. The nature of the property is material, for it affords an occular proof of a mental state which the receiver must have possessed when taking possession of the property. For it cannot be denied that if an elephant or a horse is purchased by a person, the fact of the necessary publicity attending its sale would negative any presumption as to guilty knowledge. On the other hand, if the property purchased is of an unusual character, such as a temple regalia, purchased by a Mahomedan grocer, its character would at once bespeak suspicion that the receiver must have been aware of its true origin. But no such presumption can arise in the case of an article not of an unusual character and such as easily passes from hand to hand, such, for example, as *dhotis* and turbans,(17) or pots and pans(18) or the domestic or agricultural cattle,(19) or implements, cheap ornaments,(20) or indeed such things as persons in the position of the accused might reasonably be expected to possess. But in such cases the question may sometimes depend upon the make of the article. For in a country like India peopled with multitudinous races of diverse views and customs, each race affects articles differing from the rest which afford a valuable clue for detection. For instance, the pots and pans used in a Parsi household are as distinct from those favoured by the Mahomedans as those used by the latter are distinct from those used by the Hindus. Again a Marwari from Ajmere has a distinctive costume from that of one hailing from Jaypur, and both carry their differences of habiliments to the other articles of their household.

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(16) *Novum Organum Aphorism*, 45; *cf.* also Bacon's Advancement of Learning, Bk. II. This propensity will be found to have influenced some decisions under this section. So Rattigan, J., in *Gulbad Shah*, (1888) P. R. No. 37, said: "A person must be held to have reason to believe when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the property he was asked to deal with was stolen property although the circumstances may fall short of carrying actual conviction to his mind on the point." But the receiver may not necessarily possess the intelligence of the conventional "reasonable man." He may be a dunce, what then?

(17) *Ravaji*, (1892) B. U. C. 594.

(18) *Ina Sheikh*, 11 C. 160.

(19) *Rango*, 6 B. 402; *Lal*, (1912) P. W. R. 85, 16 I. C. 528; *Mani Ram*, (1912) P. W. R. 22, 15 I. C. 971.

(20) *Behari* 120 L. J. 339, 89 I. C. 155. (1925) O. 452 (Assessor's opinion entitled to weight in such cases).

4546. Next to these considerations arise those attending the sale. The questions that present themselves in this connection are (*i*) why was the property sold and bought; (*ii*) was the sale made in public; (*iii*) was it unusual; and (*iv*) what was the price paid. A person who carries on trade in a particular article may naturally be expected to buy and sell such goods in the usual course of his business. He could not be expected to be overcircumspect as to the customers with whom he was to deal, unless, indeed, there is anything in their demeanour and mode of business which arouses his suspicions. A brazier buying and exchanging pots may receive those which a thief wishes to relieve himself of, but if there is nothing unusual in his doing, he could not be held responsible for buying pots without inquiry. The same may be said of the *sonar* who has become notorious as a receiver of stolen jewels which he is reputed to pass through his crucibles with incredible celerity. But he cannot be condemned on that account on insufficient evidence. For the evidence required in each case is the same. And the question invariably is, were the circumstances such as were sufficient to make a person in the position and of the intelligence of the accused believe that what was offered to him was stolen property.

(ii) Circumstances of Sale.

4547. Of course, one great question in such cases is the price actually paid for the thing. If it was a fair market price, it will then in ordinary cases be sufficient to repel suspicion. But if there appears a gross difference between the price paid and the price which represents its intrinsic value,[21] it will then be a strong evidence no less of dishonesty than that the property was known or believed to be stolen property. But in judging of the price of a thing regard must always be had to its present saleable value, the market available for it and the fair trade risk which the accused may have taken into account in purchasing it. For it is a fact that a second hand article does not fetch anything like its real value, and if it is an article of personal use its value is then nominal. If, therefore, the accused paid a low price for it, it must not be readily assumed to have been out of the sense of guilty knowledge, for it may have been paid because of the want of a market for the thing and the advantage it thus gave him in driving a hard bargain with his customer. But these are facts which the Court must take into consideration on a proper case arising. They are not to be readily assumed in every case nor pressed into service to explain away possession otherwise sufficiently pointing to criminality.

(iii) Price Paid.

4548. But on the other hand there may arise a combination of circumstances when the inference of criminality is not only natural but irresistible. Such a case arose where the accused took in pawn a costly shawl worth Rs. 125 from a man in poor circumstances for Rs. 10 without inquiring as to its owner and the necessity for its pledge.[22]

(21) Which must be proved—it cannot be assumed; *Mahbood* 56 I.C. (A.) 856; 21 Cr. L.J. 552.

(22) *Ramjoy Karmokar*, 25 W. R. 10

4549. Retaining with Guilty Knowledge.—The question when the accused must have possessed the requisite guilty knowledge or belief, is in view of the section immaterial. For the offence of receiving stolen property may, as here described, consist of equally whether the property is *received* or *retained* with such knowledge or belief. The use of this alternative expression "dishonestly receives or retains" thus relieves the prosecutor of proving more than that the accused either received or retained the property dishonestly, that is to say, the prosecutor need not prove that it was dishonestly received as distinct from dishonestly retained, or dishonestly retained as distinct from dishonestly received. It is enough to prove facts which justify the inference that the accused either dishonestly received the property, or having received it honestly, dishonestly retained it.[23] A person who receives property dishonestly, necessarily retains it with that knowledge if he continues to keep it with him. But he may get rid of it as soon as the true facts dawn on him, in which case it may be difficult to prove dishonest receipt or retention, for his disposal of it may synchronize with his knowledge of its being stolen property.

The collocation of "receipt and retention" are obviously intended to do away with the necessity of proving the presence of dishonestly at the time of its first possession.[24] It has been said that dishonest retention is contra-distinguished from dishonest receipt, and that in the former case dishonesty supervenes after the act of acquisition or possession, while in the latter dishonesty is contemporaneous with the act of acquisition. Every person who retains possession of property dishonestly, possesses and continues to possess it dishonestly so long as he retains it dishonestly, but every person who possesses and continues to possess it dishonestly does not retain dishonestly within the meaning of section 411. Neither the thief nor the receiver of stolen property commits the offence of retaining such property dishonestly merely by continuing to keep possession of it: to constitute dishonest retention there must have been a change in the mental element of possession (possession always subsisting *animo et facto* from an honest to a dishonest condition of mind in relation to the thing possessed). A simple illustration is the case of a pawn-broker who receives property in pledge honestly, and subsequently discovering it to be stolen property, notwithstanding mentally resolves to keep it for his own benefit. In the absence of any act amounting to misappropriation or conversion of the property to his own use, the pawn-broker could not be convicted under s. 403 of criminal misappropriation, but he might be held to have committed this offence.[25]

4550. As however both receiving and retaining constitute one offence the accused is not entitled to claim the nature of his possession specified, and it is sufficient if he is charged for receiving or retaining and evidence is adduced to prove guilty knowledge at some period antecedent to its recovery by the police. Such knowledge may be inferred from the mode of concealment as where a person conceals the property from observation which under the circumstances is otherwise inexpli-

(23) *Per* Plowden, J., in *Muhammad*, (1879) P. R. No. 15.

(24) 4 M. H. C. R. (App.) 42.

(25) *Najibulla Khan*, (1884) C. R. 18: followed in *Jawaya*, (1887) P. R. 46; *Khona*, (1879) P. R. 31.

cable. But the mere absence of explanation,(1) or unsatisfactory or false explanation, (2) are not of themselves sufficient to bring this offence home to the accused, since the failure of a person to account for his possession is only an element in the proof but it is no substitute for proof.

4551. Presumption from Recent Possession.—Assuming that the possession of stolen property is traced to an individual the proof of other facts necessary to establish an offence under this section may be dispensed with if the case falls within the rule enunciated in the Indian Evidence Act enabling the Court to presume that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession; but in considering whether this presumption is justifiable the Court must have regard to a case such as the following: "A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continuously receiving rupees in the course of his business."(3) (§ 4138) This rule of law, the bald statement of which is contained in the Indian Evidence Act, is founded upon good sense and reason which controls its indiscriminate application to all cases irrespective of the other considerations which necessarily limit and qualify it. In the first place the rule is the rule of presumption, or as it is usually termed, circumstantial evidence which is admissible in civil as well as in criminal cases, and the necessity of which in criminal cases is more obvious seeing that the positive testimony of witness is in them less available. Presumptions may be of fact or of law. A presumption of law arises where some facts being proved another follows as a natural or very probable inference or conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof. The fact thus assented to is said to be presumed, that is, taken for granted until the contrary be proved by the opposite party: *stabitur præsumptioni donec probetur in contrarium.*(4) And it is adopted the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the facility of disproving it or of proving facts inconsistent with it, if it really never occurred.(5)

S. 114, Illustration (a), Indian Evidence Act.

4552. The rule here enacted is not a presumption of law, but of fact which are of three kinds: (*i*) violent presumption; (*ii*) probable presumption; and (*iii*) rash presumption. The presumption is violent where the facts and circumstances *necessarily* attend the fact presumed; it is probable where they *usually* attend the fact presumed. A presumption is *rash* when it has no weight or validity at all.(6) Now, applying these principles to an offence under this section, suppose, if the thief were apprehended a few yards from the outer door of the house he had robbed with the stolen goods in his possession, the presump-

Degree of Presumption.

(1) *Bharos*, 21 A. L. J. 836.
(2) *Allu*, (1914) P. W. R. 34; 25 I. C. 982; 15 Cr. L. J. 654.
(3) S. 114, ill. (*a*) and Exception, Indian Evidence Act (I of 1872).
(4) Co. Litt. 272.
(5) Arch, Cr. Pl. (22nd Ed.,) p. 313.
(6) 3 Black, pp. 371, 372.

tion would be violent that the goods he possessed were stolen; but if he were dicovered with their possession in his house sometime after the theft, and he refused to account for his possession of them, this together with proof that they were actually stolen, amount not to a violent but to a probable presumption merely, and if the property was not found recently but long after the theft, say a year or more after the theft, the presumption would be rash and entitled to no weight.[7]

But length of time is not the only element in modifying the presumption which depends as much upon the nature of the property stolen, and whether it be or be not likely to pass readily from hand to hand,[8] as upon other circumstances from which men may safely draw inferences. As Maule, J., put it: "If a man go into the London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed."[9] But though these considerations necessarily influence the presumption, the main test referred to in the section is, was the possession recent enough to raise the presumption of guilty knowledge.

In one case Parke, J., observed that possession of stolen property three months after it was lost was not such recent possession as to put the prisoner upon showing how he came by it unless there was evidence of something more than the mere fact of the property being in his possession at the distance of time after the loss of it"[10]: *a fortiori* possession[11] six or seven months after the loss[12] and sixteen months was much too long to raise any presumption at all.[13] But even three months may be too long in respect of property which readily passes from hand to hand. So Patteson, J., observed that the question of what is or is not such a recent possession of stolen property as to require the person in whose possession it is to give an account of how such possession was acquired was to be considered with reference to the nature of the articles stolen, adding, "if they are such as to pass from hand to hand readily, two months would be a long time."[14]

(7) *Per* Baley, J., in *Anon.*, C. & P. 459: *Adams*, 3 C. & P. 600; *Cooper*, 3 C. & K. 318.

(8) Cf. *per* Patteson, J., in *Partridge*, 7 C. & P. 551.

(9) *Per* Malue, J., in *Burton*, Dears C. C. 822; *Dredge*, 1 Cox 235; *Mookford*, 11 Cox 16.

(10) *Adams*, 3 C. & P. 600 (No. presumption after 2 months); *Ramudu Ajyar*, 44 M. L. J. 243, 72 I. C. 538, 24 Cr. L. J. 426; *Ramhit*, 20 A. L. J. 178, 65 I. C. 849, 23 Cr. L. J. 193, (1922) A. I. R. (A.) 24 (possession of a *dupatta*, common scarf, after 40 days, held to raise no presumption).

(11) *Hari Ram*, 62 I. C. 867, 22 Cr. L. J. 595; *Ram Chundra* v. *Haji Meah*, 17 C. W. N. 1129, 21 I. C. 171, 14 Cr. L. J. 571 (A Government Currency note found with a Shroff 7 months after theft,).

(12) *Per* Maule, J., in *Cooper*, 3 C. & K. 318.

(13) *Partridge*, 3 C. &. P. 551; *Lal Singh*, (1914) P. L. R. 113, 24 I. C. 833, 15 Cr. L. J. 521; *Obbava*, (1912) M. W. N. 529, 16 I. C. 164, 13 Cr. L. J. 596; *Hatkim Mondal*, 24 C. W. N. 619, 56 I. C. 849, 21 Cr. L. J. 515.

(14) *Partridge*, 3 C. & P. 551; followed in *Ina Sheikh*, 11 C. 160; *Nga E*, (1885) S. J. L. B. 354; *Kana Nat*, 6 C. P. L. R. 29,

4553. The principle of these cases has been followed in several decided cases in this country. That the possession of the accused of the proceeds of a theft 4 days thereafter was held to raise the presumption justifying his conviction of this offence admits of no doubt.[15] In one case the accused was convicted of this offence on the presumption raised from the fact of his possession of a drinking cup proved to have been stolen eleven months back, but the Court held that his possession was not so recent as to put him to prove of how such possession was acquired.[16] In this case not only the time elapsing was long, but the thing stolen was one of common use and such as might readily pass from hand to hand. This is implied in the exception given in the Indian Evidence Act to section 114, illustration (*a*). Having regard to this fact Jardine and Telang, JJ., refused to make the presumption in the case of *dhotis* and turbans, the possession of which had been traced to the accused six weeks after the theft.[17] The case of currency notes[18] stands on the same footing. Indeed, there will be no such presumption at all if the article purchased is new and such as can be had anywhere. Even where it is old, the fact that it is one in common use would counteract any presumption that may arise from its possession.

4554. The accused was the guard of a train by which the prosecutor travelled from one station to another, and amongst his wearing apparel contained in a portmanteau were seven handkerchiefs to which the guard had access. A day or two after completing the journey the prosecutor found his handkerchiefs gone. A month later the accused was found in possession of a similar handkerchief. The accused stated that he had received it from a prostitute at Delhi, but this was not proved. The accused was convicted but on appeal it was held that the conviction could not be upheld because there was no proof of theft (§§ 4522-4526) and of its dishonest receipt by the prisoner. Then adverting to the presumption arising from recent possession the Court remarked that the handkerchief was found in the prisoner's possession more than a month after the theft. "That is a considerable time; and the circumstance will not afford a presumption that he received it knowing it to be stolen, unless he can account for its possession. The fact that he is in possession of the handkerchief, and does not account for it, is, no doubt, suspicious, but nothing more, and the prosecution is not relieved from the obligation of proving beyond reasonable doubt, both that the handkerchief was stolen and that the appellant received it dishonestly. This has not been done, and I set aside the conviction."[19]

So in another case the accused's house being searched, a number of brass utensils were found and for the possession of which he could not explain. At the time of search there were no claimants of the pots but two days afterwards some four persons came forward and

(15) *Turimella*, 33 I. C. (M) 819, 17 Cr. L. J. 179.
(16) *Ina Sheikh*, 11 C. 160.
(17) *Ravaji*, (1892) B. U. C. 594.
(18) *Ramacharan* v. *Haji Meah*, 17 C. W. N. 1120; *Vellai Ocha Thevan*, 11 M. L. T. 189, 15 I. C. 315.
(19) *Per* Oldfield, J., in *Burke*, 6. A. 224.

professed to identify some articles out of the heap shown to them. They stated that the articles had been stolen a year or more before the search. But other complainants alleged a recent theft. The Court quashed the conviction in the former cases and affirmed it in the latter, holding that the period was recent in the one batch of cases and not recent in the other so that the presumption made in the one case could not be reasonably extended to the other.[20]

4555. The prosecutor's house was broken into on the night of July 17th and the prisoner was arrested on the road with a part of the stolen property on September 15th. He could not account for his possession, but denied that he was ever found in possession upon which the Court felt justified in convicting him under this section,[21] though having regard to the lapse of time it did not feel justified in convicting him of theft. The prosecutor, a prostitute of Calcutta, was robbed of her ornaments by two persons A and B. C who was B's father-in-law was three days after the theft found in possession of the ornaments as he offered them for sale in a village where he had no business to go, as the ornaments could have been disposed of in Calcutta. It was conceded that there was no necessity for the hurried sale and yet the Court held the case to be one of no more than a mere suspicion and the accused was acquitted.[22] If the facts of this case have been fully reported, no reference was made to this presumption, and it is submitted, that the case was otherwise wrongly decided, because (*i*) the possession was recent, (*ii*) the disposal secret (*iii*) and without necessity, and (*iv*) the accused could not account for his possession. One fails to see where this presumption comes in, if it does not in a case like this.

4556. It is to be observed that the presumption arising from recent possession may be strengthened by the absence of a satisfactory explanation from the accused accounting for his possession. So in a case the Judge told the jury: "In cases of this nature you should take it as a general principle, that, when a man in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him."[23] The accused was found in possession of certain pots, a tin of gun-powder, some pieces of silks, a *sari* and a watch and chain. They were shown to have been stolen some eight or ten months since the accused was asked to account for their possession. He mentioned the name of a person from whom he had received some of the articles and in which he was corroborated. But his explanation as to the watch and chain showed that he had appropriated it without any inquiry as to its owner. The Court considered the presumption thus strengthened by the feeble explanation, and applying the other presumption arising from section 114 (*a*) of the Indian Evidence Act, it convicted him on the whole case.[24]

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(20) *Poromeshur Alteer*, 23 W. R. 16.
(21) *Madappa*, (1888) 1 Weir 471.
(22) *Aswini Kumar Roy*, 10 C. W. N. 219.
(23) *Crowhurst*, 1 C. & K. 370.
(24) *Hari Ramji*, 9 Bom. L. R. 27.

There was nothing remarkable in the case of the accused who was found in possession of stolen jewellery three weeks after it was stolen, which being held to be sufficiently identified by its owner, and his wife and daughter who were in the habit of seeing him wearing it, the Court felt justified in presuming that the accused was a receiver unless he could account for his possession.[25] Section 114 (*a*) of the Indian Evidence Act is useful in establishing *scienter* in doubtful cases, for it provides that if A is accused of receiving stolen goods knowing them to be stolen, and it is proved that he was in possession of a particular stolen article, the fact that, at the same time, he was in possession of many other stolen articles, is relevant, as tending to show that he knew each and all of the articles of which he was in possession to have been stolen.[1]

Nature of presumption How Determined.

4557. It will be observed that the presumption arising under law in case of recent possession is either of theft or receiving stolen property. It may then be a question as to when does a presumption arise of theft and when of receiving stolen property, and whether it invariably arises in the alternative. The prisoner was indicted for receiving stolen sheep which were shown to have been driven from the possession of its owner by the prisoner's two little boys aged eight and twelve. He was convicted, but it was urged that there was no evidence to support that count and that the jury ought to have been so directed, but on a case reserved the conviction was affirmed, Pollock, C. B., observing: "If no other person is involved in the transaction, and the whole of the case against the prisoner is that he was found in possession, of the stolen property, the evidence would no doubt point to a case of stealing rather than a case of receiving; but in every case, except indeed, where the possession is so recent that it is impossible for anyone else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from some one else. If there is no other evidence, the jury will probably consider, with reason, that the prisoner stole the property; but if there is other evidence, which is consistent either with his having stolen the property, or with his having received it from some one else, it will be for the jury to say which appears to them the more probable solution." To which Byles, J., added: "There are three ways in which the prisoner may have received these sheep with a guilty knowledge. *First*, the boys may have stolen them independently of their father, who may have received the sheep from them. *Secondly*, the father may have sent the boys as innocent agents to receive the sheep from the actual thief, in which case the father would have been guilty of receiving as a principal, the boys being, as it were, merely the long arms with which he took the sheep. *Thirdly*, he may have sent the boys for the same purpose as guilty agents, in which case, although the boys would be the principals in the felony (of receiving), yet the father would be an accessory before the fact, and might be convicted as a principal."[2]

(25) *Sen Raya Govindan*, 3 M. L. T. 30, 7 Cr. L. J. 30.

(1) *Ib.*

(2) S. 14 (*a*), Indian Evidence Act (I of 1872).

4558. The question whether the jury should be justified in presuming theft or receiving from a recent possession depends upon other circumstances. If the receiver was seen anywhere near the scene of theft at the time, the Court may take that circumstance with the fact of possession into consideration and presume it to be a case of theft rather than of receiving. The prisoner was indicted for larceny and receiving, and the evidence consisted of the stolen property having been found concealed on her person at about 10 o'clock in the morning after the night of theft and of her having given contrary account of how she came into possession of it, whereupon the jury convicted her only of receiving, acquitting her of larceny, and it was held that the evidence was sufficient to justify the conviction.(3)

4559. In view of the provisions of section 72 providing for a conviction in the alternative in such cases, the question as to whether the receiver should not under a given circumstance have also been convicted of larceny does not seem to call for further notice. At the same time cases may undoubtedly arise in which the act clearly amounts to stealing and when conviction for receiving would be obviously unjustifiable. Such was, for instance, the following case: An indictment charged A with stealing 18s. 6d. and B with receiving it. It was proved that A and B were accomplices, A was the barman and B went up to the bar and called for refreshments and put down a florin: —A served B, took up the florin and gave him 18s. 6d. from his employer's till as his change. He was arrested as he was leaving the bar. The jury convicted A of stealing and B of receiving, but it was held that the evidence did not make out a case of receiving but of larceny, in which B was a principal in the second degree.(4) In England this distinction is material as a person cannot be there indicted in the alternative. The distinction between theft and receiving it, therefore, is the subject of attentive consideration in English Law, but it can have no more than a bare academic interest in this country.

4560. But it suggests two other questions as of more practical importance. In the first place the question may arise whether a person guilty of theft could be convicted of receiving stolen property, if he could not be convicted of theft. Such a case may arise as in the cases supposed where the accused commits theft in foreign territory but is found in possession of his booty in British territory, in which case the view is that though he could not be convicted of theft, there is nothing to prevent his conviction for this offence. This was clearly the intention of the amendment of section 410 (§§ 4498-4501). The English rule on this point was, however, at one time(5) different, and it was erroneously followed in a case of the Chief Court of Lower Burma.(6)

(3) *Langmead*, L. & C. 427.
(4) *McMahon*, 13 Cox. 275; *Deer*, 32 L. J. M. C. 33.
(5) *Coggins*, 12 Cox. 517; *Shunker Gope*, 6 C. 307; *Ishan Muchi*, 15 C. 511: *Abdul Latib*, 10 B. 186; *Baldewa*, (1906) A. W. N. 52; *Shivram*, (1875), B. U. C. 98.
(6) *Nya Kyaw*, (1900) 1 L. B. R. 39. Now since the Larceny Act, 1896 (56 & 57 Vict., c. 52) s. 1,'a receiver of stolen goods in the United Kingdom may be convicted though the theft was committed abroad. The rule is therefore now the same as enacted in s. 410, since its amendment of 1882.

4561. No Offence if Property Abandoned or Ownerless.—It has been already seen that there can be no theft in the case of derelict or ownerless property (s. 378). It follows that if there can be no substantive offence there can be no subsidiary offence provided for here. So a person appropriating a bull let loose as a part of a religious ceremony cannot be convicted of this offence, because the bull being, since its dedication, a *res nullius*, becomes the property of anyone by capture.(7)

Dishonestly receiving property stolen in the commission of a dacoity.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Non-comp.

412. Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with transportation for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

[*Dishonestly*—s. 24. *Reason to believe*—s. 26. *Possession*—s. 27. *Dacoity*—s. 391. *Stolen property*—s. 410 *Receives or retains*—s. 411.]

Synopsis.

(1) *Analogous Law* (4562).
(2) *Procedure and Practice* (4563).
(3) *Proof* (4564).
(4) *Form of Charge* (4565).
(5) *Principle* (4566).
(6) *Meaning of Words* (4567).
(7) *Receiving from Dacoit or Dacoity Goods* (4568-4569).

4562. Analogous Law.—The drastic provisions of this section were enacted to suppress dacoity, an offence which appears to have been rampant when the Code was drafted. Consequently, this section metes out the same penalty to a receiver of the booty of dacoity as to the principal dacoit himself.(8) But naturally the case must be strictly brought within the requirements of the section.

4563. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class. Instead of the sentence here provided, section 59 authorizes the substitution of transportation for this sentence, but in that case it must be limited to ten years, the maximum here fixed.(9)

4564. Proof.—The points requiring proof are:—

(1) That the property in question is stolen property.

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(7) *Bandhu*, 8 A. 51; *Nihal*, 9 A. 348; *Jamura*, (1884), 4 A. W. N. 87; *Romesh Chunder Sanyal* v. *Hiru Mondul*, 17 C. 852; *Sita*, 18 B. 212.
(8) S. 395.
(9) *Mohanundo Bhundary*, 5 W. R. 16.

(2) That its possession was transferred by the commission of dacoity.

(3) That the accused received or retained such stolen property.

(4) That he did so dishonestly.

(5) That he then knew that—

(*a*) the property he received has been transferred by the commission of dacoity; or

(*b*) that the transferor was a dacoit belonged to a dacoit gang, in which case, prove further that the knew or had reason to believe that the property he received was stolen property.

4565. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——at——you dishonestly received (*or* retained) stolen property, to wit——belonging to one *A B*, knowing (*or* having reason to believe) the same to have been transferred by the commission of dacoity [*or* dishonestly received from one C D, a person whom you knew (*or* had reason to believe to belong or to have belonged) to a gang of dacoits] property which you knew or had reason to believe to have been stolen, and that you thereby committed an offence punishable under section 412 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4566. Principle.—Though there is no difference in the measure of punishment between the offence of the receiver from a dacoit and the dacoit himself, still the offence primarily here defined is that of a receiver of the plunder of dacoity by a person distinct from the dacoit himself.[10] The section contemplates receipt of such property with knowledge or belief that it is the outcome of dacoity, which knowledge or belief may be gained by the receiver in one of two ways: (*a*) when he knows or believes it to be property transferred by dacoity; and (*b*) when he believes that the transferor is a past or present dacoit, and that the property is stolen property. In the one case the property is directly connected with dacoity, in the other it is connected only indirectly through the dacoit from whom he receives. But in such a case it is manifest that he must be further aware that the property he is receiving is stolen property, though he may not know or believe it to be the outcome of dacoity. The section thus does not punish dealing with a dacoit, but only receipt of stolen goods from one who is believed to be a dacoit.

4567. Meaning of Words.—"*Stolen property, the possession whereof he has reason to believe to have been transferred by the commission of daco-*

(10) *Babiru*, (1886) B. U. C. 312.

ity." that is, facts must exist or be brought to his notice, connecting the property with dacoity, failing which the offence may yet fall under section 411. "*Or to have belonged to a gang of dacoits.*" Within reasonably such time as to make him believe that the stolen property is probably the proceeds of a dacoity. The person belonging to such a gang need not have been convicted under section 400, under which the meaning of this phrase has been set out.

4568. Receiving from Dacoit or Dacoity Goods.—This section is only an aggravated form of the offence punishable under the last section, the other form of aggravation being noticed under the next section. That section regards persistency as an aggravation: This section views aggravation from the heinous nature of the offender of which the receiver is regarded as the confederate. In other respects both the sections follow the language of section 411. So far as regards this section the offence is described to lie in receiving property known or believed to have been transferred by the commission of dacoity, or receiving stolen property from a past or present dacoit with the knowledge or belief that the property is stolen property, though not necessarily the proceeds of a dacoity. But in either case it is not sufficient merely to prove that the property was stolen property.(11)

Ordinarily, this section would apply to a receiver other than the dacoit himself, but in any case a person cannot be convicted both for dacoity under section 395 as well as receiving the property obtained in dacoity,(12) since the two offences would then be based on the same facts, which law does not permit. But there is nothing against a person being charged in the alternative, in which case he may be convicted of one or the other offence, and if the evidence adduced falls short of that required to establish a case under this section, the accused may be convicted of the simple offence of being in possession of stolen property under the last section.(13) But a person found in possession of property *immediately* after the commission of a dacoity may be presumed to be either a dacoit or a receiver from a dacoit, and if he does not appear to be a receiver, as when there is no reason to suppose that he had received the property from a third person, then he may be fairly presumed to be a dacoit.(14)

A receiver under this section is as heinous a criminal as a dacoit, and a person cannot be convicted of this offence unless there is some positive evidence that the knew or had reason to belive that a dacoity had been committed and that the property he was receiving was the proceeds of that dacoity, or that the transferor was a dacoit and was transferring stolen property.(15) The fact that the receiver asked no questions of the transferor, which if he had, would have put him in possession of the information necessary to bring his case under this section cannot be urged in favour of his liability under this section, for his liability does not depend upon what he might and could have

(11) *Daji*, (1895) B. U. C. 756.
(12) *Babiru*, (1886) B. U. C. 312; *Abdul Hossein*, 1 W. R. 48: *Shahabut Sheikh*, 13 W. R. 42; *Guzzala Hanuman*, 26 M. 467.
(13) *Daji*, (1895) B. U. C. 756.
(14) *Jogeshur Bagdee*, 7 W. R. 109.
(15) *Ib.*, p. 110.

learnt, but what he did in fact learn, and after learning had reason to believe.

The fact that the accused had purchased the property from a robber does not create any presumption that the receiver had done so with guilty knowledge as here required, for as Hobhouse, J., said: "The first object of a robber is to get rid of his plunder, and in doing so, he is not likely to mention and the guilty receiver is not likely to ask how and when he got it. It is a case of give and take, and no uncomfortable or compromising questions put or answered on either side, and thus it is quite possible that the prisoner, the inhabitant of a strange district, and for anything that is in the evidence to the contrary, of a strange village, six days after the dacoity, may have received and retained, knowing indeed that the property was stolen, but not knowing precisely that it was stolen at a dacoity."(16) The same view was reiterated by Dwarkanath Mitter and Jackson, JJ., in which case the accused had been persuaded to confess his guilt—which he did to the effect that one Tara Noina visited him for a smoke towards morning on a certain day after committing a dacoity, and told him that he was burying the property as it was morning, and that he would remove it the next day. The Court held that the statement, if admissible, must be taken in its entirety, and all it showed was, that the property buried was by certain dacoity to his knowledge, but it did not prove its receipt or retention by the accused. In this view the accused was acquitted.(17)

4569. Indeed, proof of the possession of the stolen property is a *sine qua non* for a conviction under section 411, *a fortiori* under this section which exposes the possessor to heavier penalties. The two offences are, however, of the same kind, so that on failing to establish a case under this section the accused may be convicted under section 411.(18) But as under that section, so under this the offence may be presumed from recent possession, though such presumption will naturally fade with time. So where persons are found within six hours of the commission of a dacoity, with portions of the plundered property in their possession, the presumption of law is that they were participators in the actual dacoity and not merely receivers.(19) But such presumption could not be made where a person is apprehended after some time, say eight days after a dacoity, with part of the plunder in his possession, but he may then be justifiably charged in the alternative for being either a dacoit or a receiver under this section,(20) and if there has been a longer interval between the dacoity and receipt, the presumption may altogether vanish (§§ 4551-4556). In any case the presumption is of fact and not of law, and it is entirely the province of the jury to make or refuse to make it. It was, therefore, considered a misdirection to the jury in the judge's directing them that the finding of the stolen shirt with the accused two months after the dacoity was so short a time as to justify them in convicting each accused of

(16) *Jogeshur Bagdee*, 7 W. R. 109 (111).
(17) *Bishoo Manjee*, 9 W. R. 16.
(18) *Samiruddin*, 18 W. R. 25; *Daji Mahadhu*, (1895) B. U. C. 756.
(19) *Gassy Mul*, 3 W. R. 10.
(20) *Motee Jolaha*, 5 W. R. 66.

the dacoity itself. It was held that the question whether the possession of the recent stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the jury, and should not have been put to them in the positive way which the Judge adopted. In the result the Court quashed the conviction of the accused for dacoity as due to the misdirection, and confirmed it under section 411.[21]

Habitually dealing in stolen property.

413. Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Session. Cognizable Warrant. Not bail- Not comp.

[*Receive*—s. 411.]

Synopsis.

(1) *Analogous Law* (4570).
(2) *Procedure and Practice* (4571-4572).
(3) *Proof* (4573).
(4) *Form of Charge* (4574).
(5) *Principle* (4575).
(6) *Meaning of Words* (4576).
(7) *Habitually Dealing in Stolen Property* (4577-4578).

4570. Analogous Law.—A casual receiver of stolen property is punishable under the last two sections, according to the nature of the property and knowledge or belief on the part of the accused. The professional receiver or dealer of such property comes under the lash of this section and the maximum sentence it prescribes is only short of death. It is needless to add that the terms of the section must be strictly fulfilled.

4571. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable and is triable exclusively by the Court of Session.

4572. An offence under this section is not of the same kind as an offence under section 411 of the Code, within the meaning of section 234 of the Procedure Code, so that a prisoner cannot be tried at the same trial for receiving or retaining stolen property and for being a habitual receiver of or a dealer in such property. The proper course in such a case is to try the accused first for the simple offence under section 411 or 412, as the case may be, and then to put him on his trial for this offence putting in the previous convictions under those sections in evidence, and proving the finding of the rest of the property in respect of which no previous conviction was had in consequence of the provisions of section 234 of the Procedure Code.[22] It may

(21) *Gussala Hanuman*, 26 M. 467.
(22) *Uttom Koondoo*, 8 C. 634. The reference in the case to s. 435 of the Cr. P. C., 1872, corresponds to the s. 234 of the present Code.

also be noted that since this section enacts a substantive offence, there must be evidence of a receiving or dealing independent of those for which the accused had already been convicted. For instance, if a person was twice convicted under section 411, he could not be convicted again on the strength of those convictions and independently of any fresh act of receipt or dealing to be tried thereunder. Any other view would offend against the provisions of section 403 of the Procedure Code.

4573. Proof.—The points requiring proof are:—

(1) That the property in question is stolen property.

(2) That the accused received it or dealt in it.

(3) That he did so habitually.

(4) That he did so knowing or having reason to believe it to be stolen property.

4574. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you were a habitual receiver of (*or* dealer in) property, which you knew (*or* had reason to believe) to be stolen property and that you thereby committed an offence punishable under section 413 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

4575. Principle.—Habitual offenders have been invariably classed as desperate criminals in the Code, and in which provision has been made for the passing of deterrent sentences either as provided in section 75 or as otherwise specifically provided, as in the case of habitual dealer in slaves[23] or false coins.[24] In this case the maximum penalty provided is transportation for life with the alternative sentence of imprisonment which may extend up to ten years and the minimum of which may be anything according to the discretion of the Court. This wide range of discretion is probably intended to be exercised not only according to the inveteracy of the habit but also according to the other circumstances which aggravate the offence which, for instance, distinguishes an offence under the last section from one under its predecessor. The question when an offender is deemed to have become a habitual one depends upon the frequency of his offending acts. He must, at least, be shown to have committed, at least once before, such an act as a distinct and independent act. It is not necessary that he should have been convicted of it, but it is necessary that the proof of that act should be as convincing, for it is that act which determines the applicability of this offence and the measure of punishment here provided.

(23) S. 371. (24) Ss. 237-240.

4576. Meaning of Words.—"*Habitually receives*": The receipt must have been so frequent as to become a matter of habit (§ 4575). "*Habitually deals*," that is, as a professional dealer. Such dealing must have been made a trade of, otherwise there would be no habitual dealing, though there may be habitual receiving. Dealing implies the transfer of such property to others whether possessing the same guilty knowledge or not.

4577. Habitually Dealing in Stolen Property.—The gist of this offence lies in the habit of receiving or dealing in stolen property. Now a person cannot be said to be an *habitual* receiver of stolen property if he receives the proceeds of a number of different robberies from a number of different thieves on the same day. In order to support a conviction under this section there must be evidence to show that the property was received on different occasions and on different dates.(25) So where the accused was found in possession of a large number of utensils which were shown to have been stolen on different dates, but there was no evidence that they were *received* by the accused on different dates, the Court quashed his conviction under this section, and since the accused had been twice tried before, it refused to direct his fresh trial under section 411 which was the only appropriate section applicable to his case.(1) The evidence of habit cannot as in the case of an offence under s. 401, be furnished by a mere record of previous convictions, or an order made under s. 110 of the Code of Criminal Procedure (§§ 4344-4345), though these might be used to corroborate other independent evidence, but such evidence must of itself be sufficient to establish habit.

What is Receiving and Dealing ?

4578. The offence of receiving here referred to must be understood in the light of its definition contained in section 411. The word "dealing" requires some explanation. It has been used in section 371, and the sense in which it has been used here is the same. The term is intended to be used as implying the carrying on a traffic in stolen property. But the term is probably not wide enough to include a mere middleman, such as a broker of stolen property, who may have habitually negotiated the transfer of such property, though such a person may, if he possesses the requisite knowledge or belief, be liable under the next section.

Assisting in concealment of stolen property.

414. Whoever voluntarily assists in concealing or disposing of or making away with property, which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Session. Pres. Mag. or Mag of 1st or 2nd class. Cognizable. Warrant. Not bail-Not comp. Summary, if property valued not more than Rs. 50.

[*Voluntarily*—s. 39. *Stolen property*—s. 410 *Reason to believe*—s. 411]

(25) *Baburam*, 19 C. 190.

(1) *Baburam*, 19 C. 190.

Synopsis.

(1) *Analogous Law* (4579).
(2) *Procedure and Practice* (4580).
(3) *Proof* (4581).
(4) *Form of Charge* (4582).
(5) *Principle* (4583).
(6) *Assisting Concealment of Stolen Property* (4584-4586).

4579. Analogous Law.—This section is generally worded, and may, as such, include not only a person assisting in the concealment or disposal of property, but also one who is its receiver, and is therefore punishable under section 411. But the section is obviously intended only to apply to cases in which the act of the accused does not fall within the scope of section 411, but in which a person is shown to stand in such a relation to a stolen property as falls short of possession by him of such property, but his manner of dealing with it is nevertheless such as warrants a charge of assisting in concealing or disposing of or making away with the property with a guilty knowledge.[2]

4580. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class, and it may be tried summarily if the value of the property in respect of which this offence is committed does not exceed Rs. 50. This section is not intended to provide an additional punishment for a thief concealing or disposing of his spoil. Consequently, a person cannot be convicted both for theft and for concealing[3] or disposing of[4] the same property. There is, however, nothing against the same person being tried at the same time for the two offences of theft and this offence, or an offence punishable under section 411 and this section, but he cannot be convicted of both.[5] The two offences in such cases must be treated as parts of one continuous transaction and they cannot be considered as two distinct offences.[6]

4581. Proof.—The points requiring proof are:—

(1) That the property in question is stolen property.

(2) That the accused assisted in concealing or disposing of or making away with it.

(3) That he did so voluntarily.

(4) That he then knew or had reason to believe it to be stolen property.

4582. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

(2) *Khona*, (1879) P. R. No. 31 *Subba Chand*, (1881) P. R. No. 39.
(3) *Nga Po Kyaw*, (1885) S. J. L. B. 334.
(4) *Zinda*, (1896), P. R. No. 15.
(5) *Nowlia*, 1 Agra 9; *Sakharam*, (1889) B. U. C. 449; *Alu Kala*, (1891) B. U. C. 553.
(6) *Alu Kala*, (1891) B. U. C. 553, *Subba Chand*, (1881) P. R. No. 39, 4 M. H. C. (App.) 13.

"That on or about the——day of——at——you voluntarily assisted in concealing (*or* disposing of or making away with) property, to wit ——which you knew (*or* had reason to believe) to be stolen property, and that you thereby committed an offence punishable under section 414 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4583. Principle.—This section is not intended to punish those whose acts constitute a distinct offence punishable as such under either sections 411, 412 or 413. It is intended only to punish those acts of assistance which fall short of actual receipt or retention of the property, but are nevertheless distinctly calculated to thwart the detection of the crime by making away with the *corpus delicti*. A person so actuated may have no dishonest intention, for his sole intention may be to screen the offender. Dishonesty is therefore made no part of this offence, though the section requires that the assistance should have been given voluntarily.This ensures the exemption of those who have rendered assistance under coercion or who have been made innocent tools by designing men. As, however, the assistance given by a person may be voluntarily rendered under circumstances of great extenuation, the section provides for the alternative sentence of a mere fine.

4584. Assisting Concealment of Stolen Property.—The offence here defined consists in rendering voluntary assistance in concealing or disposing of or making away with property which the person so assisting knows, or has reason to believe to be stolen. The property must thus in fact be stolen property, and the accused must moreover have known, or at least believed it to be so. Now such belief does not imply a conviction amounting to certainty. Nor does it imply a mere suspicion falling short of a moral conviction.(7) All that the section says and all it implies is that there must be such facts and circumstances present to the mind of the accused that he was, or should have been, as a reasonable man, convinced that the property he was dealing with was stolen property. He was bound to desist from assisting in its concealment after that belief. If, therefore, he voluntarily disposes of it, or assists in its disposal, he renders himself obnoxious to the penalties of this section.

4585. Such knowledge may, for instance, be easily inferred on the part of a cartman removing a bale of cloth from the station-yard at night, especially in a place where railway robberies had become notorious. The cartman could not, in such a case, believe otherwise than that the bale he was ordered to shuffle out of sight was a bale of merchandise and not the property of the station-master who ordered its removal.(8) Of course, in such cases, in order to consider whether a person was voluntarily assisting another in the disposal of stolen property, not only the nature of the property but also the circumstances under which it was being made away with, must be taken into consi-

(7) *Rango Timaji*, 6 B. 402 (403). (8) *Hari Shankar*, 2 B. H. C. R. 130.

deration. So, where the wife, on hearing that her husband was about to be arrested for the theft of oil which he had been stealing from his employers, the Railway Company, carried it to a neighbour's kitchen and buried it there, the Court held the case to be one fit for punishment under this section.(9) In such cases, there may have been no direct communication of knowledge or belief, but there were circumstances from which the Court felt justified in presuming knowledge or belief.(10) The accused may not have actually believed in the property being stolen, but in dealing with this case, the law regards the probability of his belief which it infers from the sufficiency of cause. The voluntary assistance here punishable may as much be concealing or otherwise disposing of the property so as to assist the thief in escaping detection as for the purpose of fabricating evidence for the purpose of getting an innocent person convicted of theft. The accused had some railway pins brought to him which he employed a servant to conceal in the godown and fields of his enemy, his intention being to implicate him as the thief. It was held that inasmuch as there was both the voluntary concealment of stolen property as well as the fabrication of false evidence with the intention of implicating a person, the two acts constituted two distinct offences punishable under s. 193 as well as this section.(11)

4586. The word "concealment" means hiding from view—specially the view of those interested in the investigation of the crime. A person may conceal property by altering its form so as to prevent its recognition, as by melting down jewellery or effacing therefrom the marks of identification. The burial of such property under ground would serve the same purpose. The disposal of property suggests its transfer to a receiver or other person, while "making away" implies taking it away so as to put it out of the reach of those legally requiring it. It does not necessarily imply concealment or disposal, but implies such an act as swallowing a stolen article or setting it on fire or the like.

OF CHEATING

Cheating.

415. Whoever, by deceiving any person, fraudulently or dishonestly, induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat."

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

(9) *De Silva*, 5 N. W. P. H. C. R. 120. 17 I. C. 537.
(10) *Budhan Khan*, 14 Bom. L. R. 898, (11) *Rameshar Rai*, 1 A. 279.

Illustrations.

(*a*) *A*, by falsely pretending to be in the Civil Service, intentionally deceives *Z*, and thus dishonestly induces *Z* to let him have on credit goods for which he does not mean to pay. *A* cheats.

(*b*) *A*, by putting a counterfeit mark on an article, intentionally deceives *Z* into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces *Z* to buy and pay for the article. *A* cheats.

(*c*) *A*, by executing to *Z* a false sample of an article, intentionally deceives *Z* into believing that the article corresponds with the sample, and thereby dishonestly induces *Z* to buy and pay for the article. *A* cheats.

(*d*) *A*, by tendering in payment for an article a bill on a house with which *A* keeps no money, and by which *A* expects that the bill will be dishonoured, intentionally deceives *Z*, and thereby dishonestly induces *Z* to deliver the article, intending not to pay for it. *A* cheats.

(*e*) *A*, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives *Z*, and thereby dishonestly induces *Z* to lend money. *A* cheats.

(*f*) *A* intentionally deceives *Z* into a belief that *A* means to repay any money that *Z* may lend to him and thereby dishonestly induces *Z* to lend him money, *A* not intending to repay it. *A* cheats.

(*g*) *A* intentionally deceives *Z* into a belief that *A* means to deliver to *Z* a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces *Z* to advance money upon the faith of such delivery. *A* cheats; but if *A*, at the time of obtaining the money, intends to deliver the indigoplant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(*h*) *A* intentionally deceives *Z* into a belief that *A* has performed *A*'s part of a contract made with *Z*, which he has not performed and thereby dishonestly induces *Z* to pay money. *A* cheats.

(*i*) *A* sells and conveys an estate to *B*. *A*, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to *Z*, without disclosing the fact of the previous sale and conveyance to *B*, and receives the purchase or mortgage money from *Z*. *A* cheats.

Synopsis.

(1) *Analogous Law* (4587-4593).
(2) *Principle* (4594).
(3) *Meaning of Words* (4595).
(4) *What is Cheating* (4596-4606).
(5) *No Intention No Deception* (4597).
(6) *Fortune Telling* (4598).
(7) *Puffing Advertisement* (4600).
(8) *Misrepresentation* (4601-4602).
(9) *Overstating Weight* (4603).
(10) *Showing Better Sample* (4604-4606).
(11) *Mute Deception* (4607).
(12) *Deceiving must Induce* (4608-4611).
(13) *Attempt to Cheat* (4611).
(14) *Inducement must be Fraudulent or Dishonest* (4612-4623).
(15) *Meaning of "Fraudulently"* (4612-4617).
(16) *Omission to Disclose an Incumbrance* (4618-4619).
(17) *Inducement by Acts and Conduct* (4624-4635).
(18) *Inducement by Dishonest Acts* (4625-4629).
(19) *Subsequent Conduct* (4630-4635).
(20) *Delivery of Retention of Property* (4636-4641).
(21) *Meaning of "Property"* (4638).

(22) *Delivery or Retention must be Illegal* (4639).
(23) *Temporary Delivery Sufficient* (4640).
(24) *Inducement Too Remote* (4642-4643).
(25) *Indirect Inducement When Criminal* (4644).
(26) *Intentional Inducement* (4645-4648).
(27) *Harm When Too Remote* (4647-4648).
(28) *Dishonest Concealment* (4649).
(29) *Attempt: Abetment* (4650-4655).
(30) *Fraud by Post* (4652).
(31) *Abetment* (4655).
(32) *Immoral Contract* (4656).

4587. Analogous Law.—Cheating was from very early times punishable under the English common law.[12] So a married woman executing a bail bond for one arrested on a bailable writ pretending to be a widow was punishable as a fraud on the Sheriff who had been thus defrauded.[13] Other cases treated as frauds are cases of swearing a false affidavit [14] or execution of a false instrument,[15] as by forging an order of discharge from jail or the like.[16] To the same class were relegated such offences as should now be classed as public nuisances, as the selling of unwholesome provisions *lucri causa*,[17] the using of false weights and mesures [18] or trade mark,[19] of bread mixed with alum,[20] the *mala proxis* of a physician, the rendering of false accounts [21] or a refusal to render an account,[22] frauds in connection with procuring and securing admission to the parish work-house [23] or enlistment into a regiment.[24] So voluntarily maiming oneself to attract charity or to prevent one's being impressed as a sailor or enlisted as a soldier was treated as an offence of the same kind.[25]

It will thus be seen that the conception of the offence in common law followed more the popular notion of cheating than what is now defined as constituting that offence under the Code. So Hawkins defined cheating to be those "deceitful practices in defrauding or endeavouring to defraud another of his known right by means of some artful device contrary to the plain rules of common honesty.[1] But the classification of forgery as a distinct offence was early recognised,[2] and latterly cheating was defined to be the fraudulent obtaining of the property of another by any deceitful and illegal practice or token short of felony which affects or may affect the public.[3]

(12) 2 East. P. C., c. 18, s. 4, p. 821; 2 Hawk. P. C., c. 22, ss. 1, 31, 39, citing *Waterer* v. *Freeman*, Holt 205 (266); *Morley* v. *Harrison*, Dy. 249; *Nawbey*, 6 T. R. 619 (635); *Crossby*, 7 T. R. 315.
(13) *Blackburn*, Trem. P. C. 101.
(14) *Waterer* v. *Freeman*, Holt 205 (266).
(15) *Omealy* v. *Newell*, 8 East. 364; *Mawbey*, 6 T. R. 619 (635).
(16) *Fawcett's case*, 2 East. P. C., c. 19 s. 7, p. 862.
(17) 4 Black 162; 2 East. P. C., c. 18, s. 4, p. 822; *Pinkney's case*, 2 East P. C. 820; *Young*, 3 T. R. 104.
(18) 2 East. P. C. 820.
(19) *Edward's case*, Trem. P. C. 1-103.
(20) *Dixon*, 4 Camp. 12; *Dixon*, 3 M. & S. 11.
(21) *Dr. Groenvelt's case*, 1 Ld. Raym. 213.
(22) *Bembridge*, 22 St. Tr. 1; *Martin*. 2 Camp. 269.
(23) *Commings*, 5 Mad. 179.
(24) *The Minister of St. Botolph*, 1 Black R. 443.
(25) *Jone's case*, 1 Leach 174.
(1) 1 Hawk. P. C., c. 55; 1 Holt P. C. 412; Co. Litt. 127-*a*.
(2) 1 Hawk. P. C., c. 71, s. 1.
(3) 2 East. P. C. 817; *Ward's case*, 2 Sr. 747.

4588. The view of the English common law thus was to regard the offence as cheating if it affected the public as against an individual merely, which was not indictable.(4) So an indictment of cheating which merely affected an individual in a private transaction, was quashed on the mere ground that it did not affect the public. Such was the case of the accused who had used a false bushel for measuring corn,(5) and one who had falsely described a gum of inferior quality as the gum seneca, and thus imposed on the purchaser,(6) or one who obtained money by falsely representing himself to have been sent by another and upon which Holt C. J., said: "Shall we indict one man for making a fool of another? Let him bring his action."(7) So on the same ground Lord Ellenborough, C. J., threw out an indictment against a miller who, having received good barley for grinding had substituted bad and musty barley which he fraudulently delivered to the owner as his own.(8)

4589. These provisions of the common law were in part supplemented by the Larceny Act which provided, "whosoever shall, by any false pretence, obtain from any other person any chattel, money or valuable security, with intent to defraud, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for a term of not less than five years, or to be imprisoned for any term not exceeding two years with or without hard labour, and with or without solitary confinement..."(9) The section goes on to provide that if on such an indictment the offence disclosed is larceny, the accused may be convicted of it, and that it was sufficient to support the indictment to prove that the accused did the act charged with an intent to defraud, it being unnecessary to establish an intent to defraud any particular person.

4590. It is thus obvious that the present section embraces cases clearly distinguishable from those which are classed as those of cheating under English law. In drafting it the framers appear to have taken an independent line, for though they acknowledged their general indebtedness to the laws of England and France, they said: "There is no offence in the Code with which we have found it so difficult to deal as the offence of cheating. It is evident that the practising of intentional deceit for purposes of gain ought not always to be punished. It will hardly be disputed that a person who defrauds a banker by presenting a forged cheque, or who sells ornaments of paste as diamonds, may with propriety be made liable to severe penalties. On the other hand, to punish every defendant who obtains pecuniary favours by false professions of attachment to a patron; every legacy-hunter who obtains a bequest by cajoling a rich testator; every debtor who moves the compassion of his creditors by overcharged pictures of his misery; every practitioner who, in his appeals to the charitable, represents his distresses as wholly unmerited, when he knows that he

(4) 2 East. P. C. 818.
(5) *Pinkney's case*, 2 East. P. C., c. 18, s. 2, p. 818.
(6) *Lewis*, Say. 205.
(7) *Jones*, 1 Salk. 379. To the same effect, *Byran*, 2 Str. 866; *Lara*, 6 T. R. 565; *Gibbes*, 1 East. R. 185.
(8) *Haynes*, 4 U. & S. 214.
(9) 24 & 25 Vict., c. 96, s. 88.

has brought them on himself by intemperance and profusion, would be highly inexpedient. In fact, if all the misrepresentations in which men indulge for the purpose of gaining at the expense of others, were made crimes, not a day would pass in which many thousands of buyers and sellers would not incur the penalties of the law.

It happens hourly that an article which is worth ten rupees is affirmed by the seller to be cheap at twelve rupees, and by the buyer to be dear at eight rupees. The seller comes down to eleven rupees and declares that to be his last word; the buyer rises to nine, and says that he will go no higher; the seller falsely pretends that the article is unusually good of its kind, the buyer that it is unusually bad of its kind; the seller that the price is likely soon to rise, the buyer that it is likely soon to fall. Here we have deceptions practised for the sake of gain, yet no judicious legislator would punish these deceptions A very large part of the ordinary business of life is conducted all over the world, and nowhere more than in India, by means of a conflict of skill, in the course of which deception to a certain extent perpetually takes place. The moralist may regret this; but the legislator sees that the result of the attempts of the buyer and seller to gain an unfair advantage over each other is that, in the vast majority of cases, articles are sold for the prices which it is desirable that they should fetch, and therefore, he does not think it necessary to interfere. It is enough for him to know that all this great mass of falsehood practically produces the same effect which would be produced by truth; and that any law directed against such falsehood would in all probability be a dead letter, and would, if carried into rigorous execution, do more mischief in a month than all the lies which are told in the making of bargains throughout all the bazars of India produced in a century.(10)

4591. So far the view here enunciated coincide with the English common law under which a cheat or fraud, in order to be indictable, must be such against which common prudence could not have guarded.(11) All these cases have been also excluded from the section, which embraces only such cases of cheating as involve not only deception but also either dishonesty or fraud. So the framers wrote: "We propose to make it cheating, to obtain property by deception in all cases where the property is fraudulently obtained; that is to say, in all cases where the intention of the person who has by deceit obtained the property, was to cause a distribution of property which the law pronounces to be a wrongful distribution and in no other case whatever. However immoral a deception may be, we do not consider it as an offence against the rights of property if its object is only to cause a distribution of property which the law recognizes as rightful.

"A few examples will show the way in which this principle will operate.

"A intentionally deceives Z into a belief that he is strongly attached to Z. A thus induces Z to make a will, by which a large legacy is left to A. Here A's conduct is immoral and scandalous.

(10) Note N, Reprint, p. 163. Buller, J., in *Young*, 3 Tr. 99 (104).
(11) 1 Hawk, P. C., c. 71, s. 1; *per*

But still A has a legal right on Z's death to receive the legacy. Even if the clearest proof of A's insincerity are laid before a tribunal, even if A in open Court avows his insincerity, the will cannot, on that account, be set aside. The gain, therefore, which A obtains under Z's will is not in the legal sense of the expression, wrongful gain. He has practised deception; he has thus caused gain to himself and loss to others; but that gain is a gain to which the civil law declares him entitled, which the civil law will assist him to recover if it be withheld from him; that loss is a loss with which the civil law declares that the losers must put up; A, therefore, has not committed the offence of cheating under our definition.

"But suppose that the civil law should contain, and we think that it ought to contain a provision declaring null a will made in favour of strangers, by a testator who erroneously believed his children to be dead; and suppose that A intentionally deceives Z into a belief that Z's only son has been lost at sea, and by this deception induces Z to make a will by which everything is left to A: here the case will be different. The will being null, any property which A could obtain under that will would be property which he had no legal right so to obtain, and to which another person had a legal right. The object of A has, therefore, been wrongful gain to himself, attended with wrongful loss to another party. A has, therefore, under our definition, been guilty of cheating.

"Whether the principle on which this part of the law is framed be a sound principle, is a question which will be best determined by examining, *first*, whether our definition excludes anything that ought to be included, and *secondly*, whether it includes anything that ought to be excluded.

"It can scarcely, we think, be contended that our definition excludes anything that ought to be included; for surely, it would be unreasonable to punish as an offence against the right of property, an act which has caused, and was intended to cause a distribution of property which the law declares to be right and refuses to disturb. If such an act be an offence, it must be an offence on some ground distinct from the effect which it produces on the state of property. Thus, if a person to whom a debt is due, thinking that he shall obtain payment more easily if he assumes the appearance of being in the public service, wears a badge of office which he has no right to wear when he goes to make his demand, he is guilty of this offence; but if he gains only what he has no legal right to retain, he is not a wrongdoer as respects property, inasmuch as he has only rectified a wrong distribution of property.

"Indeed, it appears to us that there is the strongest objection to punishing a man for a deception, and yet allowing him to retain what he has gained by that deception. What the civil law ought to say may be doubtful, but there can be no doubt that the civil and criminal law ought to say the same thing; that the one ought not to invite while other repels that the Code ought not to be divided against itself. To send a person to prison for obtaining a sum of money, and yet to suffer him to keep that sum of money, is to hold out at

once motives to deter and motives to incite. Humanity requires that punishment should be the last resource employed only when no other means can be found of producing the desired effect. Penal laws clearly ought not to be made for the prevention of deception, if deception, could be prevented by means of the Civil Code. To tempt men, therefore, to receive by means of the Civil Code, and then to punish them for deceiving, is contrary to every sound principle.[12]

4592. The framers then went on to add that their definition did not exclude any case of deception which ought to be punished as cheating. On the other hand, it includes many cases of cheating which are so punishable under English law such are, for instance, cases of loans obtained by false representation with no intention of repayment,[13] obtaining an advantage of money on a false promise to render service or deliver goods which the promisor never intended to make good,[14] or where a person receives payment by falsely asserting that he had performed the work for which he was hired.[15] The Code punishes these acts, as being infractions of a legal right effected by deliberate dishonesty.

4593. The section is very widely worded, and it was objected to at the time, on the ground that it was likely to bring within the vortex of its text a host of trivial illegal acts which were in no sense criminal. The case assumed in illustration (*f*) was especially singled out as "of a quality to excite ridicule."[16] This was no doubt a startling innovation on the accepted doctrine of common law, but the framers knew it and they gave weighty reasons in support of their clause, for if a civil debtor was liable to imprisonment for non-payment of debt why should one escape, who had voluntarily and by wilful deceit obtained a loan which he does not pay, because he never meant to pay it? This was the view of the English Law Commissioners[17] and it strengthened the hands of the Legislature in retaining the clause in spite of the adverse criticism to which it was exposed. Indeed, the defect in the English law in this respect was itself rectified in 1869, by the Debtors' Act,[18] which made the incurring of any debt or liability "under false pretences or by means of any other fraud" punishable as a misdemeanour.

4594. Principle.—The offence of cheating must, like that of extortion, be committed by the wrongful obtaining of consent. The difference is, that the extortioner obtains the consent by intimidation, and the cheat by deception. In both cases there is wrongful gain or loss, and in both cases the act is done to induce delivery of property. The two offences are thus essentially the same, though the *modus operandi* of the offender in the two cases necessarily differs. The offence is here subdivided into (*i*) cheating by representation, and (*ii*) cheating by personation; and of these two, law regards the latter as more serious. It also considers it an aggravation to cheat one whose interest the cheat was legally

(12) Note N, Reprint, pp. 164-166.
(13) Ill. (*f*).
(14) Ill. (*g*).
(15) Ill. (*h*).
(16) First Rep., s. 581.
(17) Fourth Rep., p. 43.
(18) 32 & 33 Vict., c. 62, s. 13.

bound to protect. The distinction between sections 417 and 420 has been, moreover, held to turn upon the delivery of property as the result of cheating, and the success attending the act may thus be regarded as another element of aggravation.

4595. Meaning of Words.—*"By deceiving any person"*: The word "deceiving" means causing to believe what is not true. It implies a misrepresentation inducing belief, and such misrepresentation may be by an act or omission.(19) *"Fraudulently or dishonestly"*: "Dishonestly" is defined in section 24 and "fraudulently" in section 25. *"Induces the person so deceived to deliver any property"*: Inducement and not delivery of the property would seem to be the gist of the crime.(20) That inducement may relate to delivery or retention of property, or the doing of or omitting to do anything which he would not have, but for the inducement, done. The property in this section has been held to mean only moveable property.(21) *"Or intentionally induces, etc."*: The word "intentionally" only qualifies the second clause as the words "fraudulently" or "dishonestly" qualify the first clause.(22) But this view if pushed to its logical end, might at times lead to awkward result. See the subject discussed under section 419, *post*. The second clause is intended to cover cases like those assumed in illustrations (*f*) to (*i*). *"And which act or omission causes damage or harm"*: This means that the inducement must result in a harmful act though unconnected with the delivery or retention of property. *"A dishonest concealment of fact is a deception:"* Fraud is defined to be *"suppressio veri, suggestio falsi."* A dishonest concealment may be either.

4596. What is Cheating?—The terms of this definition of cheating are so wide as to include almost any case of misrepresentation. And as the section is worded even the intent to deceive is not material, though without such intention the section would include a host of deceptions which, as the authors noted, were the common incidents of every bazar in India (§ 4590). The question of criminality must then be limited with reference to the "deceiving" which is the mental act constituting the *scienter* in this offence. What is then deceiving as used in this context? Ordinarily, term "deceiving" means(23) nothing more or less than cheating. But the sense in which it has been used here, would seem to imply an act by which another is led into error or made to believe what is false or disbelieve what is true. It no doubt and necessarily implies fraud, but it is fraud which operates upon the conviction of another's mind which prompts him to action, taking on trust the existence of facts which in reality do not exist.

No Intention No Deception.

4597. But such deception may be innocent or fraudulent. The former is, of course, necessarily excluded from the operation of this rule. So an overcharge made by mistake, could not be held to constitute cheating if there was no dishonesty or fraud.(24) So where on an auction-sale

(19) *Giles*, 34 L. J. M. C. 50; *Khoda Bux* v. *Bokeya Mundari*, 32 C. 941; *see* Explanation.

(20) *Bavaji*, (1875) B. U. C. 96.

(21) *Abdul Ahad*, (1882) A. W. N. 6.

(22) *Nandlal*, (1888) P. R. No. 36; *Mahabat*, (1889) P. R. No. 20, F. B.; *Ahmada*, (1914) P. R. No. 9, 27 I. C. 203.

(23) From Lat. *decipere*, to catch, to ensnare—to deceive.

(24) *Nathuram Naranji*, 4 Bom. L. R. 442 (Head-note is inaccurate),

of waste paper held in the office of the Accountant-General the accused, who was a Daftari in the office, bid for its purchase under an assumed name, and the sale was concluded in his favour, whereupon he was prosecuted for cheating, the Court held that as there was no rule prohibiting the purchase of such waste paper by an employee of the department, the accused committed no offence in bidding in an assumed name.(25) There is, indeed, nothing wrong in assuming a false name: many people of distinction travel *incognito* for the sake of privacy and quiet. But it is wrong to use that name fraudulently.

So if A goes to a Bank under the name of B, knowing that B has credit there, and in that name cashes a cheque drawn by himself as B, A would be guilty of cheating B, though it would be otherwise if A's disguise was innocent, as if A had credit at the Bank and drew a cheque believing that the Bank knew of his *alias*. If there is an intention to cheat, cheating may be committed under any circumstance, whether in business or at play, the latter being expressly enacted an offence under English law.(1) So cardsharpers and tricksters are clearly within this rule. But in such a case, the evidence adduced must establish fraud or dishonesty. This may be done by establishing collusion between the players to defraud one, as in the case of the accused who inveigled the prosecutor to deposit twenty guineas on a bet that he could not successfully guess three times successively the hiding place of a half-penny by another of the prisoner under a pot. The two prisoners were found to have conspired to rob the prosecutor and they were held to have been rightly convicted of larceny.(2)

Fortune-Telling.

4598. The question whether money made by fortune-telling, and by persons professing to forecast the future by means of cards, caligraphy, phrenology and photographs, raises a somewhat similar question. But it has been held that if the accused believed in what he professed, he could not be convicted of cheating, though that offence would be committed if it was merely a device used for practising deception. The prisoner, a gipsy woman, told the prosecutor that she could raise spirits and lay them, that some property had been left for the prosecutor, which she had been cheated of and that the prisoner could recover it for her. The prosecutor believed her and put half a crown on a certain spot in a book shown to her by the prisoner. She then went away promising to call the next day which she did and then she said that the money she wanted was not her husband's but her

(25) *Kutub Ali*, (1902) A. W. N. 151, (1903) A. W. N. 231.

(1) Gaming Act, 1815 (8 & 9 Vict., c. 109), s. 17: "Every person who shall by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other games or in bearing a part of the stakes, wages or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person, to himself at any other or others—any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly."

(2) *Robson*, R. & R. 413. In other cases the question turned upon whether what was parted with was property or merely possession. It being held that if the prosecutor parted with the property under a belief that the money had been fairly won there could then be no larceny; *Nicholson*, 2 Leach 610; *Riley*, 1 Cox 98. But these cases imply that the greater the fraud, the less is the chance of the accused being brought to book.

own, which the prosecutor gave her amounting to £10. 9*s*. 4*d*. She then demanded a shift to wrap the money in and a shawl to cover it, which were lent her on her promising to return them. Other articles were also similarly lent. The prisoner had been promised £5 for her trouble. She never returned. It was held that if the original intention of the prisoner was merely to practise witchcraft, in which she might believe although it was afterwards altered, there would be no larceny. But, if it was a mere trick to get the property with no intention to return it, it was larceny.(3)

4599. In another case, the prosecutrix went to the prisoner to exercise her power to bring her back her husband who had deserted her. She took some clothes and money and promised to bring her husband back by a certain day, but which, of course, she failed to do, and whereupon she was prosecuted for false pretence, and Erle, C. J., told the jury: "The first question is whether the indictment is good. I take it that the pretence that the prisoner had the power to bring back her husband to the prosecutrix is the material part of the indictment. Now, the pretence of power, whether moral, physical, or super-natural, made with intent to obtain money, is within the mischief of the law, and sufficient to constitute an offence within the language of the Statute.... Then the question is, was there evidence of a false pretence of an existing fact that the prisoner had the power to bring the husband back when the money was obtained. It was contended that the prosecution ought not to succeed, because the evidence was that the prisoner said that she would bring the prosecutrix's husband back, and that after the prisoner had got the property she said she could bring the husband back, and that there was, therefore, a promissory pretence only.(4) It is clear that an indictable pretence must precede the obtaining of the money, so that it can be alleged that the money was obtained by means of the pretence. The exact words of that part of the evidence favour the argument of the prisoner's counsel; but I have come to the conclusion that we ought not to sustain the objection, because the whole tenor of the evidence is to be regarded, and it may be upon the evidence that the prisoner intended to convey to the mind of the prosecutrix that she had not only the will but the power to bring her husband back. The whole of the evidence was to be regarded by the jury, and they were to consider whether the prisoner intended to pretend to the prosecutrix, and to induce her to believe, that she, at that time, had the power to bring her husband back, and that she did actually so pretend."(5) The learned Judge then held that the evidence clearly justified the finding that the prisoner was an impostor and her conviction was consequently affirmed. Following the principle of these cases the accused was convicted in a case in which he had induced the prosecutor to believe that God had ordered him to pay him Rs. 300.(6)

Puffing Advertisement.

4600. So a trickster who finds a dupe to believe in his power to convert a currency note into one of a higher denomination, commits the same offence, because he deceives him into a belief in his power and thereby induces delivery of property. In all such cases, there is both deceit and dishonesty or fraud. But there may be all these elements and yet no

(3) *Bunce*, 1 F. & F. 523.
(4) In England a promissory pretence is not indictable, but in this respect the rule here enacted is wider.
(5) *Giles*, 10 Cox 44.
(6) *Doraiswamy*, 48 M. 774.

cheating, as in the case of a tradesman puffing his goods and thereby inducing the public to pay for them a price they would not have otherwise paid. The framers of the Code evidently intended to exclude all trade advertisements from the operation of the rule, for they wrote: "However censurable, in a moral point of view, the deceptions practised by both may have been, yet those deceptions were intended to produce a distribution of property strictly legal. Neither the buyer nor the seller, therefore, has been guilty of cheating; but if the seller has produced a sample of the article, and has falsely assured the buyer that the article corresponds to that sample, the case is different if the article does not correspond to the sample, and the buyer is entitled to have the purchase-money back. The seller has taken and kept the purchase-money without having a legal right to take or keep it, and it may be recovered from him by a legal proceeding. His gain is therefore wrongful, and is attended with wrongful loss to the buyer; he is therefore guilty of cheating under the definition. So if the seller passes off ornaments of paste on the buyer for diamonds, the price which the seller receives is a price to which he has no right, which the buyer may recover from him by an action. Here, therefore, the object of the seller has been wrongful gain attended with wrongful loss to the buyer; the seller is therefore guilty of cheating. So if the buyer, intending to acquire possession of the goods without paying for them, induces the seller by deception to take a note which the buyer knows will be dishonoured, the buyer is guilty of cheating. His object is to retain in his own possession, money which he is legally bound to pay to the seller. The gain which he makes by retaining the money is wrongful gain, and it is attended with wrongful loss to the seller; he is, therefore, within the definition."(7)

Misrepresentation.

4601. The question whether a misrepresentation amounts to a statement of fact or is merely an expression of opinion, would seem to determine the difference between liability and non-liability. The rule is the same in civil law, for mere words of commendation do not amount to warranty: *Simplex commendatio non obligat.*(8) The prisoner went to pawn certain spoons with the prosecutor and obtained a larger advance for them, on the strength of his assurance that they were of the best quality, being equal to Elkington's A, that the foundation was of the best material and that they had as much silver upon them as Elkington's A. The spoons were in fact of an inferior make and the jury found that the prosecutor had been induced to make the large advance he did owing to the false declaration of the prisoner. But on a case reserved it was held that the exaggeration of the quality of one's goods could not be held to be indictable, Cockburn, C. J., adding: "It seems to me to make all the difference whether the man who is selling merely represents, as in this instance it appears he did, the articles to be better in point of quality than they really are, or whether he represents them to be entirely different to what they really are.....Here if the prisoner had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be a different thing; but the representation

(7) Note H. Reprint, pp. 164, 165.

(8) "A simple recommendation creates no warranty"; *Da Costa* v. *Deefholts*, 29 C. W. N. 362, 86 I. C. 985, (1925) C. 605

here made was only a vaunting or exaggerating of the value of the article in which he was dealing, by representing it to be in quality equal to a particular manufacture."[9] This view was concurred in by the majority of the Judges,[10] but there was a notable dissent,[11] Willes, J., observing: "It appears that the persons who made the advances were thereby defrauded, and thereby induced to make the advances, and the jury have found that the statements were known by the prisoner to be untrue, and that in consequence of these statements he obtained the money mentioned in the indictment. It appears to me that for all practical purposes that ought to be taken to be a sufficient fact, coming within the region of assertion and calculation, and not mere opinion, and that it should be considered as a false pretence." Though his view was not acceptable to the majority of the Judges, they conceded that there may be cases where even a mere expression of opinion may be indictable.

So Coleridge, J., said: "It would be a dangerous thing to say that there could be no fraudulent misrepresentation within the Statute, in the course of an ordinary transaction of buying and selling. I think it may as often occur in the course of a real transaction of buying and selling as in any other way; but in order to determine whether a fraudulent misrepresentation is or is not within the Statute, I think you must look, among other things to the extent to which it goes, and the subject matter to which it is applied. It seems to me to be a safe rule to say, where it applies simply to the quality, and is only in the nature of an exaggeration on the one hand, or a depreciation on the other, which too frequently takes place even in tolerably honest transactions, this is not the subject of a criminal proceeding." But as Crompton, J., puts it "Where the thing sold is of an entirely different description from what it is represented to be and of no value whatever, as where a man passes off a chain of base metal for gold or silver, and the buyer really gets nothing for his money, the Statute applied." Such was the case of the prisoner who took eleven thimbles for pawn and on being questioned by the pawnbroker if they were silver asserted that they were and upon which they were tested and proved to be of base metal, it was held that the prisoner was rightly convicted of obtaining money by false pretences.[12] In such a case, the fact that a precious metal entered into the composition of an article is not sufficient to exonerate the accused if his representation was in substance false and he knew it.

4602. The accused represented that the figure "18" on a watch indicated that it was made of 18 carat gold, which he knew it was not, and whereupon he was convicted though he was able to show that some gold had entered into its composition.[13] Such was the case of the prisoner who sold a chain fraudulently representing it to be a 15 carat gold, whereas in fact it was only a trifle better than 6 carat in quality, it was held that the statement that the chain was 15-carat gold was not a mere laudation

(9) *John Bryan*, 26 L. J. M. C. 85.

(10) Lord Campbell, C. J., Pollock, C. B., Coleridge, J., Cresswell, J., Earle J., Crompton, J., Crowder, J., Watson, B. and Chanell, J.

(11) Willes, J., who differed stating that his view was shared by Jervis C. J.; and with whom Bramwell, B., concurred.

(12) (1842) *Ball*, C. & M. 249, overruling *Tabram*, C. & M. 251; (mentioned by counsel in *Ball*, C. & M. 249,: followed in *Roebuck*, D. & B. 24; *Steven* 1 Cox, 83.

(13) *Sutor*, 10 Cox 577.

but a warranty as to a fact within his knowledge and as such constituted a false pretence.(14) The prisoner went about hawking blacking bottles advertised as "Everett's Premier," which was a make of repute which the bottles sold were not. His bottles bore a label which was a colourable imitation of the label used on Everett's blacking, the only difference noticeable between the two being in the address which was stated at "Queen's Court" instead of King's Court which was the address on the genuine article. The prisoner gave himself out as Everett's agent. The prosecutor's case was that he had purchased the bottle taking it to be Everett's; the defence was that the bottle was sold on approval and that the prosecutor having had the option to retain or return it, he was not cheated as he might have returned it if he was not satisfied with it. But Earle, J., told the jury that the offer to sell on approval might be intended to put the prosecutor off his guard; but the actual bargain was for cash, which was paid, and the sale completed. As to the difference between the labels the jury would consider whether it was a small and colourable difference only, and intended to deceive. It was of little consequence whether the man's name was Everete, as he had stated, or not; for even if it were, and he went about the country and offered blacking for sale as "Everett's Premier," representing it to be the well-kown article of that name, knowing that it was not so, and intending to cheat the prosecutor by passing upon him a spurious article as the true one, his conduct was equally fraudulent."(15)

Overstating Weight.

4603. The case is the same if the prisoner overstated the quantity of the goods sold by weight. The prisoner sold the prosecutrix a load of coals which he represented to weigh eighteen hundred weight, but which in fact weighed only fourteen hundred weight; it was held that the prisoner having overstated the quantity by four hundred weight more and having received its price for the same, was guilty of fraudulent representation. So Pollock, C. B., put the following case; "If the bargaining and selling being entirely over, goods were to be transferred from the seller to the buyer, upon payment of the price, and the seller were to go and demand payment, and fraudulently name an amount different from that agreed on, and that false representation was for the purpose of obtaining money which was not in fact due for the goods, and the seller did thereby obtain it, he would be guilty of obtaining money by false pretences."(16) Such a case is not unlike the case supposed by Jervis, C. J., who said: "Supposing a person employed a man on a contract to do ditching at one shilling a yard; and the man came at the end of the week and said, 'I have done 5,000 yards,' whereas he had only done 1,000, and thereby gets the money, he is guilty of obtaining it by false pretences."(17)

Showing Better Sample.

4604. A person who shows one sample and then sells goods of inferior quality guaranteeing them to be as per sample, is clearly guilty of cheating. For the sample is shown to induce consent to the sale and the

(14) *Jahn Ardley*, 12 Cox 23.

(15) *Dundas*, (1853) 6 Cox 380; *Smith*, D. & B. 566.

(16) *Sherwood*, (1857) D. & B. 251 overruling *contra* in *Read*, 7 C. & P. 848, in which a lie told in trade was held to be exempt from punishment.

(17) *Ragg*, (1860) Bell C. C. 214; *cf*, *per* Bramwell, B., in *Ridgway*, (1862) 3 F. & F. 838.

inferior goods are sold to make wrongful gain, which constitutes dishonesty. In such cases, the disparity between the sample and the goods sold may be small, but if it makes a difference in their respective values, there is wrongful gain. In England several cases have been decided in which the prisoner had sold cheese giving cheese of superior quality to taste, the difference between the sample and the goods sold being in one case one penny or two pence a pound,[18] in other cases the precise difference was not ascertained, but the result was held to be unaffected by it.[19]

4605. This offence may equally be committed by a person standing to another in a fiduciary relationship such as attorney and client. So where the accused appeared as an attorney for the prosecutor before a Magistrate who fined the prosecutor £ 2 and whereupon the attorney went to the prosecutor's wife and falsely assured her that the Magistrate had inflicted the same fine upon another person at the same time but had afterwards relented to reducing it to £ 1 on his offering it, and that he should try the same plan for the prosecutor if she gave him £ 1 and which she did, but the attorney misappropriated the money and never made the application he had promised. It afterwards appeared that his story to the prosecutor's wife was a myth, and it was held that the money was obtained by false pretence.[20] Such a case may arise where an attorney or pleader induces the client to part with his money on the pretext of requiring it to bribe the judge or pay in court-fees or for a like purpose in the course of his duties.

4606. On the other hand, where the accused described a certain plot of land as "situated in a hollow" on the faith of which the Commissioner sanctioned its sale at a lower rate. The Magistrate found that his report though false was not dishonest, and thereupon his discharge was ultimately upheld,[21] though no reference was made to the fact that the report related to immoveable property with which the offence has no concern.[22]

4607. Mute Deception.—It is not necessary that the deception should be by the express words or visible representation, for it may be equally practised by conduct or implied in the transaction itself. The accused delivered a cheque in payment of goods without informing the payee that he had no balance to his credit. He was held guilty of this offence.[23] The complainant had executed a *zur-i-peshgi* mortgage of his land in favour of the accused. He paid him the amount due thereon and asked him for the return of his security. The accused returned a bond which the complainant repudiated as not his own, and who insisted upon the return of his lease. As the accused would not return it, he was prosecuted for this offence and the lower Courts found that the complainant had not executed the bond which the accused had offered to return to him, that is, in any case the money was paid to disencumber the land, and that the accused dishonestly refused to return the mortgage-deed, upon which the High Court held that inasmuch as the accused gave the complainant to understand that he would return the mortgage-deed on receipt of the

(18) *Dark*, 1 Den. C. C. 276.
(19) *Garlick*, 1 Den. C. C. 276; *Abbott*, 1 Den. C. C. 273; *Goss*, Bell C. C. 208; *Pratt*, 8 Cox 334.
(20) *Asterley*, 7 C. Q. & P. 191.
(21) *Kaka*, 5 S. L. R. 95; 12 I. C. 641.
(22) *Abdul Ahad*, (1882) A. W. N. 6.
(23) *Martindale*, 52 C. 347 (370).

money and on the faith of which he paid the amount, the subsequent refusal of the accused to return it was manifestly dishonest. And since the accused had deceived the complainant by his previous attitude into a belief that his bond would be returned on payment, the conduct of the accused clearly fell within the terms of this section.[24] In this case the accused had made no express promise to return the deed, but the Court held it to be immaterial, for one may as much deceive another by express words as by acts and conduct.

The same view was taken in another case in which the accused who was the pledgee of the complainant's jewels, received the payment made to redeem it, after which he refused to deliver the jewels, and claimed to have appropriated the payment towards another unsecured debt. It was shown that the payment was made to redeem the jewels, and that it would not have been made if the complainant had not been assured of the delivery of his jewellery. It was held that if the accused had made the pretence of returning the jewellery on the faith of which the complainant paid the money, he was clearly guilty of this offence. But if the accused had not made this pretence, but had at the time of receiving payment intended to restore the jewellery but afterwards changed his mind and failed to restore it, then he would not have been guilty of cheating but only of a breach of contract.[25] The following case is a barefaced example of cheating. The accused's immoveable property was attached and advertised for sale. He had applied for permission to raise the decretal amount by private transfer, but his application was rejected. Nevertheless he falsely represented to one A that he had received the Court's sanction, and A thereupon advanced him Rs. 1,000. In ordinary course the house was sold and the accused withdrew the surplus sale-proceeds. He was convicted of cheating as he deserved to be.[1] The same fate befell a minor who raised a loan upon assurances given that he had attained majority which induced lenders to make loans which the minor had no intention to repay.[2]

4608. Deceiving must Induce.—It is of the essence of this offence that the deceit must induce the person deceived to do any of the acts mentioned in the section. But the inducement need not have been wholly due to the deceit independent of other auxiliary causes. It was so held by Bovil, C. J., who said: "The second point reserved was, whether a charge of obtaining goods by false pretences can be sustained when the prosecutor admits that another circumstance influenced his mind in parting with his goods, as well as the alleged false pretence. It has been long settled that it is immaterial that the prosecutor was influenced by other circumstances than the false pretence charged. If that were not so, an indictment for false pretence could scarcely ever be maintained, as a tradesman is generally more or less influenced by the profit he expects to make upon the transaction."[3] Nor is it necessary that the deception should have been such as was sufficient to deceive a man of ordinary prudence.

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(24) *Khoda Bux* v. *Bakeya Mundari*, 32 C. 941.

(25) *Sheodurshun Dass*, 3 N. W. P. H. C. R. 17.

(1) *Ramchand* v. *Jai Dial*, (1915) P. W. R. 18, 30 I. C. 641.

(2) *Sada Ram*, 18 A. L. J. 408, 58 I C. 253, 21 Cr. L. J. 749.

(3) *Lince*, 12 Cox. 451, following *Hewgill*, Dears C. C. 315.

For it is enough if it deceived the accused, though it might have been wholly inadequate to deceive another. It was argued in a case that the deception was such as was unlikely to impose on a man of ordinary caution, whereupon Lord Denman, C. J., said: "I never could see why that should be so. Suppose a man has just art enough to impose upon a very simple person, and defraud him. How is it to be determined whether the degree of fraud is such as shall amount to a misdemeanour? Who is to give the measure?....There are indeed cases, where the pretence is so very foolish, that it is difficult to say that an imposition is practised; but still who is to give the measure?"(4)

4609. The question in such cases is, therefore, not whether the deception could have imposed upon an ordinary mind, but whether it did impose upon the mind of the person deceived. That is the question—the sole question in the case, though the quantum and nature of the deception might be looked at to see if the prosecutor was in fact deceived. This dispenses with the necessity of proving ordinary prudence or caution on the part of the prosecutor. So Alderson, B., told the jury in a case: "If a man represents as an existing fact that which is not an existing fact, and so gets your money, that is a false pretence; for instance, that a certain church had been built, and that there was a debt still due for the building, when there was no debt due, that would be a false pretence; yet the matter might easily be inquired into and ascertained."(5) The prisoner gave an Irish one-pound note to the prosecutrix for changing, saying it was a five-pound note. As a matter of fact it was only a pound-note and the word "one" was clearly printed at each corner and the words "one pound" were also printed in the centre. The prosecutrix gave it to her mother without examining it, who again did not look at it, but gave the change for £ 5. Both the mother and daughter were literate, and it was objected that there was no deception as they could have ascertained the truth if they had only used ordinary prudence, but on a case reserved the conviction was upheld on the ground that as the prosecutrix gave the change trusting in the misrepresentation of the accused, the latter had obtained the money by false pretences, whatever imprudence the other party might have betrayed.(6)

So where the prisoner produced a £ 5 note of a bankrupt bank for change, and the prosecutor accepted it in ignorance of the bankruptcy, and gave the change asked for, the Court held it to be a case for conviction, though there was no formal proof of the bankruptcy of the bank by production of the bankruptcy proceedings, though there was evidence that the bank had stopped payments forty years ago and had not resumed business.(7) The prisoner in another case had sent the two halves of a good note to two different tradesmen on the same day as a security for the goods he intended for. He was indicted for obtaining goods by false pretences, but it was held that as there was no direct promise in either of the letters accompanying the half-notes that the other half would be forwarded, the indictment could not be sustained.(8)

(4) *Wickham*, 10 Ad. & E. 34.
(5) *Wooley*, 1 Den. C. C. 559.
(6) *Jessop*, D. & B. 442; *Bryan*, D. & B. 265.
(7) *Per* Cockburn, C. J., *Dowey*, 37 L. J. M. C. 52; *Flint*, R. & R. 460; *Evans*, Bell C. C. 187.
(8) *Masterson*, 2 Cox. 100.

It is cheating if the steward of a club should present a bill for a larger sum than was actually owing by the prosecutor and thereupon the prosecutor pays the amount of the bill out of which the accused misappropriates the excess paid.(9) The same principle runs through the case of a workman claiming a large amount of wages for the work done than were actually earned by him.(10)

4610. But such a case is clearly distinguishable from one in which a false claim is made, but it is discovered before it is met, or where again, the making of an exaggerated claim may as conceivably be due to mistake or negligence as to an active fraud intended to deceive. The accused who was a Marwari cloth merchant had had dealings with the prosecutrix, to whom he had supplied cloth from time to time. In his bill he included an item of claim on account of the price of cloth alleged to have been supplied to the prosecutrix. The latter admitted having received the cloth, but afterwards returned it to the accused which was proved. It was held to be no case of cheating.(11) But a person who sees through the deception can scarcely be said to have been induced. The prisoner was employed to cut chaff for the prosecution at 2*d*. per fan. He had cut and removed eighteen fans which he piled on the heap of other chaff to the knowledge of the prosecutor, to whom, however, he represented having cut sixty-three fans and for which he demanded payment. The prosecutor met his claim and then prosecuted him, but on a case reserved it was held that the prisoner had not obtained the money by means of false pretence, for the prosecutor knew it was false, and therefore it was not the false pretence that induced him to part with his money.(12) The accused requested the complainant to receive bets on credit promising to pay up his losses, if any, punctually on the settling day. He failed to pay up as promised. His conviction was quashed on the ground that while there was no doubt that the accused had deceived the complainant, the evidence fell short of proving that it had induced the acceptance of his bets; since it is possible that if the complainant had not accepted them on credit the accused might not have offered any bets at all.(13) In short, this case is little distinguishable from those in which the creditor makes the loan upon the debtor's promise to repay it which he afterwards fails to do.

Attempt to Cheat.

4611. But in one case it was held that though in such case there may be no cheating, still there may be an attempt to cheat, for which the accused may be convicted. In this case the accused sent two half currency notes of Rs. 20 each enclosed with a letter in which he claimed the amount due thereon, alleging that the other halves of the notes had been lost. On receipt of this claim the currency office made a search and discovered that the other halves of the notes in question had been already cashed and cancelled. The prosecutor stated that after this he was satisfied

(9) *Wooley*, 1 Den. C. C. 559.
(10) *Leonard*, 1 Den. C. C. 304.
(11) *Baijnath Ram* v. *Burgess*, 5 C. W. N. 255.
(12) *Mills*, D. & B. 205.
(13) *Bhedwar* v. *Rao*, 27 C. W. N. 919, 74 I. C. 76, 24 Cr. L. J. 748.

that the claim was false and that the accused was attempting to cheat, and for which he wanted the accused to commit himself. He therefore sent him the usual D form of inquiry containing a set of questions to be answered by the accused, which he did declaring that the other halves of the notes had been lost from his box in December 1887. As a matter of fact the other halves had been discharged in 1871. The story of the accused was therefore palpably false and the question arose what offence he had committed. It was held that the fact that there was no possibility of inducing the prosecutor to sanction payment only showed that the offence was not cheating. But "a man may attempt to cheat, although the person he attempts to cheat is forewarned, and is, therefore, not cheated." The case was thus held to be an attempt to commit this offence. It was contended for the accused that his first letter of demand was a mere preparation and not an attempt, but the Court held that though it was so, still the form D filled in by the accused was a formal claim made, which so far as he was concerned completed the only act he was required to do to complete the demand. It was, therefore, an attempt and not merely a preparation.(14) And this view accords with English Law.(15)

4612. Inducement must be Fraudulent or Dishonest.—Again though a person may deceive and another may be deceived still it will not amount to this offence unless the inducement is fraudulent or dishonest. These words have been the subject of separate consideration (§§ 243-260), but their force in this connection requires to be again examined. The word "fraudulently" is defined in section 25 as meaning "to defraud," but as the Code does not define what it is to "defraud," the definition is defective inasmuch as it is content to define one word by another itself requiring a definition.(16) However, as has been elsewhere pointed out, the term "fraudulently" has been obviously used in the Code in a sense distinct from "dishonestly." It does not necessarily imply wrongful gain or loss, but rather merely deception or artific caused or used intentionally (§§ 255-263). The term "dishonestly" is clear, for it means the causing of wrongful gain or wrongful loss as those terms have been defined in section 23 (§§ 227-239).

Meaning of Fraudulently.

4613. It will be observed that these words do not control the whole section, which is divided into two distinct clauses, of which the second provides for the case of a person who by deceiving another intentionally induces the person so deceived to do an act which causes or is likely to cause damage or harm, although the deceiver has not acted fraudulently.(17) Reserving this branch of the case for subsequent consideration, the use of the terms "fraudulently" and "dishonestly" will be found to be associated only with the delivery or retention of property. Now the term "fraudulently" being used in juxta-position with "dishonestly" must mean something akin to and yet different

(14) *Umesh Chunder Mitter*, 16 C. 316; distinguishing *Hensler*, 11 Cox 570; *Maung Po*, 2 R. 53.

(15) *Roebuck*, 25 L. J. M. C. 101; *Mills*, 26 L. J. M. C. 79; *Hensler*, 11 Cox 570.

(16) *Baburam Rai*, 1 C. L. J. 469 (472).

(17) *Mohabat*, (1889) P. R. No. 20, following *Girdharee*, (1876) P. R. No. 16.

from the term "dishonestly."[18] It, of course, implies the practice of intentional fraud upon another, the object being to convey conviction by precluding inquiry. This is necessarily compassed with an ulterior object, though it may not be associated with the wrongful gain or loss of property, and though it does imply either such loss or the risk of such loss.[19] One thing, however, is clear. All deception is not fraudulent, nor is all fraud punishable. If, therefore, there is evidence of deception, and even of fraud, such as is here implied, it does not necessarily make for this offence.

Such, for instance, was the case of the accused who applied for a duplicate certificate of his having passed the matriculation examination of the Madras University in the name of one A who had really passed that examination, and to obtain which he made a false statement that A had lost his original certificate and to support which a forged letter from the Headmaster of the local school was enclosed with his petition. The Registrar of the University sent a duplicate certificate to the address of the said headmaster, who thereupon disclaimed his authorship of the certificate purporting to go from him, and whereupon the accused was prosecuted for forgery and attempting to cheat, but the Court held that there was nothing in the conduct of the accused to merit punishment. His forgery of the headmaster's certificate was neither fraudulent nor dishonest, and his application to the Registrar for a duplicate certificate of A had not caused any damage or harm to the Registrar or to the University. It may be that the accused intended to secure some temporal advantage by pretending that he had passed the Maticulation Examination. But if he had such an intention it was merely a preparation towards such object and would not amount to an attempt within the meaning of section 511.[20] But in this case the fraud, if any, was inchoate and inconsequential. But the following case furnishes an example of cheating by fraudulent as distinct from dishonest inducement.

4614. The accused, presumably the decree-holder in a civil suit, went to a Court clerk and requested him to let him have the warrant of attachment issued on his judgement-debtor just to show it to his pleader. The clerk believed him and delivered him the warrant upon which he indorsed a report that the bailiff refused to go on foot to execute it, but wanted a carriage, and that he had requested the accused to make thereon a false report that the house of the judgment-debtor was found locked and so the bailiff could not execute the process. The clerk prosecuted the accused for this offence and he was held to have brought his act within the first part of this section,[21] that is to say, the view of the Court was that the accused had fraudulently induced delivery of the warrant, his intention being to injure the bailiff.

(18) It must mean something different. *Baburam Rai*, 32 C. 775 (779); but see *Kotamrajee*, 28 M. 90, F. B. In *Lal Mahomed*, 22 W. R. 82, Couch, C. J. held "fraudulently" to have been used in the *same* sense as "dishonestly." But West and Nanabhai, JJ., citing De Blanc, J. (*Haycroft* v. *Creasy*, 2 East. 92, 108), held the term to imply merely an intention to deceive whether from any expectation of advantage to the party himself or from the ill-will towards the other.

(19) *Kotamrajee*, 28 M. 90, F. B.

(20) *Srinivasan*, 25 M. 726.

(21) *Harishankar*, 6 Bom. L. R. 375.

"Fraudulently" must, therefore, imply at least ill-will towards another.[22] If even this is lacking, the accused cannot be punished for doing an act which may be fraudulent in the eyes of the public, but which is not fraudulent in the especial sense in which that term is used in this context. The accused visited the doctor and Health Officer of the Calcutta Corporation, for subscription stating to him that he was a Muncipal employee and was collecting money to feed the poor on the occasion of the opening of the new Municipal offices. The subscription book contained the names of many subscribers and P contributed Rs. 10. The accused made over the collection to the charity. He was, however, prosecuted for cheating inasmuch as he had falsely stated that he was a servant of the Municipality which he was not, and which P swore had induced him to part with his money But it was held that the deceit was too remote, and was not at any rate fraudulent.[23]

4615. Two brothers, A and B had borrowed a sum of Rs. 900 from C who pressed them for payment. They agreed to execute a mortgage of their house to him, purchased a stamp-paper and engrossed thereon a mortgage-deed. A signed it but B demanded Rs. 200 more for his signature which C refused. While the brothers were thus negotiating with C for the payment of the Rs. 200 they secretly mortgaged their house to D C appeared before the Registrar to prevent the registration of D's mortgage, but failed. He then complained against A and B of cheating, but Melville, J., held it to be merely a breach of contract and not cheating.[24] But the following case presents a different view of such breaches of contracts. The accused had purchased grain from the complainant on the express contract that it was to be paid for on delivery. The complainant measured out the grain, but refused to let the carts leave till he was paid. Taking advantage of his momentary absence the accused slipped away. The complainant promptly complained to the police and in defence the accused falsely pleaded payment. The Court found that he had no money to pay, and his conviction for this offence was upheld.[25]

4616. The accused, who were rival shop-keepers, waylaid certain intending customers of the complainant and falsely represented themselves as belonging to the complainant's shop and took them to their own shop which they alleged to be the complainant's, and sold goods to them at the prevailing market-rate. They were convicted of this offence, but their conviction was quashed on the ground that the persons deceived had suffered no loss by the deception, and that the fraud or dishonesty here contemplated was intended to involve loss to the person deceived, and not to a third person like the complainant.[1] The same view was taken in a case, where the accused personated another (A), and caused the Registrar appointed to record Mahomedan marriages and divorces to register a fictitious deed of divorce, by which A purported to divorce his wife. It was held that though the accused

(22) *Per* Le Blanc, J., in *Haycroft* v. *Creasy*, 2 East. 98 (108).
(23) *Ashutosh Mallick*, 33 C. 50.
(24) *Hargovandas*, 9 B. H. C. R. 448.
(25) *Nga Mya*, 4 Bur. L. T. 14, 9 I. C. 458.
(1) *Sundar Singh*, (1904) P. R. No. 25.

had clearly deceived the Registrar by falsely personating A and causing him to register a fictitious deed in the name of A still, inasmuch as there was no evidence of damage or harm within the meaning of this section, the accused was held to have committed no offence. So where the creditor induced the debtor to pay up his father's debts by acting merely on his fear of consequences to his father, he could not be convicted of cheating, even though he had grossly exaggerated the consequences of non-payment.(2) Such a case is not unlike that supposed by Lord Macaulay of a creditor donning the dress of a public servant to induce his debtor to pay up his debt in which case there would be no cheating because there is no fraud or dishonesty.(3)

4617. The term "fraudulently" may then be defined to imply an intent to deceive in such a manner as to expose any person to loss or risk of loss.(4) A mere false personation unconnected with such loss is not fraudulent. The accused was the manager of a joint-family and as such entitled to draw some money held for payment to a minor. The accused falsely represented himself to be the minor and thus obtained the payment. It was held that the deception was not fraudulent within the meaning of this section.(5)

Omission to Disclose an Incumbrance.

4618. While it would unquestionably be cheating to sell property to which the vendor had no title,(6) there is nothing fraudulent or dishonest in omitting to disclose an existing incumbrance on property sold by the owner to another, unless it is shown either that he was asked by the vendee whether the property was incumbered and said it was not, or that he sold the property on the representation that it was unencumbered.(7) In such a case there is no fraud even in the contemplation of the civil law, for illustration (*a*) of section 17 of the Indian Contract Act runs thus: "A sells by auction to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A." In this respect the English rule is not different. So Bramwell, B., said, "The fraud must be committed by the affirmance of something not true within the knowledge of the affirmer or by the suppression of something which is true which it was his duty to make known."(8) So in another case Lord Macnaughten observed: "Silence is innocent and safe when there is no duty to speak."(9) Such duty may of course be statutory, or conventional, or it may arise from the necessity of disclosure because one is invited to speak. Such was the case of the accused, whose nonage was extended to 21 by the appointment of a guardian. He concealed this fact from the creditor from whom he borrowed money which he had no intention to repay. He was held guilty of this offence.(10)

(2) *Mojey*, 17 C. 606.
(3) *Raj Coomar Banerjee*, (1864) W. R. 25.
(4) *Kotamrajee*, 28 M. 90, F. B.
(5) *Baburam Rai*, 1 C. L. J. 469.
(6) *Dorai Lal*, 17 A. L. J. 500, 50 I. C. 667, 20 Cr. L. J. 331.
(7) *Bishankas*, 27 A. 561.
(8) *Horsfall* v. *Thomas*, L. J. Ex. 322.
(9) *Chadwick* v. *Manning*, (1896) A. C. 231 (238).
(10) *Sada Ram*, 18 A. L. J. 408, 58 I. C. 253, 21 Cr. L. J. 740.

Of course, a fraud that is actionable is not necessarily indictable, for criminal responsibility is by no means co-extensive with civil liability. But there is nothing even creating a civil liability in a seller not mentioning the existence of an incumbrance to his purchaser. So where A sold his property to B for the sum of Rs. 750 and the sale-deed was silent as to the existence of a prior incumbrance for a sum of Rs. 20,000, and it was proved that A did not disclose that fact to B nor did B make any inquiry about it, it was held that the omission on the part of A to disclose the heavy prior incumbrance on his property sold to B did not amount to cheating, Aikman, J., holding that the omission was not dishonest, as dishonesty implied unlawfulness and there could be no unlawfulness when there was no legal obligation to disclose under section 55 of the Transfer of Property Act, inasmuch as the mortgage had been effected by a registered instrument, the existence of which could have been discovered by the mortgagee by the exercise of ordinary care. " He might also have ascertained its existence by questioning his vendor. Had he done so, and had the vendor falsely represented the property to be unincumbered, the case would have been very different, as there would have been an actual misrepresentation by the vendor sufficient to consistitute the offence of cheating.

It might be thought at first sight that illustration (i) appended to section 415 is opposed to the view set forth above, but the case contemplated in that illustration is clearly distinguishable. The illustration referred to deals with the case of a person selling or mortgaging an estate which he has previously sold and conveyed away. In that case a person who knows that he has got no right left to a property deals with it as if he had, his conduct amounts to a false representation that he has a subsisting right in the estate, although he well knows that he has not. In the case before me the seller still owned an interest namely the equity of redemption in the property which he conveyed to the complainant. For all that he knew to the contrary, the vendee might have been aware at the time of his purchase that the property he bought was under a mortgage. I have no hesitation in holding that the dishonest concealment of facts referred to in the explanation to section 415 is a dishonest concealment of facts which it is the duty of the person concealing them to disclose to the person with whom he is dealing. The Magistrate in his judgment argues that it is not necessary that wrongful gain or wrongful loss should have been caused, inasmuch as the conduct of the defendant, if not dishonest, was at least fraudulent. If the appellant refrained from disclosing the existence of the incumbrance, his conduct might be immoral, but it would not in my opinion be fraudulent, any more than would be the conduct of the seller of a horse who, knowing that the horse had a splint, did not disclose its existence to a purchaser.(11)

4619. This was also the view of Banerji, J., in another case in which A had sold his property to B for Rs. 2,750, whom C sued for pre-emption alleging that the actual consideration for B's sale was only Rs. 1,525. The suit was eventually compromised on condition that C

(11) *Per* Aikman, J., in *Bishankas*, 27 A. 561, followed in *Bhojraj*, 9 S. L. R. 97, 30 I. C. 994; *Paruchery*, 36 I. C. 872.

should get a decree for pre-emption against B on payment of Rs. 1,575 in cash, the rest of the consideration being withheld by C for discharge of a prior charge on the property. After the compromise-decree C discovered that B had executed a mortgage of his property since his sale and prior to his suit for pre-emption in favour of D. C therefore prosecuted B for this offence, but the Court held that there was no legal obligation cast on B to disclose the existence of this incumbrance to C. B's omission was therefore not dishonest, nor could it be said to have induced C to compromise his suit.(12)

4620. So there is nothing fraudulent within the meaning of this section in a person giving a false name and address in order to shield himself from prosecution for an offence. The accused was asked his name and address by a Sanitary Inspector to enable him to prosecute him for committing a nuisance, and the accused thereupon gave a false name and address which led to the prosecution of a person of that name, who was innocent of the offence. The accused was thereupon prosecuted under this section and the Magistrate convicted him for fraudulently giving his false name and address which induced him to charge Magan with a criminal offence, and that it was likely to cause the Sanitary Inspector harm in his mind and reputation. But it was held that the giving of a false name and address by the accused could not be said "to defraud" the Sanitary Inspector, nor could it be said to have deceived the latter and intentionally induced him to do anything which he would not do if he were not deceived, which act was likely to cause damage or harm to that person in body, mind, reputation or property within the meaning of the second clause of this section.(13) It is not fraudulent to tell a lie, nor is the mere telling of a lie punishable under this section. It may be that the lie induced a man to do an act which he would not otherwise do, but that too does not bring the act within the terms of the section.

4621. The accused was in the sevice of A whom he deserted and went to A's brother B in a distant village and being questioned by B as to A's health replied that he was dangerously ill, whereupon B hied himself to A only to find him well. B prosecuted the accused for cheating, but the Court held that the accused had no doubt told a lie and played a practical joke at B's expense, but he could not be convicted of this offence unless it appeared that by deceiving B the accused had "fraudulently or dishonestly" induced him to do a certain thing which he would not have done if "not so deceived and that act" caused or was likely to cause damage or harm to B in body, mind, reputation or property.(14) The accused and the complainant had filed cross complaints against each other, and they both compromised them by each undertaking to withdraw his complaint against the other. Acting on this assurance the complainant withdrew his complaint, but the accused then refused to withdraw his cross-complaint whereupon the complainant prosecuted him for cheating, but the Court held it

(12) *Gendanlal* v. *Abdul Aziz Khan*, 27 A. 302.

(13) *Ladka*, (1898) B. U. C. 635.

(14) *Punjia*, (1888) B. U. C. 423, following *Lal Mahomed*, 22 W. R. 82; *Narotam Das*, 6 A. 98, the latter of which cases has no bearing on the subject.

to be no case of cheating inasmuch as his act could not be held to cause damage or harm to the complainant's body, mind, reputation or property. "The object of a criminal complaint is supposed to be the punishment of the offender, and his not being punished could not, in the present case at least, injure his accuser."(15) So there is neither fraud nor dishonesty in travelling in a railway carriage of a higher class than what the accused had paid for,(16) or in being found within an exhibition without a ticket. Moreover, merely a fraudulent act does not amount to cheating unless it was done to induce some one to do or omit to do something which he would not have otherwise done or omitted to do. So while in a case like the last the intrusion of the accused into the exhibition grounds might be fraudulent, still it could not amount to cheating.(17)

4622. The accused applied for his enlistment in the police force of Farukabad. He knew that the natives of that district were ineligible for such enlistment. The Superintendent of Police questioned him if he was a native of that district and he falsely stated that he was not. He was prosecuted for cheating, but Tyrrell, J., quashed his conviction holding that his statement was neither fraudulent nor dishonest.(18) But would not the offence in such case be one under section 182? (§§ 1785-1789).

4623. It has been sometimes said that there is no difference between "fraudulently" and "dishonestly" as used in this context.(19) It has been, on the other hand, said that the two terms must have necessarily different meanings because they have been used together, otherwise the use of the two words would be redundant.(20) It will be observed that while the section uses the words as distinct concepts, the nine illustrations appended to the section are all cases of dishonesty which Couch, C. J., held to indicate that the two terms were intended to be used in the same sense. But though the illustrations undoubtedly relate only to dishonest inducement, it is possible to conceive of a case of cheating in which the inducement was fraudulent without being dishonest, though naturally such cases are comparatively rare. Such a case may be conceived of a prostitute suffering from syphilis and inducing another to have connection with her by falsely assuring him that she was not diseased, in which case the communication of the disease would be a fraudulent inducement, but under circumstances when fraud does not enter into the composition of the crime, for the case would then fall under the second clause of the section.(21) Indeed, if the fraud was practised in connection with the delivery of property as it must invariably be in a case falling under the first clause of the section, that word must necessarily bear a sense akin to dishonesty, though the term might save cases in which dishonesty may not be palpable.

(15) *Durgiah*, (1892) 1 Weir 477.
(16) *Dayabhai*, 1 B. H. C. R. 140.
(17) *Meheranji Bejanji*, 6 B. H. C. R. 6.
(18) *Dwarka Prasad*, 6 A. 97.
(19) *Per* Couch, C. J., in *Lal Mahomed*, 22 W. R. 82 (83).
(20) *Per* Harrington, J., in *Baburam Rai*, 1 C. L. J. 469.
(21) *Rakhma*, 11 B. 59.

4624. Inducement by Acts and Conduct.—The cases of cheating by a dishonest inducement present comparatively no difficulty. They are all cases in which the deceiver plots to receive or retain property to which he has no right by employing unlawful means. The means of inducement employed in such cases must necessarily differ according to the nature and belief of the person deceived and the influences to which he is subject. Of course, such inducement need not be by words only for it may be as effectually made by the acts and conduct of the party, though there may not be a single word spoken,(22) or where words are spoken, they may, when literally construed, be mere expressions of hope and expectation, though their intention may be to make a representation as to existing facts, in which case it is for the judge of fact to say whether their form or their substance was intended to operate.(23) So if a person purchase goods from a tradesman and deliver him a cheque upon a banker with whom in fact he had no credit, he would be guilty of this offence,(24) if he was then aware of the fact that he had no credit at the Bank. But the case would be different if he had reason to believe that the cheque would be honoured on presentation, even though he had no account at the bank, but the bank refused to cash it.(25)

The accused purchased goods of the prosecutor, promising to pay ready money for them. He gave a cheque on a bank for the price and took away the goods. He had shortly before opened an account at the bank but had withdrawn his deposit except a few shillings He was held guilty of obtaining goods by means of a false pretence.(1) In another case the prosecutor had agreed to sell some iron to the accused for £1-17*s*. Ten shillings were paid on account, and the balance was agreed to be paid on delivery. The next day the accused brought a pony cart and began to load it with the iron. During the loading he gave the prosecutor a cheque for £1-7*s*. The prosecutor allowed the iron to be taken away. The cheque was dishonoured on presentation, and it was held that the prosecutor had been induced to part with his goods in the belief that the cheque was good and genuine, and that the accused was rightly convicted of this offence.(2)

In these cases the transaction was for cash, and neither party intended to give or take credit. But if there is anything in the transaction to show that one party intended to give and another to take credit for how short so ever a time then there would be no cheating, but a breach of contract on the failure to pay. Such contract would be necessarily implied from delivery of a post-dated cheque. So where the accused purchased a horse and paid for it by a post dated cheque, telling the prosecutor not to present it for the two days by which it had been post-dated, but who nevertheless presented it on that very day and when it was dishonoured and it appeared that

(22) *Partridge*, 6 Cox 82; *Hunter*, 10 Cox 642; *Carter* ,10 Cox 642; *Giles* L. & C. 502; *Cooper*, 2 Q. B. D. 510; *Parker and Bulteel*, (1916) 80 J. P. 271.

(23) *Aaron's Reefs* v. *Twiss*, (1896) A. C. 273 (284).

(24) Ill. (*d*); *Jackson*, 3 Camp. 370; *Martin*, 5 Q. B. D. 34; *Garratt*, 10 T. L. R. 167; *Haselton*, 44 L. J. M. C. 11; *Cosuett*, 20 Cox 6.

(25) *Walue*, 11 Cox 647.

(1) *Haselton*, (1874) 44 L. J. M. C. 11.

(2) *Cosuett*, (1901)65 J. P. 472.

the accused *bona fide* expected a remittance which he intended to deposit in the bank to pay for the cheque, it was held that there was no false pretence.(3) But this case does not establish a general exception in favour of drawers of post-dated bills, for the question in such cases depends upon intention. The accused purchased a watch and chain for £25, and before the completion of the sale represented to the prosecutor that he was in funds at the bank, and that he had the right to draw the cheque, though he was going to post-date it for his own convenience which was all false. The cheque was presented and dishonoured on the date of its execution, and it was held that as the accused had no reasonable means of paying it on the date it fell due, and as his whole statement was false and calculated to deceive the prosecutor, he was rightly convicted of the offence.(4) The cases in which the accused pays in forged or worthless notes are clearly cases of flagrant cheating.(5) Such case may arise where the prisoner encloses a half of a good bank note having already parted with the other half to a third person, and which implies a representation that the accused would forward the other half in due course.(6)

Inducement by Dishonest Acts.

4625. So where the accused at Oxford went to a shop wearing the university cap and gown, though he was not a member of the University, and thus obtained credit, he was held to have committed this offence, though nothing passed in words.(7) It may be that the act in this case was ambiguous, for, the accused may conceivably have put on the University robes for a purpose other than that of fraud. But this should have been established by the accused. The prosecutor is not bound to show that the words and acts of the accused had no other meaning. If they were susceptible of the meaning attached to them by the prosecutor who was thereby deceived it is sufficient. The accused wrote to the prosecutor the following letter: "Please send me one truck of Regent's and one truck of Rock's as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. *P.S.*—I may say if you use me well I shall be a good customer. An answer will oblige, saying when they are put on." The prosecutor sent the potatoes, believing that the accused was a dealer in potatoes in a large way of business. He was in fact a huckster and carried about fruit for sale in a donkey cart.

The jury found that the prisoner's ordinary dealings being on a very small scale to which the large order for potatoes was disproportionate, and that consequently he had misrepresented his character and position and thereby induced the prosecutor to consign goods, and on a case reserved the Court confirmed the conviction, Lush, J., observing: "The pretence in order to justify a conviction must be of existing facts. It may be made either by words or by acts. It is sufficient if it can be reasonably and naturally inferred from the words, or from the acts, in order to raise a question for the decision of the jury. It is not

(3) *Walne*, 11 Cox 647.
(4) *Parker*, 7 C. & P. 825.
(5) *Flint*, R. & R. 460; *Dowey*, 11 Cox 115; *Freetle*, R. & R. 127; *Anderson*, 2 M. & Rob. 471; *Caulson*, 4 Cox 227.
(6) *Murphy*, 13 Cox. 298.
(7) *Barnard*, 7 C. & P. 784; *Stevens*, 1 Cox 83.

necessary that the words or that the acts should be capable only of the meaning charged by the indictment. If the words in the letter written by the prisoner in the present case were intended to mean, and are fairly capable of meaning, that which is charged, and if they were so understood, then there was as much a pretence, as though the letter had contained, the definition of their meaning. The words here are capable of supporting the pretence charged without further explanation, this large quantity is asked for as a sample, and then the prisoner says he will remit, and talks of the trade to be done. The letter is fairly capable of representing and conveying to the mind of the reader that the defendant was a man dealing largely, and in a position to do good trade, and remit at once on delivery. The jury have adopted this construction, and have found that the prosecutor did so read the letter and that the prisoner intended it to be so read. I therefore think the conviction right."[8]

4626. So while an ordinary trader does not by the mere fact that he keeps his doors open for business represent that he is at the moment solvent, the business of a bank stands on a different footing because a banker trades with other persons' money, and he undertakes by the very carrying on of his business that he will honour any cheque drawn upon an account provided that the account is in credit to the account of the defendant. Consequently, it is open to a jury to find that a banker impliedly represents that he is in a position to fulfil those obligations, and is solvent.[9]

4627. As a letter alleged to contain a dishonest inducement and sent to the prosecutor is presumably intended to influence him, his opinion as to what he understood thereby is material, though the question whether the letter did influence him is for the jury, while the question whether it could have influenced him is a question of law and for the judge. As Wright, J., put it: "In order to convict the prisoner three things must happen: *first* which is a question for the judge, whether the document is reasonable, capable of bearing the meaning attributed to it; *secondly*, which is for the jury, whether it was so meant by the prisoner; and *thirdly*, whether it was so understood by the prisoner.[10]

4628. The prisoner went to a post office and enquired if there were any letters for John Story. The postmaster looked into his reserve letter box and found one addressed to John Storer which the lady in charge made over to him. He took it and then returned with the enclosed money-order for a pound and demanded money which was paid to him on his signing his real name John Story. He was prosecuted for obtaining money by false pretences, but it was contended for him that he had made no false assertion and had signed his true name, but on a case reserved it was held that he was rightly convicted inasmuch as in presenting the money order and receiving payment he represented himself to be John Storer which he knew to be another man.[11]

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(8) *Cooper*, 2 Q. B. D. 510 (514).
(9) *Parker and Bulteel*, (1916) 80 J. P. 271.
(10) *King*, (1897) 1 Q. B. 214 (219).
(11) *Storey*, R. & R. 81.

The case of a false cheque delivered in payment of goods implies the same representation, that the cheque would be cashed on presentation.

4629. In judging of the nature of the act the only thing relevant is the intention of the accused at the time of the inducement For a person cannot be said to cheat if his act being originally honest afterwards became dishonest with the change of intention. The mere taking of money one day, and dishonestly running away without paying the next day is not necessarily cheating. There must be an intention to deceive and defraud at the time of taking the money, and subsequent conduct of the accused would only be evidence to show the previous dishonest intention,[12] but it is not necessarily conclusive.[13]

Subsequent Conduct.

4630. So it has been held that a vendor who delivers goods on the terms that they are to be paid for immediately after they have been received gives credit to the purchaser.[14] Such was the case of the accused who was introduced to the prosecutor by another person and who thereupon agreed to advance him a sum of money on his agreeing to purchase rice and bring it in his own boats for sale through the prosecutor, and upon which he was to receive a certain commission. The accused received the money but failed to bring the rice as promised. It also appeared that his statement was grossly exaggerated, but that it had the substratum of truth, for he had control over some boats and there was evidence of his having made advances for the purchase of rice. On these facts the High Court held that it was not a case in which it could interfere with the acquittal.[15] This was a case of mere breach of contract. The distinction between such a case and one of cheating is well marked though it is not often manifest. It depends upon the intention of the accused at the time of the inducement, which may be judged by his subsequent act but of which the subsequent act is not the sole criterion. The prisoner hired certain property from the complainant for use at a wedding and advanced a portion of the hire, promising in writing to pay the balance of hire and restore the goods when the wedding was over. Here the transaction was manifestly a fair one, but other facts may be superadded to put upon it a different complexion. For instance, in the case last supposed it was shown that the alleged wedding was a mere ruse resorted to get possession of the property which the accused intended to secure by applying for its attachment before judgment.

In a suit brought against another person to whom it really belonged and who had previously mortgaged it to the complainant, it was held that the act of the accused was clearly dishonest and as it had induced delivery of the property he was guilty of cheating.[16] The same view was taken of the accused who had mortgaged his land to the complainant and who visited him during his absence, and finding his wife at

(12) *Heeramun Hulwye*, 5 W. R. 5.
(13) *Ram Chandra*, 43 C. L. J. 287, 94 I. C. 204.
(14) *Jones (Williams)*, (1898) 1 Q. B. 119; *Khitish Chandra*, 5 I. C. 796.
(15) *Deputy Legal Remembrancer* v. *Ijjatulla Kasi*, 10 C. W. N. 1005.
(16) *Kadir Bux*, 3 N. W. P. H. C. R. 16; *Khoda Bux Sheikh* v. *Bakeya Mundari* 32 C. 941; *Ramanath Kalapahar*, 2 C. L. J. 524. *Per* Rampini & Woodroffe, JJ. (Mookerji, J., *dissenting*).

home asked her to let him see the instrument which she delivered him. He then took it away. He was convicted of this offence, but on appeal it was held that inasmuch as the complainant's wife had not been examined, the circumstances attending its delivery were not proved. On the case being reported to the High Court it was held that the conviction was not bad in law if the allegations were proved. If it had been proved that the accused made a promise which he at the time never intended to keep and thereby deceived the woman, and in consequence of which she delivered the deed to the accused, his intention inducing her to deliver the deed would have been clearly fraudulent or dishonest and upon which he might have been rightly convicted of this offence.(17)

4631. But in such a case, the intention of the accused at the time he requested delivery of the deed, may well be gathered from his subsequent conduct. If, however, there was anything in it to negative that intention, then the accused could not have been convicted of this offence. Such was the case of the accused whom the complainant engaged at Madras to serve him as a cook for six months. He received an advance of a half-a-month's pay and travelling expenses and joined his master on a hill station, but after serving for twenty-four days he absconded. He was prosecuted for cheating, but the Court held that there was nothing to show that at the time the accused induced the complainant to part with his money he intended to act fraudulently or dishonestly. He did not intend to get to the hill on the pretext of serving the complainant. The fact that something afterwards supervened which caused the defendant to break his contract to remain in complainant's service for six months, does not convert the previous honest intention into a dishonest one so as to support the conviction for cheating.(18) The accused presented a stolen note to a shopkeeper for encashment, and in reply to the inquiry of the shopkeeper gave his name falsely. The shopkeeper did not ask the accused for his name until after he had cashed the note, and he admitted that the name given by the accused in no way influenced him in cashing the note. It was held that the giving of the false name had nothing to do with its encashment by the complainant, and that there was no other deceit inducing delivery of the money. The accused may, perhaps, be presumed to have represented the note to be a good note, as it was in fact, but there was no representation that it was not stolen. There was, therefore, no cheating, and consequently no cheating by personation for which the accused could be convicted.(19)

4632. The selling of milk and water in about equal proportions as pure milk is sufficient to support the finding of cheating.(20) But where a person went on purpose to buy such milk in order to prove a case of adulteration against the seller, he could not be said to have been deceived or induced to buy such milk and the seller could not therefore be convicted of cheating,(21) though he may be convicted of an attempt. So it is cheating to demand a higher rate for an article than what is legally prescribed as the rate at which it is to be sold.

(17) *Anan*, (1880) 1 Weir 478.
(18) *Viraswami*, (1881) 1 Weir 478.
(19) *Shaik Basit*, (1883) 1 Weir 479.
(20) *Nana*, (1880) B. U. C. 145.
(21) *Kalee Modock*, 18 W. R. 61.

So the sale of opium is regulated by Government which prescribes the rate at which it is to be sold by licensed retailers. If, therefore, such a ratailer sell opium worth half-an-anna for an anna he would be guilty of cheating[22] in the same way as if he had passed on a half-anna stamp when what the purchaser had wanted and paid for was an anna stamp. In either of these cases the act of the accused was dishonest, because the vendor made half-an-anna more than he was entitled to and it induced delivery of it by deception inasmuch as the vendor made the accused falsely believe that the property delivered was what the Government had ordered him to sell. Such a case must, however, be distinguished from one in which the Government Famine Relief officers sold rice to shopkeepers at the rate of sixteen seers per rupee on condition that they should retail it at fifteen seers per rupee. The accused was one such purchaser and he was convicted of cheating for selling the rice which he had so purchased at sixteen seers per rupee at the rate of twelve seers. It was held that as property in the rice passed to him its sale by him at a rate other than that subject to which it was sold amounted only to a breach of contract and not cheating.

As Couch, C. J., put: "The rice having been sold to him and he having paid for it, it was not unlawful for him to sell it again at such prices as he thought fit."[23] The non-fulfilment of a promise which was only one factor in inducing delivery of the property otherwise legally made, does not make it a case of cheating. The example of the son being induced to pay up his father's debts failing which the father should suffer dire consequences which were imaginary and intended merely to frighten the son, has been already considered.[24] Another case of the same kind is the following. The accused was the holder of a decree against the prosecutor for Rs. 194-10, in execution of which he attached his property for sale, whereupon the prosecutor compromised his case by paying him Rs. 154, the latter agreeing to withdraw from the execution, which, however, he failed to do as soon as he had secured the sum of Rs. 154, and the result was that the sale was proceeded with and the prosecutor's property sold. He was prosecuted for cheating and would have been convicted were it not for the finding that he had thereupon instructed his pleader not to prosecute the case, but which he nevertheless went on with and eventually purchased the property himself It was in fact a case where the accused had bungled but not cheated the complainant.[25]

Far different, however, would be the case of the man who under such circumstances received the money and then denied its receipt. His denial would be a clear proof of his previous dishonesty, creating a presumption against him which it would not be easy for him to overcome.

4633. A person who receives money from another giving him a girl in marriage falsely stating her caste, would be guilty of cheating

(22) *Pandurang*, 4 Bom. L. R. 823.
(23) *Lal Mahomed*, 22 W. R. 82.
(24) *Raj Coomar Banarjee*, (1864) W. R. 25.
(25) *Sadoo Churn Pal*, 4 W. R. 13.

if he knew of the real caste of the girl and had dishonestly concealed it for the sake of the money.(1) And the offence would be the same if in such a case the girl's true parentage is concealed and she is described to be of a good family which she was not.(2) But to say that a person belongs to a good family is a matter of opinion, and upon which one could not be convicted of cheating, for which there should be a mis-statement of fact as distinct from a mere expression of an opinion. So where the accused reported as having completed the work, and whereupon he was paid off his final bill by the Public Works Department under whom he had taken a contract, but who afterwards discovered it to be incomplete in parts, it was held that his statement if false was alone insufficient to sustain the charge of cheating, because there must be evidence that it was not only false but believed it to be false by the accused at the time he made it.(3) So a person cannot be convicted of cheating for selling nasty sweetmeats, for nastiness is a matter of taste and upon which opinions are likely to differ.(4)

4634. The case would, however, be different if a person used false weights and measures and represented them to be true, in which case he may bring himself within the penalties of sections 264-267 as well as of this section. The accused sold liquor measuring it in a glass which was not a prescribed measure, and which contained less liquor than it was represented to do, it was held that the appropriate offence of the accused was cheating.(5)

4635. Compared to these cases the following is a barefaced example of cheating. The accused advertised for the sale of a book of English idioms by one Robert S. Wilson, M.A., for Rs. 2-4, obtainable on prepayment from the said Robert S. Wilson, M.A., Council House Street, Calcutta. The accused instructed the post office to redirect the letters sent to that address to his own at Rajam in the Vizagapatam district. He signed himself as Robert S. Wilson. He then wrote to the postmaster at Rajam that his clerk Seshagiri Rau should visit him for receiving the redirected money orders and later on he himself appeared at the post office and took delivery of the money orders, representing himself to be the expected Seshagiri Rau, and producing for the satisfaction of the postmaster a written authority purporting to be written and signed by Robert S. Wilson and which was in his own handwriting. There were no such persons as Robert S. Wilson or his clerk Seshagiri Rau, nor any book of Idioms by the former. In fact all that the accused did was to advertise a fictitious book by a fictitious author to cheat intending buyers. It was held that the accused was guilty of cheating those who remitted money for the book.(6)

The case is not unlike the many cases of swindling, which play changes on the same tune. In some the advertiser promises a lucra-

(1) *Peddomonee*, 5 W. R. 98; *Dabee Singh*, 7 W. R. 55; *Komul Das*, 2 W. R. 7; *Sheoram*, 2 A. W. N. 237.
(2) *Dhunput Ojhah*, 7 W. R. 51.
(3) *Kalipuddo Poramanik*, 23 W. R 43.
(4) *Kalee Modock*, 18 W. R. 61.
(5) *Nurodin*, (1888) B. U. C. 386.
(6) *Pera Raju*, 13 M. 27.

tive employment on payment of a fee, in others he promises an heiress for a wife for the same consideration, but in both cases there is neither the employment nor the promised heiress. The advertisement is in short, a swindle intended to draw money, which clearly constitutes cheating. Sometimes this form of swindle assumes a more specious form. The advertiser gives away a photographic enlargement just to boom his trade. He only wants a photograph and a shilling or two for packing. If the money is sent, the advertiser demands later on half-a guinea for the frame without which the enlargement cannot be sent, which is a clear case of cheating, inasmuch as there was a dishonest concealment of this fact when the shilling was demanded for postage and the photograph was promised free.

4636. Delivery or Retention of Property.—The first clause dealing with fraudulent or dishonest inducement relates merely to the delivery or retention of property. It has no application to any damage done to property, nor indeed to any damage or harm done to a person in body, mind or reputation, as distinct from his property. The delivery or retention of property, which alone is the subject of the first clause, may, however, be any property, present or prospective, existent or non-existent, provided that the inducement is a continuing one and existed at the time the property comes into being and is delivered under its influence. So, where the prisoner was indicted for obtaining by false pretences a spring van, and it was proved that the prosecutor built it on the faith of those pretences and delivered it in pursuance of the original order, although the prisoner had countermanded the order after the building and before the delivery, it was held that the existence of the chattel was not necessary to constitute the offence.

4637. As Bovill, C. J., put it: "Take the case of a coat obtained by a false pretence, or of money, say £500. A man may not carry £500 about with him, and it may be that the bank notes obtained by the pretence are not printed when the pretence is made. Can anybody doubt that such a case would be an obtaining within the Statute, the pretence and the delivery being connected together? So is the detaining of a valuable security in the shape of a note or bill of exchange, which does not exist at the time when the prisoner asks for it but is made afterwards. Again, take the case of minerals, of coals which is not dug at the time of making the pretence, which at common law is not, till severed, the subject of larceny. A vast variety of similar cases might occur in which it would be an absurdity to say that the offence was not within the Statute. In all cases, of course, the pretence must precede the delivery of the chattel. What, then, is the test as to the distance of time between them? The real test is whether or not there is a direct connection between the making of the pretence and the delivery; or, in other words, whether the pretence is a continuing one, continuing during the interval between the time of making the pretence and the time of the delivery. It would be for the jury in all cases to say whether that was so in fact."(7)

So, where the accused went to a restaurant and ordered and ate a meal knowing that he could not pay for it, he was held to have been rightly convicted of this offence though the meal was not in existence when the pretence

(7) *Martin*, L. R. 1 C. C. 56.

was made.[8] In another case the prisoner induced the prosecutor to deliver him a cheque, which, however, owing to a material omission, was dishonoured by the banker upon whom it was drawn; and whereupon the pretender informed the prosecutor who wrote out another cheque which the accused got cashed, appropriating the proceeds. It was held that the false pretence which induced the prosecutor to issue the first cheque continued when the second cheque was drawn and that the money obtained by him on the second cheque was wrung out of the prosecutor by cheating.[9]

Meaning of "property."

4638. The term "property" is thus here used in the widest sense as signifying anything which is the subject of ownership. As property without an owner is not property within the meaning of law, it follows that there can be no cheating by appropriating it whether with or without consent, and whether that consent is free or coerced. The fact that a thing is valued, but is valueless, is enough to invest it with the right of property. So a cancelled cheque has been held to be property. And so a lottery ticket, however valueless it may be for the time being, is property, the right to which may be vindicated by complaint or action. The principle *de minimus non curat lex* cannot shield an attack made on such property. The prosecutor had purchased a lottery ticket which the accused took away, representing that it had won a prize of Rs. 10 or Rs. 20 which he offered to pay. As a matter of fact it had won a prize of Rs. 598. The complainant insisted upon the return of his ticket, but as the accused refused, he complained of cheating and the Court held it to be a good *prima facie* case of that offence.[10]

The term "property" includes money,[11] and everything else whether corporal or incorporal. But it does not include immoveable property.[12]

Delivery or Retention Must be Illegal.

4639. The delivery or retention of property secured by deceitful inducement must be illegal, for, as has been already seen, if the delivery was legal there can be no cheating.[13] So there is nothing illegal in a passenger to make over his excess luggage to a friend to evade payment of its freight, and the Railway cannot charge such person of cheating them out of their freight, because they have suffered no injury.[14] But it is illegal to take possession of a warrant of attachment before it is ready for delivery, on the pretence that it was required for inspection, and then to appropriate it. The accused, who was presumably a decree-holder, induced a clerk of the Civil Court to let him show the warrant of attachment to his pleader which the clerk delivered to him for the purpose, whereupon the accused made an indorsement on it to the effect that the bailiff refused to execute it, refusing to go on foot and wanted a carriage and that he wanted the accused to report that the judgment-debtor's house was closed. The clerk prosecuted the accused for this offence, and it was held that as the accused had taken possession of the warrant by false

(8) *Jones*, (1898) Q. B. 119.
(9) *Greathead*, 14 Cox 198.
(10) *Bhagwan Kessev* v. *Siba Valji*, 4 Bom. L. R. 76.
(11) *Birendra Lal Bhaduri*, 32 C. 22.
(12) *Abdul Ahad*, (1882) A. W. N. 6; cf. *Durga Tewari*, 36 C. 758.
(13) *Raj Coomar Banerjee*, (1864) W. R. 25.
(14) S. 44; *Paras Ram*, (1903) P. R. No. 25.

representation, he was guilty of this offence under the first part of this section.[15]

Temporary Delivery Sufficient.

4640. Both under English law as well as under this section the offence is complete with delivery or retention of property, though the delivery or retention may have been consented to only for a moment. So in England it is no defence to an indictment for this offence that the money had been obtained only by way of a loan and that the defendant intended to repay it. But in this respect the English rule is narrower and draws a line between property, such as money and other chattels, the rule being that in the case of money the offence is complete even if the loan be taken and the accused, intended to repay it,[16] whereas in the case of other chattels a temporary possession, however deceitful, is held insufficient to constitute cheating. This difference between the two kinds of property follows the rule, that while property in the one passes by mere delivery, property in the other does not necessarily accompany its physical possession.[17] This is, however, a conception of law which does not find favour in the Code except for the purpose already discussed (ss. 378, 411).

4641. The fact, however, that the property had been already made over to the cheat before the inducement began is important, as it will then show that its delivery could not have been induced by deceit. But if what had been parted with was merely possession, as in the case of a bailment, this offence may be equally committed by the owner consenting to its retention by the cheat.

4642. Inducement Too Remote.—But in this case it may be a question whether the inducement was not too remote. For while the section undoubtedly speaks of deceit and inducement, it is evident that there must be a limit beyond which criminal law could not extend its penalties.[18] For instance, there is such a thing as undue influence which vitiates a contract, which in view of the civil law is so induced where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, which he uses to obtain an unfair advantage over the other.[19] A person who dominates the will of the other possesses an advantage which he can turn to his account. But the gaining of any advantage would not amount to cheating unless it was gained either fraudulently or dishonestly and was, moreover, so directly the outcome of another's fraud as to amount to delivery induced by deceit. And even apart from undue influence there may be cases when the inducement is too remote to be criminal. Such was the case of the prisoner who falsely represented himself to be a naval officer, and by that false pretence obtained lodging for a week. He had then said nothing about the board. He, however, subsequently arranged for his board as well and for which he was indicted, but it was held that the obtaining of the articles of food was too remotely the result of the false pretence.[20] This case was followed by Hill, J., in another case in which the prisoner's first contract was for board and lodging, but he subsequently

(15) *Harishanker*, 4 Bom. L. R. 375.
(16) *Crossley*, 2 M. & Rob. 17.
(17) *Burgon*, Dears & B. 11; *Kilham*, 39 L. J. M. C. 109.
(18) *Sarada Saran*, 21 A. L. J. 873
(19) S. 16, Indian Contract Act (IX of 1872).
(20) *Gardner*, 25 L. J. M. C. 100; *see* this case explained, *per* Bovill, C. J., in *Martin*, L. R 1 C. C. 56

obtained a sixpence as a loan and for which he was indicted, but his pretence was held to be too remote.[21]

4643. In another case the prisoner competed in a swimming race, and gained a twenty seconds' start allowed to members of a certain club, of which he falsely represented himself to be a member. He won the prize and upon which he was indicted for obtaining it by false pretences, but the Common Sergeant, after consulting Stephen, J., held that the prize was too remotely connected with the false pretence.[22] This was also the view of the Court in the case of the accused who visited a Municipal employee representing to him that he was also a servant of the same Municipality and was collecting money for feeding the poor on the occasion of the opening of the new Municipal offices. He showed a list containing the names of respectable subscribers, whereupon the prosecutor paid Rs. 10, which the accused duly made over to the charity. His statement that he was in the service of the Municipality was false and the prosecutor swore that that false statement had alone induced him to subscribe to the fund of the charity. But the Court held the misrepresentation too remote, adding that any other view involved the assumption that the charity was not to have the benefit of the money in the event of the accused not being employed in the Municipality.[23] The question of remoteness is, however, a question of fact, and it is for the jury to find whether the deceit was so proximately connected with the delivery of property as to be the cause of it.

4644. Indirect Inducement When Criminal.—It is not necessary that the inducement should be directly addressed to the person deceived, for he may be equally influenced through an innocent agent[24] or while the deceitful representation is ostensibly,[25] intended to be addressed to a third person. So two or more persons may conspire to influence another by their joint effort, in which case it will be a question of fact whether the several representations were not a part of the same scheme intended to defraud a person[1] (§§ 324-325).

4645. Intentional Inducement.—The inducement operating upon a person's mind, may, according to the section be (*i*) fraudulently; (*ii*) dishonestly; and (*iii*) intentionally. The first two refer only to the delivery or retention of property. The last has a wider operation, for it may result in an act or omission unconnected with the delivery or retention of property, provided that it causes or is likely to cause damage or harm to the person deceived "in body, mind, reputation or property." Here again the question of remoteness (§§ 4642-4644) must be strictly kept in view. For if these words are too literally construed they may include not only the delivery or retention of property specifically provided for in the first clause, but would also include almost any phase of the mind such as regret caused by the deception or the like, or even such an offence as murder caused by inducing one to take poison misrepresenting it to be an innocuous drug. But this

Clause 2.

(21) *Bryan*, 2 F. & F. 567.
(22) *Larner*, 14 Cox 497.
(23) *Ashutosh Mullick*, 33 C. 50.
(24) *Butcher*, 28 L. J. M. C. 14.
(25) *Brown*, 2 Cox 348; *Dent*, 1 C. & K. 249; *Hamilton*, 9 Q. B. 271.
(1) *Kerrigan*, 9 Cox 441; *Moland*, 2 M. C. C. 276; *Clayton*, 1 C. & K. 128.

is not the intention of the section. The section was probably pushed to its extreme length in the following case.

The accused applied to the Tehsildar for a lease for five years of 23 acres of land describing it as waste, upon which the Tehsildar forwarded the application to his superior officer for sanction. The land he had applied for was cultivated and not waste, and he was therefore prosecuted for cheating but acquitted by the Sessions Judge who held that it did not cause nor was likely to cause any damage to the person deceived. But the High Court reversed the conviction, holding that the false statement had induced the Tehsildar to entertain his application forwarding it to his superior officer. "Nothing was more likely," it added, "to damage the reputation of the Tehsildar with his immediate superiors than forwarding such an application, which, if complied with, would have resulted in a considerable loss of revenue to Government, and might have laid the Tehsildar open to suspicion of having colluded with the defendant to defraud the Government." In this view the accused was convicted of this offence.(2) But it is submitted that the damage in this case was too remote (§§ 4642-4644).

The correct view was taken by Henderson and Geidt, JJ., in a case in which the *Karta* of a joint Hindu family had applied in his representative character for the withdrawal of certain sale proceeds standing to their credit in the Treasury, but the Collector directed him either to file a power of attorney or to cause all the other members to appear and admit his authority to sign on their behalf, whereupon they all appeared in person before him except two minors who were personated by other persons, and who signed for the minors and withdrew the money standing to their credit. They were prosecuted for this offence, but it was held that though the men had undoubtedly deceived the Collector, still it was no more than a trick to obtain money to which the men were rightly entitled. In short, though they had induced the Collector to deliver them the money they had not done so fraudulently or dishonestly. But did their act then fall under the second clause? "Here again there is no question that deception was intentionally practised and that the Collector was actually deceived, and in consequence of the deception he made over the money, which he would not have paid, but for the deception. But in my opinion it cannot be said, upon the facts found, that the act done, that is, the payment of the money, caused or was likely to cause damage or harm to the Collector in body, mind or reputation, for he was legally bound (though he was entitled to insist upon the authority being proved) to hand over the money to the person or persons authorized to receive it and Ramdiyal (the *Karta*) has been found to have been so authorized."(3)

4646. In another case in which the same question was agitated was decided upon the following facts. The accused was a coolie-recruiter and he induced the complainant to go to his depot by promising him domestic service. He went. In the meantime the accused sold him to a coolie contractor as a coolie to work in Assam. He was then sent to the station to fetch a parcel. He went there and found himself booked for Assam, where he refused to go. He communicated with the police who prosecuted

(2) *Anon*, (1871) M. H. C. R. 477. (3) *Babu Ram*, 32 C. 775.

the accused under section 164 of the Assam Labour and Emigration Act,(4) under which he was convicted, but on appeal his conviction was altered to one under section 417|511 of the Code, after giving the accused the chance to resummon and cross-examine the witnesses. The accused moved the High Court in revision and Henderson and Geidt, JJ., held that the case of the accused did not fall under the first clause, but that it fell under the second clause and for the following reasons: The complainant had been deceived by the accused when he promised him domestic employment, while his real intention was to sell him as a coolie. If he had not protested, he would have been so sold, and if once sold as a coolie there can be no doubt but that he would have suffered in mind. As, however, he was not actually sold, the act of cheating was not complete. It was, however, an attempt to cheat for which the accused was rightly convicted.(5)

Such a case bears some analogy to the case in which the accused who was in the service of *A* deserted him and appeared in a distant village where *A's* brother *B* resided, and who having questioned him as to *A's* welfare, the accused maliciously told him that *A* was dangerously ill, whereupon B took the trouble of paying him a visit finding him well as usual, and whereupon he prosecuted the accused for cheating him, but he was acquitted by Birwood and Jardine, JJ., with reference to this clause, the scope of which, however, was not discussed, the learned Judges being content to hold that the deception had not caused *B* any damage or harm in body or mind, reputation or property.(6) But there appears to be nothing to discriminate between this case and the last—the persons deceived in the two cases were both deceived and the mental harm suffered in the latter case was more than what the complainant in the last case suffered.

Harm when Too Remote.

4647. At any rate, the mental harm here contemplated must be something more appreciable than a mere momentary annoyance which should be condoned under section 95. Such was the annoyance caused to certain sepoys who being accustomed to purchase from the shop of *A* were waylaid by a more enterprising rival and taken to his own shop on the false representation that it was the shop of *A*, of which he was the agent. *A* prosecuted the accused as having suffered by his deception, but the Court had no difficulty in putting him out of Court, holding that the section does not contemplate injury to any but the person actually deceived, which in the case under reference were the sepoys, but who having bought the goods at the market rate could not be said to have been injured beyond feeling of some annoyance at having been taken in by the accused, but which the Court considered a negligible wrong.(7) Such was held to be the case where the servants of a Railway Company had allotted more wagons to a colliery than they were entitled to. It was contended that the colliery proprietors had cheated the Railway by conspiring with the servants of the Railway, but it was held that the allotment had caused no damage to the Railway and could not therefore be construed as cheating it.(8)

The accused had appeared at the Matriculation Examination of the Madras University, but was unsuccessful. One *A* had passed that examina-

(4) Act VI of 1901.
(5) *Kishori Lal Chatterji*, 9 C. W. N. 764.
(6) *Punjia*, (1888) B. U. C. 423.
(7) *Sunder Singh*, 6 P. L. R. 62.
(8) *Manmatha*, 51 C. 250 (262, 263).

tion and held a certificate issued by the Registrar. The accused wrote to him in the name of *A*, alleging the loss of his certificate and requesting him to issue a duplicate. He enclosed with his application a forged certificate purporting to have been issued by the local schoolmaster corroborating his alleged loss and recommending the issue of a fresh certificate. The accused paid Rupees 3, which was the fee charged on a duplicate copy of a certificate. The Registrar issued a duplicate and forwarded it to the schoolmaster for delivery to the accused, when the fraud was discovered, and the accused prosecuted for this offence, but Davies and Bhashyam Ayyangar, JJ., held it to be no case of cheating, as the certificate had been paid for and could not be said to have caused any damage or harm to anyone.(9)

4648. The same view was taken of the accused who being a candidate for recruitment in the police force falsely stated to the Superintendent of Police that he was not a native of the Farukhabad district, the natives of which were disqualified from entering the local police force and upon which he was prosecuted for this offence, but Tyrrell, J., held the statement though false, to have neither caused nor was likely to cause damage in body, mind or reputation to the person so misinformed.(10) So the complainant and the accused had filed cross-complaints against each other which they both compromised, each undertaking to withdraw his complaint against the other. The complainant withdrew his complaint, but the accused did not, and the former consequently prosecuted the latter for this offence, but it was held that the non-withdrawal of the complaint could not be held to cause harm to the mind of the complainant, for it was only to result in the punishment of the offender which is not harm within the contemplation of this section.(11)

The view of the Court apparently was to construe "harm" as meaning injury as defined in section 44. If so, the term "harm" must mean "harm *illegally* caused to any person in body, mind reputation or property," and if so again, all that the second clause means is that the intentional deception should have caused an injury, and this is all that the clause was probably intended to imply. In any view it is not necessary that the intentional inducement should imply an intention to cause the damage or harm. It is sufficient if the deceiver intentionally induces the person deceived to do or omit to do anything which he would not do or omit to do if he were not deceived, *and* such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.(12) In other words, the clause presumes that the deceiver who intentionally induces a person to do an act knows of the natural consequences of his inducement, and if the consequence was natural, his knowledge need not be proved, but if it is unnatural his ignorance of the consequence is presumed and his inducement cannot then be held to constitute cheating. Such a case arose where the accused, a broker, entered into a forward delivery contract for the sale of jute on behalf of a fictitious firm, and on the price rising the complainant prosecuted the accused for an attempt to cheat; but the Court quashed the proceedings holding that the act amounted to no offence because the harm suffered was at the time of the contract both uncertain and too remote.(13)

(9) *Srinivasan*, 25 M. 726.
(10) *Dwarka Prasad*, 6 A. 97.
(11) *Durgiah*, (1892) 1 Weir 477.
(12) *Nand Lal*, (1888) P. R. No. 36.
(13) *Harendra Nath* v. *Jyotish Chandra* 52 C. 188 (194, 195).

4649. Dishonest Concealment.—Lastly, while deception may be practised as much by words as by act and conduct, still it cannot be practised for this purpose by a mere concealment unless it is dishonest. But does this exempt a concealment which is fraudulent though not dishonest? For example, suppose *A* personates *B* and appears before *P* to cheat him of property. *C* happens to know that *A* is not *B* and he is questioned by the intended victim of *A* as to his identity. *A* professes ignorance and thereupon *A* victimizes *P*, *C* knew of the fraud *A* intended to practise on *P*, but he did not like to incur his displeasure by exposing him to *P*. *C* gained nothing by *A*'s fraud. *C*'s concealment was fraudulent, but not being dishonest, *C* could not be held to have deceived *P*. There is another reason why in such a case *C* did not deceive *P*. The explanation, as it is worded, refers only to the actual deception itself and not to the concealment of a deception by some one else.(14) The accused was manager and secretary of an incorporated company which was in a state of collapse, and the news of whose failure created a panic amongst its members. He thereupon prepared a false document affixing thereto the signature of a fictitous shareholder alleged to embody a resolution of the shareholders of the company sanctioning his resignation as secretary, and a copy of which he forwarded to the Registrar of Joint Stock Companies, and whereupon he was prosecuted for cheating and forgery, but it was held that the act constituted neither offence nor cheating because no damage or harm was likely to arise from the acts of the accused, his object being merely to escape the inconvenience and annoyance caused by the importunate inquiries of the shareholders.(15)

4650. Attempt: Abetment.—Instances have been given in the foregoing discussion of acts which falling short of cheating may yet amount to an attempt or abetment. An attempt must be distinguished from a mere preparation which is an indifferent act possessing no definite indication of criminality. It only develops into an attempt as soon as the accused has done all in his power to let the act be out of his control so that the commission of the crime would be a natural effect of the acts already committed. Such would be the purchase of a stamp paper in the name of another, which may or may not be used to forge a bond against the person in whose name it was purchased. But if the bond is actually executed in his name, the act then passes out of the region of preparation, and becomes an attempt and may even amount to forgery. The accused had borrowed money from the complainant and the two met to adjust their accounts which showed to be Rs. 33-5-3 due to the complainant, which he requested the accused to acknowledge in his account book. The accused thereupon made an entry in Malayan, a language unknown to the complainant, that the said sum had been paid to the complainant, and the account squared. He was prosecuted for forgery, but as the entry was not signed by the complainant it was held not to amount to a document, but it was held to constitute an attempt to cheat for which the accused was convicted.(16)

The accused was employed to note in a register the weight of sugarcane purchased by a factory. He had overstated the weight of a purchase

(14) *Nga Po Maung*, (1891) 1 U. B. R. 255.
(15) *Lallubhai*, 4 Bom. L. R. 440 (442).
(16) *Kunju Nayar*, 12 M. 114.

but was detected before he could fill all the connected entries. He was held to have been detected before he had reached beyond the stage of preparation.(17) But where the accused had fraudulently obtained a consignment receipt from the Railway for 300 bales of cotton worth Rs. 63,000. He pledged it for Rs. 40,000. It was found that he had only 200 available for despatch. He was convicted of an attempt to cheat; presumably because the complainant had issued only Hundis for Rs. 40,000 the payment of which was withheld in consequence of the detection of fraud.(18) A person is guilty of an attempt to cheat if he makes a claim for damages against an insurance company far in excess of the goods destroyed by fire.(19)

4851. The accused was the son of one A who had purchased some tobacco of B who drew up a bill stating the quantity sold and the instalment in which its price was payable. After the first instalment became due B presented the bill in A's shop for payment, when he was accosted by the accused who took the bill and indorsed on it payment of the money. This he did in spite of B's remonstrance. But having succeeded in making the entry he snatched away the bill tearing it in twain, only one fragment containing the writing remaining with the accused, and B then asked him for the money the payment of which he had indorsed, and to which the only reply the accused gave was: "Go away, I have paid." The accused being prosecuted pleaded payment. It was held that the mere writing of the indorsement on the bill was insufficient to constitute an attempt, which seemed to the Court at least to involve that the person charged should have taken some step towards the communication of the representation to the person whom it was the intention to deceive; but however probable it may have been that the accused would have taken such a step if the bill had been taken away from him, he did not in fact take it, and a man is punishable not in respect of what he may have intended to do, but in respect of what he does.(20)

The accused applied for employment to the Carriage and Locomotive Department of the Burmah Railways enclosing a false certificate purporting to have been issued by the District Loco Superintendent of Multan certifying the past employment of the applicant on the North Western Railway from the 1st July 1900 to the 15th April 1903, "when he resigned, character good." It was held that inasmuch as the accused intended to secure an employment by means of the false certificate he was guilty of attempting to cheat presumably under the second clause of the section, for the Court said:—"The 'injury' specified in section 415 of the Penal Code is as comprehensive as words can make it, and we hold that the respondent attempted to cheat."(21) But in another case the accused had applied for a temporary appointment in the Public Works Department. He had filed with his application a printed pamphlet containing his collected certificates which included one from one Mr. Clayton, Executive Engineer at Cawn-

(17) *Lakshmi Prasad*, 65 I. C. (Pat.) 492, 23 Cr. L. J. 108.
(18) *Shiamji*, 65 I. C. (N.) 694, 23 Cr. L. J. 210, (1922) A. I. R. (N.) 40.
(19) *Mg Po Hmyin*, 2 R. 53.
(20) *Hurjee Mull* v. *Imam Ali Sircar*, 8, C. W. N. 278, F. B.
(21) *Fazal Din*, (1906) 1 P. W. R. 9. This was held to be no forgery but in *Abdul Razack*, (1895) P. R. 2, it was held to amount to forgery; but in *Lachman Lal*, 4 Pat. L. J. 16; 49 I. C. 174; 20 Cr. L. J. 142 it was held to be neither forgery nor an attempt.

pur purporting to have been given by him some 20 years ago. Mr. Clayton denied its authorship and it was found that the certificate was a pure invention. Nevertheless the Court acquitted the accused of an attempt to cheat on the ground that since it was one of his many certificates which the accused expected would combinedly induce the recipient to offer him the appointment, it could not be said nor had it been proved that Mr. Clayton's certificate alone, if true, would have induced him to appoint him which he would not have done without it.[22] In other words, the inducement was too remote.

4652. Fraud by Post.—Several cases are reported of fraud committed by post. The debtor advises his creditor of the remittance of a sum of money in currency notes by insured post. On opening it the creditor finds its contents worthless. What offence has the debtor committed? It has been held in some cases that his offence is an attempt to cheat,[23] while in others it is held to constitute no offence,[24] though in one case it was conceded that it might amount to the fabrication of false evidence.[25] The act seems more in the nature of a preparation than an attempt, for which a closer relation to cheating would seem to be necessary. This appears to be the *rationale* of the case in which the accused, a broker had entered into a contract with the complainant for the sale of jute on behalf of the firm B which proved to be fictitious. The price of jute having risen the complainant prosecuted the broker but the prosecution was quashed on the ground that the prospective harm to the complainant was both uncertain and too remote[1] (§§ 4647, 4648).

4653. There need be no inducement in an attempt to cheat. A definite overt act intended to cheat is sufficient to constitute an attempt. The accused was a forest contractor who was by his agreement bound to grant passes to all comers wishing to cut timber in the Government forest, persons found cutting without such passes being subjected to a second payment. The accused realized more sums than were shown in his accounts, and he was prosecuted for fabricating false evidence and criminal breach of trust, but West, J., held it to be a case of an attempt to cheat.[2] So in another case the accused was detected travelling on an expired Railway pass of which the entries as to the date and the number of persons had been altered. It was held that the offence of the accused was an attempt to cheat the Railway Company.[3]

4654. The case was the same where the accused appearing before the Superintendent of the Municipal Octroi Duty for refund of duty paid by him, informed the Superintendent that the cart contained sixteen maunds of sugar, whereas it contained only six maunds of it, which was discovered before any money was paid out. It was held that the accused had attempted to cheat and was liable to a conviction for that offence.[4] But the case was held to be different where the accused induced the Moharir

(22) *Lachman Lal*, 4 Pat. L. J. 16; 49 I. C. 174; 20 Cr. L. J. 142.
(23) *Arura*, 1913 (P. R.) 10; 20 I. C. 596; 14 Cr. L. J. 426; *Sadho Lal*, 1 Pat. L. J. 391: 34 I. C. 992; 17 Cr. L. J. 272.
(24) *Ram Behari*, 50. C. 849; *Tularam*, 21 A. L. J. 865, 83 I. C. 993, (1924) A. 205; *Vythinathaswami*, 51 M. L. J. 800.
(25) *Tularam*, 21 A. L. J. 865, 83 I. C. 993, (1924) A. 205.
(1) *Harendra Nath* v. *Jyotish Chandra*, 52 C. 188 (194, 195).
(2) *Ramjirav*, 12 B. H. C. R. 1.
(3) *Gunpat*, (1868) P. R. 6.
(4) *Bhagwan Dass*, 2 A. L. J. R. 718.

to prepare a refund chalan for 460 bags of linseed, but as a matter of fact there were only 230 bags, the balance he however promised to produce the next day, when he sent some more carts, but they were stopped by the Municipality and a case for attempted cheating launched against him. The Court, however, acquitted the accused holding that the laxity of the Municipal procedure did not prove the dishonesty of the accused.(5)

On the 25th April the parents got to know that the accused was married. They gave the lady option to give up the accused or their house which she did, joining the accused who seduced her. It was held that the accused could not be convicted of this offence, because, while the accused had clearly deceived the girl her seduction was not the natural result of the deception.(6) A young boy A was married to B who was much older. On discovering her age A's father convened a panchayat who ordered return of the presents and the marriage was cancelled at the instance of A's mother and brother. Subsequently, B's father charged A's mother and brother for this offence, but the Court, having found no dishonest inducement, threw out the charge.(7) But the Court has convicted the accused who have brought about the marriage of girls by misrepresenting their caste. So, where a sweeper woman was passed off as a Jat woman,(8) and a Rajput as a Kunbin,(9) by marriage brokers who received the price for bringing about the marriage, they were both convicted of this offence.

Abetment.

4655. It may be sometimes difficult to say whether an act amounts to an attempt or abetment. For instance, take the following case: The goods train of a railway arrived late at a wayside station, and the guard was in a hurry to get away. The accused, who was the Assistant Station Master, came up to his van as he was starting and asked him to initial a consignment note misrepresenting it to be only a letter or words to that effect. The guard hurriedly put his initials in the Station Receipt Book against the words " one only " which were afterwards altered to " four only," and the description " four bales silk " was also subsequently interpolated—as meaning that the accused had delivered four bales of silk in charge of the guard. He was convicted under section 418, but Sargent, C. J., and Candy, J., altered it to one for an abetment holding that the act was neither cheating nor an attempt to cheat, because the forwarding by the accused of the fictitious consignment notes could only be regarded as preparatory to the offence of cheating. It was not done in the attempt to cheat, but was an abetment of cheating, the principal being presumably either the owner of the bales or the guard.(10) The three accused, who were known to the complainant, persuaded him to gamble with one Fakirya who had been rigged out as a rich Seth, and whom they represented to be so, adding that he should fall an easy prey to

(5) *Birjraj*, 17 C. W. N. 294, 18 I. C. 680, 14 Cr. L. J. 120.

(6) *Milton* v. *Sherman*, 22 C. W. N. 1001, 45 I C. 701, 19 Cr. L. J. 781.

(7) *Jumman*, 21 A. L. J. 321, (1923) A. I. R. (A.) 431.

(8) *Jhanda Singh*, (1918) P. R. No. 16 44 I. C. 351, 19 Cr. L. J. 335.

(9) *Jham Singh*, 58 I. C. 820, 21 Cr. L. J. 820.

(10) *Raghunath*, (1889) B. U. C. 470; following *Padala Venkatasami*, 3 M. 4, relying on s. 116, *ante*; as to not being an attempt, see *Doyal Bawri*, 3 B. L. R. A. C. 55; *Riasab Ali*, 7 C. 352.

the complainant who thereupon gambled with Fakirya who was a notorious and practised gambler well versed in all the tricks of gambling, and who cheated the complainant of all he had. It was held that the three accused were guilty of cheating and Fakirya of abetment.[11] All that is reported of this case is the judgment and it is not clear from it what further part the three accused took and why they were guilty of the substantive offence while Fakirya was only guilty of abetment.

4656. Immoral Contract.—Although the section is generally worded, it has been held that no person should be permitted to prosecute in a criminal Court for an act for which he will obtain no redress from the civil Court. It was so held in a case in which the accused had agreed to hire out her daughter for concubinage to the complainant for one year for Rs. 70 out of which she was paid Rs. 35 in advance. Later on she refused to carry out her contract or to refund the advance. The Court held the contract immoral and rejected the complaint on the ground of public policy.[12] But the doctrine of public policy must be used with discrimination. The accused offered for sale to complainant spurious trinkets which he said were made of gold, but offered cheap as they had been stolen. The accused was convicted of an attempt to cheat.[13]

Cheating by personation.

416. A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations.

(*a*) *A* cheats by pretending to be a certain rich banker of the same name. *A* cheats by personation.

(*b*) *A* cheats by pretending to be *B*, a person who is deceased. *A* cheats by personation.

Synopsis.

(1) *Analogous Law* (4657). (2) *Cheating by Personation* (4658-4665).

4657. Analogous Law.—This section defines "cheating by personation," an offence for which the penalty is prescribed in section 419. The offence owes its aggravation to the fact that it affects both the person deceived as well as the person personated.

4658. Cheating by Personation—This offence is a special form of cheating practised by false personation which the section describes as

(11) *Jaharna*, (1904) P. R. No. 4.
(12) *Jani Hira*, 14 Bom. L. R. 503, 15 I. C. 793, 13 Cr. L. J. 521.
(13) *Abdullah*, (1914) P. R. No. 14, 23 I. C. 473, 15 Cr. L. J. 265.

"pretending to be some other person or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is." The false personation may be by word, act or conduct. But it must be a personation, otherwise the accused could not be convicted under section 419. The fact that a person falsely describes himself as a naval officer and thereby obtains credit is such an offence.(14) And such representation need not be by word of mouth. For where the accused put on the cap and gown of an undergraduate of Magdalen College at Oxford and went to a bootmaker ordering him to send him goods, and when questioned he said that he belonged to that college, which was false, Bolland, B., said: "If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury would infer that he pretended he was a member of the University, and if so, would have been a sufficient false pretence to satisfy the Statute. It is clearly so by analogy to the cases in which the offering in payment the notes of a bank which had failed knowing them to be so has been held to be a false pretence without any words being used."(15)

4659. The accused was asked by a patient if he was the Mr. H. who had cured Mrs. C. at the Oxford Infirmary and to which he replied he was, which was false, but the prosecutor believing in him advanced him a sum of money for his treatment and purchased his meditine. It was held that inasmuch as the accused had induced the prosecutor to deliver money by representing himself to be Mr. H. he was guilty of cheating by personation.(16) In another case the accused told the prosecutrix that he was a member of a club called the "Instant Benefit" which he described as in a very solvent state. The prosecutrix would not be persuaded then, but a month later the accused visited her again and said no more than that the club was strong and respectable whereupon the prosecutrix gave him 3*d*, for membership which he misappropriated. It was held that it was for the jury to connect the two representations and to say if they formed one continuing representation,(17) and on their verdict would then depend whether the accused could be convicted of cheating merely or of cheating by personation. One Vellore Absalom David was a registered candidate for a University Examination. The accused entered the hall as Vellore David and answered the examination questions in that name. He was prosecuted and the Court held that in obtaining an admission ticket to the examination hall in the name of David he had committed the offence of cheating by personation and in signing himself in the examination papers as David he committed the offence of forgery and for both of which he was convicted.(18) The accused entered as a candidate for a prize in a foot-race. He was a superior runner and a previous winner, but in order to gain an advantage over his competitors he falsely declared himself to be one Sanis and as one who had never previously won a race. He was convicted of attempting to obtain the

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(14) *Wickham*, 13 Ad. & E. 34.
(15) *Barnard*, 7 C. & P. 784.
(16) *Bloomfield* C. & M. 537.
(17) *Welman*, Dears C. C. 188.
(18) *Appasami*, 12 M. 151; followed in *Soshi Bhushan*, 15 A. 210.

prize by false pretences, and on a case reserved his conviction was affirmed, it being held that the attempt was not too remote from the pretence.(19)

4660. False personation may consist as much in personating another as in the dishonest concealment of facts relating to one's own personality. So where the accused falsely represented to the prosecutor that a girl which he intended to sell him in marriage was a Brahmin, and whereupon the prosecutor who was a Brahmin paid him the money and married her to his brother and it afterwards appeared that the girl was a *Sudra*, it was held that the accused was guilty of this offence.(20) The term "person" is thus used here in its rather wide sense as connoting not only a separate individual but also a material misdescription of the same individual. Such misdescription may consist as to one's position in life as in the illustration (*a*) or of one's caste as in the cases last cited, or in any other matter influencing the mind or judgment of man.

It has, however, been held in the Punjab that mis-statement of a person's caste is not such misdescription as to amount to cheating by personation. This was laid down in a case in which the facts were these: A was the wife of B who was absent on duty at Kohat. His wife A who was then aged 16 lived with her mother-in-law and from whose custody she eloped with a man C who made her over to D who kept her as his mistress, and then sold her to a woman P who presented her to her husband R and herself went away to live at another place. This man kept her as his mistress for a couple of months and he then sold her to another man E. Meanwhile her husband (B) and his brother-in-law were making a search for her and traced her to E, who was convicted with R for kidnapping and cheating, P being convicted of the abetment. So far as regards R's conviction for cheating, the prosecution relied upon his having sold her to E describing her to be a *kirari* woman, though in fact she was a Brahmin. It was found that the misrepresentation of her caste enabled R to realize Rs. 250 as her price which he would not have obtained if he had truthfully stated her caste. This was held to justify R's conviction under section 420, though not under section 419.(21) The soundness of this view depends upon what is to be understood by "representing that any person is a person other than such a person is."

4661. There appears to be no reason why this should not include a representation that a Brahmin is a non-Brahmin or *vice versa*. It certainly includes a misdescription as to one's position in life as in illustration (*a*). And it is clear that the misdescription may assume any other form and have the same effect. So it has been held to be cheating by personation for a person to describe a girl to be the daughter of A and of good family when in fact she was the daughter of another woman.(22) The accused was charged with having filed

(19) *Button*, (1900) 2 Q. B. 597.
(20) *Mohim Chunder Sil*, 16 W. R. 42 43).
(21) *Durga Das*, (1904) P. R. No. 13. To the same effect, *Singhara*, (1903) P. L. R. 613.
(22) *Dhunput Ojhah*, 7 W. R. 51.

certain *Jamabandis* purporting to have been prepared and signed by one "Ganpat Lal Patwari." They were really signed by Ganpat Lal, but he signed them as Patwari though they related to a time when he did not fill that office. The object of so signing them was clearly to induce a belief as to their genuineness, and thereby affect delivery or retention of property. The question, however, was whether the preparation of such *Jamabandis* constituted forgery, but it was held by Ainslie, J., that the misrepresentation by false description of one's position in life was distinctly provided for by this section, and that therefore the document could not be held to be a forgery under the first part of section 464 but would be evidence of cheating by personation under this section.(23)

4662. It is clearly cheating by personation in A to obtain a hall ticket giving himself out as B and then answer B's examination paper and sign them in B's name. Here as the real candidate was B, A's personation of him would be cheating by personation,(24) and B would be guilty of abetment. In one case the accused Ahmada had sold a mare in the Lyallpur fair to one Lalu and got the sale registered under the false name of Sultan. The mare was not stolen property, and all that the accused did was to give a false name to the Moharir He was convicted of this offence, it is submitted wrongly, for there is nothing illegal in trading *in cognito* unless there is any intention to defraud. But in the Punjab the view taken of section 415 is that the term "intentionally" in the second clause governs that clause alone, the words "fraudulently" or "dishonestly" only qualifying the first part of the section. This may be so; but nevertheless, a mere giving of a wrong name to a cattle sale Moharir is of itself not cheating by personation in any sense of the term,(25) and in the case under reference there was nothing to shew that if the accused had given his name as Ali Baba, Lalu would have hesitated to purchase the mare.

4663. A personation of another may be innocent or fraudulent. This section is not intended to punish all cases of false personation but only those in which it is used as a means to cheating. Now it is obvious that such personation may be of the cheat himself or of another person utilized by the cheat. In the former case the cheat pretends or represents himself to be some other person, while in the latter case he *substitutes* one person for another. The pretension or representation may be by disguise or it may be by verbal persuasion as in the illustration, or it may be by both. So if a person who is a notorious gambler and a cheat dons the dress of a rich Marwari and three of his confederates represent him an easy victim to the complainant who intending to cheat him in gambling is himself cheated, the cheat would be guilty of this offence.(1) So where the accused knowingly represented one Mt. Jasoda to be Mt. Bitia, the mother of a sepoy named Kapur Singh who had been killed in action, and thereby induced the military authorities to grant her a pension which she drew for nearly nine years, he was held to have committed this offence.(2)

(23) *Joy Kurn Singh* v. *Man Patuck*, 21 W. R. 41 (43).
(24) *Appasami*, 12 M. 151; *Katamraju*, 28 M. 90, F. B.
(25) *Ahmada*, (1914) P. R. No. 9, 27 I. C. 203.
(1) *Jahara*, (1905) P. R. No. 4.
(2) *Kirab Singh*, (1907) A. W. N. 291.

4664. But where a servant purchased a stamp paper in the name of his master, it was held that though he had personated his master he did not cheat for he had no fraudulent or dishonest intention,(3) or rather because it was a mere preparation as distinct from an attempt. Where A who had executed a deed fell ill on her way to the registration office and she thereupon requested B to personate her and admit the deed for registration, which she did, she was held to have personated A but committed no cheating by such personation, and though she was convicted under the Registration Act, her conviction for this offence was quashed.(4) In another case on the same facts the Sessions Judge justified the conviction on the ground that the false personation of the executant by the accused had caused harm to the Registrar, but the Court held that the "damage or harm" must be the necessary consequence of the Act done by reason of the deceit practised, or must be necessarily likely to follow therefrom. The possibility of the Registrar suffering in reputation and losing fees in future from persons deterred from registering their transactions is too remote to be in the contemplation of section 415.(5) But the false personation of a witness, as where B passes himself off as A and deposes as such is not cheating under this section but giving false evidence within the meaning of section 193 of the Indian Evidence Act.(6)

4665. Of course, it is not necessary for the purpose of cheating that the person personated should be a real person. For cheating may be as effectively done by representing oneself to be some other person whether that person is real or imaginary. But in either case the personation must be used as an aid to deception and inducing delivery of property so as to constitute cheating within the meaning of that term as defined in section 415. In other words, the fact that a person falsely personates another is not cheating, but false personation if used to cheat aggravates the offence if the offence of cheating is proved.

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Cognizable. Court's sanction.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for cheating.

[*Cheats*—s. 415.]

Synopsis.

(1) *Analogous Law* (4666).
(2) *Procedure and Practice* (4667-4671).
(3) *No Cheating* (4672).
(4) *Proof* (4673).
(5) *Form of Charge* (4674).
(6) *Evidence of Simple Cheating* (4675-4680).
(7) *No Cheating* (4681-4687).
(8) *Marriage Lies* (4686).
(9) *Cure Dispute* (4687).
(10) *Evidence of Other Acts* (4688-4694).
(11) *Evidence of Conduct* (4690).

(3) *Keruppanna*, (1883) 1 Weir 480.
(4) *Loothy Bewa*, 11 W. R. 24.
(5) *Mojey*, 17 C. 606.
(6) *Prema Bhika*, 1 B. H. C. R. 89.

4666. Analogous Law.—This section punishes the simplest case of cheating not otherwise provided for. Since section 420 also punishes the same offence, a question may arise and has arisen as to the scope of the two sections, the distinction between which is all the more important in view of the fact that while this offence is non-cognizable section 420 is cognizable; and while an offence falling under this section is triable by a Magistrate of the second class, that under s. 420 is not so triable. The fact that section 420 speaks of the inducement resulting in the delivery of property, appears to make no difference, for, but for such delivery the offence of cheating would be incomplete. The two sections are really redundant and this was presumably recognized by Couch and Newton JJ., who laid it down that "effect should if possible, be given to both sections of the Act, and that the offence of cheating accompanied by a delivery of property may be punished under either section; when the case appears to the trying authority to be of a serious nature steps should be taken that it may be sent to the Court of Session and punished under section 420."(7)

4667. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is both bailable and compoundable with the permission of the Court, and is triable by the Presidency Magistrate or Magistrate of the first or second class.

4668. The venue for this offence may be laid either in the place where the deception was practised or where the delivery of property in consequence of the deception took place.(8) So if A post a letter containing money, obtained by cheating, for delivery in the district P and the cheat receives it in the district R the accused may be prosecuted either in the district P or R.(9) A cheque issued at Gaya was dishonoured by a bank in Calcutta and the notice of such dishonour was given to the complainant at Butan. It was held that the accused might be prosecuted at any one of the three places namely, Calcutta, Gaya or Butan.(10)

4669. Where an accused person attempts to cheat a whole body of villagers and speaks to them as a body, and to each individual villager for the purpose, he may be tried on one charge for each attempt to get money from them.(11) The accused asked the villagers for 8 annas and 4 annas a piece for signing their land certificates. He did not ask each individual singly but spoke to them in a body. It was held that he was thereupon rightly charged as for a single attempt to cheat.(12)

4670. Property obtained by cheating is not stolen property, so that the receiver from the cheat acquires full right thereto and is not liable to restore it to the owner on conviction of the cheat, unless the receiver be his confederate.(13)

(7) *Bapu*, (1864) B. U. C. 2; *Billinghurst*, 27 C. W. N. 821, (1924) A. I. R. (C.) 18 (41).

(8) S. 179, Cr. P. C. The English rule is the same; *Jones*, 19 L. J. M. C. 162; *Buttery*, 4 B. & *Ald.* 179; *Ellis*. (1899) 1 Q. B. 230; *Leach*, 25 L. J. M. C. 77; *Allington*, 9 T. L. R. 199; *Holmes*, 12 Q. B. D. 23.

(9) *Jones*, 19 L. J. M. C. 162.

(10) *Metcalfe* v. *Watson*, 76 I. C. (C.) 17; 25 Cr. L. J. 81.

(11) 2 C. L. J. 618.

(12) *Ibid.*

(13) S. 410.

4671. This is one of those sections in which the Court should carefully discriminate between the civil liability and a crime, and in a case where the Court saw no *prima facie* case against the accused, it stopped the inquiry and discharged the accused.(14) In another case an insurance company refused to redeem its policy on the ground that the age of the deceased policy-holder was misstated. The Court quashed the proceedings holding the matter to be one of a purely civil nature.(15) Again, though a case may, strictly speaking, be one of cheating it does not follow that the Court will lend its machinery to the prosecution of a person against whom the doors of the civil Court are closed. So where the accused was paid Rs. 35 agreeing to let her daughter on hire to the prosecutor for one year for Rs. 70, and she was prosecuted for cheating, the Court refused to act, holding that no Court could afford redress for breach of an immoral contract for which the prosecutor had no civil remedy.(16) It has already been seen that evidence of the subsequent conduct of the accused is admissible to prove his intention (§§ 4630-4631). But evidence that the accused had similarly cheated others on previous occasions is not admissible either under s. 14 or s. 15 of the Evidence Act.(17) Where the accused had obtained the thumb impressions of ten persons on blank papers upon which he afterwards drew up bonds, he could not be tried for all the ten offences on a consolidated complaint of the ten complainants.(18)

4672. No Cheating.—There is nothing to prevent the High Court from quashing a conviction for cheating, even though there be concurrent findings of facts to the contrary, if there is nothing on record to justify them.(19)

4673. Proof.—The points requiring proof are:—

(1) That the accused deceived some person.

(2) That he thereby induced him.

(3) That the inducement was fraudulent or dishonest.(20)

(4) That the person so induced delivered or consented to the retention of some property.

Or prove:—

(1) That the accused deceived some person.

(2) That the accused thereby induced him.

(3) That such inducement was intentional.

(4) That the person so induced did or omitted to do something.

(5) That such act or omission caused, or was likely to cause, damage or harm to that person in body, mind, reputation or property.

(14) *Nrisingha*, 20 C. W. N. 1112.
(15) *Hiran Kumar* v. *Mangal Sen*, 17 C. W. N. 761, 20 I. C. 222.
(16) *Jani Hira*, 14 Bom. L. R. 503, 15 I. C. 793.
(17) *Abdul Wahid*, 34 A. 93.
(18) *Girja Dayal*, 25 O. C. 151, 69 I. C. 271, (1922) A. I. R. (Oudh) 250.
(19) *Shib Das*, (1909) P. W. R. 13, 4 I. C. 978.
(20) Which must, of course, be proved by the prosecution; *Khairati*, 15 A. L. J. 807, 42 I. C. 1005, 19 Cr. L. J. 45.

4674. Charge.—A charge for cheating ought to mention the date on which[21] and manner in which the cheating is alleged to have been committed,[22] as also the name of the person who was cheated[23] though this omission is curable by s. 537 of the Criminal Procedure Code.[24] The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the ——day of——-at——you cheated A B by deceiving him fraudulently (*or* dishonestly induced him) to deliver some property to wit—[*or* induced him to consent to the retention of some property, to wit—by you (*or* C D)] [*or* by intentionally inducing the said A B to do (*or* omit to do) something, to wit—which the said A B would not do (*or* omit to do) if he were not so deceived, which caused him (*or* was likely to cause him) damage (*or* harm) in body, mind, reputation or property]; and that you thereby committed the offence punishable under section 417 (*or* 420) of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session, *or* High Court).

["And I hereby direct that you be tried (by the said Court) on the said charge].

4675. Evidence of Simple Cheating.—This section prescribes the penalty for the simple offence of cheating. The offence itself has been defined in section 415 under which its ingredients will be found to have been fully set out (§ 4596). The enactment of section 420 prescribing a penalty for a similar offence raises a doubt as to the necessity of two similar sections in the Code. But so long as these two sections remain, some workable rule should be agreed upon as to the applicability of each. In the opinion of Couch and Newton, JJ., this section should be reserved only for cases of minor importance, the other section being applied to more serious cases, and to those in which there is delivery of the property of the nature there described (§ 4665). It would seem that the Codifiers intended to discriminate between cheating not followed by delivery of property or other consequences specified in section 415, and one in which there was such delivery. But a deceitful inducement not attended with delivery is merely an attempt as distinguished from a completed offence (§§ 4651-4655) and consequently the position of both this section and section 420 in the Code is anomalous.

However, reserving this section only to cases of comparative unimportance, the questions that call for notice are: (*i*) Did the act constitute cheating; (*ii*) was it not otherwise provided for; and (*iii*) what is there in the nature of the act so as to make a case fit for punishment under this section?

(21) *Farsand Ali*, 96 I. C. 221, (1926) Pat. 347.

(22) *Kedar Nath*, 29 C. W. N. 408, 86 I. C. 705, (1925) C. 603; *Janke Das*, (1922) P. L. R. 38, 68 I. C. 819, 23 Cr. L. J. 595.

(23) *Billinghurst*, 27 C. W. N. 821, (1924) A. I. R. (C.) 18 (41).

(24) *Gokul Khatik*, 29 C. W. N. 483, 86 I. C. 970, (1925) C. 674.

4676. As regards the first, the requirements of this section are the same whatever may be the nature or gravity of the offence. Such requirements have been already the subject of discussion under section 415. But they may be again briefly adverted to here. As has been already pointed out, the two essential ingredients of this offence are deceit and inducement. Of these two there must be first deceit and then inducement. If there was no deceit but inducement there cannot be cheating and *vice versa* (§§ 4612-4613). The practice of deception implies the practice of fraud and falsehood. For there can be no deception without fraud, and falsehood is a species of fraud implied in deceit. Now fraud is hydra-headed, and its ways of attack are insidious and innumerable. It may consist of words, acts or conduct or all combined (§ 4607). There is no general rule as to what deceit should consist of and the Courts have rightly regarded it as a question of fact to be decided upon the facts of each case (§ 4609).

4677. The deception may or may not be seen through. If it is seen through the receiver cannot be said to have cheated though there may be a stage when the person deceived may have been "induced," though he may have been disabused before he delivered property or suffered the other consequences which complete the crime. In that case the offence is inchoate, though if the deceiver has gone beyond the stage of preparation and committed an overt act amounting to an attempt he may be so punished. Such was the case of the accused who being indebted to the complainant in the sum of Rs. 600 sent him a letter insured for Rs. 650, but which contained nothing but blank paper, whereupon his conviction for attempted cheating was justified presumably on the ground that the complainant had been induced to sign the acknowledgment which he did on the assurance implied by the fact stated on the letter that its contents were valued at Rs. 650.[25]

4678. Persons not guilty of an attempt may still be liable for an abetment (§ 4655). But abetment does not imply that the offence is incomplete. It only presupposes instigation of the offence (§§ 999, 1002), whether the offence instigated is or is not committed in consequence (§ 1003). If it is committed in consequence the abettor is liable to an enhanced penalty (§ 1052). But it does not thence follow that if the offence is not committed the abettor is not liable (§ 1072).

4679. The inducement necessary to constitute cheating may be (*i*) fraudulent; (*ii*) dishonest; or (*iii*) merely intentional. Now an intentional inducement can only amount to cheating if it leads to the doing of an injurious act (§§ 4608, 4612, 4613), as distinct from or unconnected with the delivery or retention of property (§ 4624). An intentional inducement merely as such for delivery of property does not amount to cheating, unless that intention is also fraudulent or case dishonest. An act may be fraudulent without being dishonest as in the case of the decree-holder making a false endorsement on the writ of attachment to the effect that the bailiff wanted a cart to go in, to execute the process, and that he did not go at all but wanted the accused to

(25) *Sadho Lal*, (1916) 1 Pat. L. J. 391; 34 I. C. 922; *Arura*, (1913) P. R. 10; 20 I. C. 596.

make a false report that he had gone to the house of the judgment-debtor, but could not attach his property as his house was locked.(1) Other cases have been already given to illustrate the difference (§§ 4612-4619). An act may be fraudulent if it is malicious and intended to injure though it may be unconnected with the delivery of property. If it is dishonest, it must be necessarily connected with the delivery of property. The question whether an act was fraudulent or dishonest depends upon proof of facts and circumstances which may justifiably lead the Court to a conclusion that the inducement was fraudulent or dishonest, and that it had caused the delivery of property. The delivery of property must have of course effected a wrongful distribution of property, for if the receipt or retention was legal, the act which induced it could not be illegal (§ 4637).

4680. But apart from the delivery of property there may be cheating, where the person induced does an act or suffers an omission injurious to the person deceived. The terms of this clause of section 415 are wide, but they must be confined only to such injuries as are at once appreciable (§§ 4644, 4645), and proximate (§§ 4600-4604).

4681. No Cheating.—So there may be a promise to induce another, but it would fall short of an inducement within the meaning of s. 415. Such was the case of a pleader who promised to induce his client to agree to certain terms on the faith of which a case was to be compromised, but the client would not agree to the pleader's persuasion which was not the latter's fault, though he was dragged into Court for this offence.(2)

4682. As observed before (§ 4670) recourse to this section should not be too readily had where from all appearances the matter savours of a civil dispute. The accused held three bonds from the complainant who really owed him some Rs. 170. He paid him Rs. 116. The accused returned him two of his bonds withholding the third. The complainant alleged that such withholding was fraudulent as the accused had agreed to compound them all for Rs. 116, but the Court opined that even if the accused had tricked the complainant into paying him Rs. 116 as alleged, it would not be cheating as the accused was not legally bound to relinquish the balance due to him.(3)

4683. It is of course, no cheating to obtain decrees by means of forged bonds.(4) So there can be no cheating where the statement of fact is no more than a statement of opinion which may be reasonably probable though not literally true. The accused who were owners of a pilgrim ship advertised its sailing "about the 12th October" by which times its repairs were likely to be completed. They were however completed on the 23rd and it sailed on the 24th October. They were prosecuted for receiving fares by cheating, but the Court acquitted them on appeal, holding that the assumption of a sanguine anticipation

(1) *Hari Shankar*, 6 Bom. L. R. 375.
(2) *Nrishingha*, 20 C. W. N. 1112.
(3) *Mausa Ram*, (1913) P. L. R. 327, 20 I. C. 1104.
(4) *Chuni*, (1913) P. R. No. 10, 27 I. C. 200.

was not such a misrepresentation as would render the accused criminally liable.(5) The prosecutor complained that the accused had sub-mortgaged to him a house to which his mortgagor had no title as proved in an objection case filed against the accused's brother. He was convicted but on revision his conviction was quashed on the ground that even if the house be in fact found to belong not to the mortgagor but to his grandfather, who successfully claimed it in the objection proceedings, it was no ground for holding the accused guilty of cheating, because there was neither fraud nor dishonesty on the part of the accused in sub-mortgaging a house on the terms of which his other property was equally liable for realization of any balance irrecoverable from the sale of the mortgaged property.(6)

4684. A Railway Company issued tickets to students at a reduced rate. As such certain students received a certificate entitling them to receive tickets at a reduced fare. This was utilized by other students, whereupon they were convicted of cheating, but the High Court held them not guilty on the ground that as students, they were entitled to the concession, and that the students' tickets were not untransferable, so that even if the original students had purchased the tickets the accused could have legally used them.(7) It is not cheating the Railway Company where one obtains a larger allotment of wagons than one was fairly entitled to. The fraudulent act of the Railway Company's servants in unduly favouring some applicants over others has not the effect of causing any appreciable damage to the Company's reputation as the damage would in any case be too remote.(8)

4685. There can be, of course, no cheating where there is no dishonesty and no fraud. Certain recruits were presented to and rejected by the Recruiting Officer. They were offered to the accused, who was Lambardar, through whom recruits had got to be enlisted, as fresh recruits. He presented them as such to the Recruiting Officer who discovered that they had already been rejected by him. The accused was convicted of cheating, but there was nothing to support his conviction for it was found that he had been himself misled, and he was acquitted on appeal.(9) There might be misrepresentation but no deception in charging a discount on currency notes.(10) Such discount is charged by money changers everywhere.

4686. So while a number of lies pass muster in marriage contracts, there is a limit to the endurance of Criminal Law. The accused, a married man, got engaged to and seduced a lady to whose parents he introduced himself as a bachelor. On the 25th April the parents got to know that the accused was married. They gave the lady option to give up the accused or their house, which she did joining the accused who seduced her. It was held that the accused could not be convicted

Marriage Lies.

(5) *Ebrahimji*, 15 Bom. L. R. 297, 19 I. C. 328.
(6) *Hari Krishan*, (1910) P. W. R. 40, 8 I. C. 256.
(7) *James Fletcher*, 7 M. L. J. 201, 5 I. C. 973.
(8) *Manmatha*, 51 C. 250.
(9) *Mhd. Shah*. (1918) P. R. No. 34 48 I. C. 877, 20 Cr. L. J. 77.
(10) *Murarji*, 43 B. 842.

of this offence, because while the accused had clearly deceived the girl, her seduction was not the natural result of the deception.[11] A young boy A was married to B who was much older. On discovering her age A's father convened a panchayat who ordered return of the presents, and the marriage was cancelled at the instance of A's mother and brother. Subsequently, B's father charged A's mother and brother for this offence, but the Court having found that there was no dishonest inducement, threw out the charge.[12] But the Court have convicted the accused who have brought about the marriage of girls by misrepresenting their caste. So where a sweeper woman was passed off as a Jat woman,[13] and a Rajput as a Kunbin[14] by marriage brokers who received the price for bringing about the marriage, they were both convicted of this offence.

Cure Dispute.

4687. It has already been seen that questions involving the determination of civil rights cannot be appropriately tried in the guise of criminal offences. Where a partner realizes the dues due to a partnership even after its dissolution, it cannot be denounced as done on purpose to cheat his quondam partner.[15] It may amount to cheating if its ingredients are present and proved; but without such proof—and let it be added, clear proof—the Court will refer the complainant to the Civil Court. The complainant owed the accused Rs. 170 on three bonds. He complained that the accused had accepted Rs. 116 in full payment of all the bonds but returned only two of them claiming a further sum due on the third, the Court held it to be no cheating since the creditor was legally entitled to the full sum legally due on the three bonds.[16] The accused was the complainant's pleader in a proceeding under s. 107 of the Criminal Procedure Code. He had agreed to persuade his client to avert a sale. He failed to do so, whereupon the party, aggrieved by his inaction, flew to Court for action under this section. His complaint was naturally dismissed.[17]

4688. Evidence of Other Acts.—These are then the elementary pre-requisites of the offence, the proof of which must depend upon the proof of facts and acts which law declares to be relevant for this purpose. Thus, only such evidence as establishes the fraudulent or dishonest intention of the accused, at the time of the commission of the act in respect of which the cheating is alleged, is held to be relevant to establish this offence. For instance, take the case supposed in illustration (*f*) of a person borrowing money from another not intending to repay it. The offence is declared to be cheating, but it is cheating only if at the time of the loan the debtor had no such intention, but not otherwise. In other words, if the debtor intended to fulfil his obligation at the time of contracting the loan but afterwards

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(11) *Milton* v. *Sherman*, 22 C. W. N. 1001, 45 I. C. 701, 19 Cr. L. J. 781.

(12) *Jumman*, 21 A. L. J. 321, (1923) A. I. R. (A.) 431.

(13) *Jhanda Singh*, (1918) P. R. No. 16 44 I. C. 351, 19 Cr. L. J. 335.

(14) *Jham Singh*, 58 I. C. 820, 21 Cr. L. J. 820.

(15) *Paruchery*, 36 I. C. (M.) 872, 18 Cr. L. J. 40.

(16) *Mansa Ram*, (1913) P. W. R. 25, 20 I. C. 1004, 14 Cr. L. J. 524.

(17) *Nir Singha* v. *Kumudendu*, 20 C. W. H. 1112, 37 I. C. 34, 18 Cr. L. J. 50.

changed his mind, his subsequent dishonesty, howmuchsoever culpable from the standpoint of social ethics, is not criminal within the meaning of this section.[18] Where therefore the two brothers A and B borrowed Rs. 900 from C, and who having threatened them with a suit, they agreed to mortgage their house to him. They purchased a stamp and got a mortgage engrossed thereon, and one of them A even signed it but B refused to execute it unless he was paid Rs. 200, which C naturally declined to pay, while, however, C was pressing for the execution and B for the payment, the two brothers secretly executed a mortgage in favour of another person D, the registration of which C attempted to prevent, but was unsuccessful. He thereupon prosecuted both A and B for cheating, but Melville, J., held it to be no case of cheating but only of a breach of contract.[19]

4689. The accused represented to the complainant that he would pay the amount of a decree, and thereby induced the complainant to pay the accused a certain sum of money for the purpose of being applied in satisfaction of the decree. He received the money and failed to apply it as he had promised, whereupon the complainant charged him of this offence, but the Court held it to be a breach of contract and not cheating.[20] In both these cases there was a promise and a subsequent default, and all that the Court held was that the mere proof of a subsequent default, was no proof of cheating. But subsequent default is evidence of the previous dishonest intention,[21] though it is obviously inconclusive.

Evidence of Conduct.

4690. But evidence may be given of other similar subsequent defaults as showing that the default in question was not accidental but intentional and as a part of the same system of fraud.[22] Some doubt has been cast on this rule by a judgment of West and Birdwood, JJ., who held section 119 of the Indian Evidence Act to be insufficient to let in evidence of other transactions. In that case the accused purchased wool with delivery of possession from a firm agreeing to pay its price on the next day. He failed to pay as promised and pledged the wool to another and raised money thereon. He was prosecuted under section 420 and the prosecution produced evidence of two other similar purchases made by the accused, in which he had made similar promises after which he had similarly pledged the wool and misappropriated the proceeds.

But the Court excluded this evidence,[23] relying on the judgment of Melville and West, JJ., in another case of the same Court,[24] in which they held section 11 to be limited by section 54 of the Indian Evidence Act. It was a case of forgery, and the view of the Court in that case was that it was not open to the prosecution to produce

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(18) *Hargovandas*, (1872) 9 B. H. C. 448; *Fazul*, (1886) B. U. C. 412; *Venkatachala*, (1883) 1 Weir 476; *Viraswami*, (1881) 1 Weir 478.

(19) *Haragovandas*, 9 B. H. C. R. 448.

(20) *Venkatchala*, (1883) 1 Weir 476.

(21) *Hceramun Hulwye*, 5 W. R. 5.

(22) S. 11, Indian Evidence Act; *Fazul*, (1886) B. U. C. 312; *Wyatt*, (1904) 1 K. B. 188; *Rhodes*, (1899) 1 Q. B. 77; *Smith*, (1905) 69 J. P. 51.

(23) *Fazul*, (1886) B. U. C. 312.

(24) *Parbudas*, 11 B. H. C. R. 90.

a number of other forged documents found in the possession of the accused as establishing that his possession of the particular document in question was intentional and not accidental. And West, J., said: "Section 11 of the Evidence Act is, no doubt, expressed in terms so extensive as that any fact which can, by a claim of ratiocination, be brought into connexion with another, so as to have a bearing upon a point in issue may possibly be held to be relevant within its meaning. But the connection of human affairs are so infinitely various and so far-reaching, that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral injuries limited only by the patience and the means of the parties. One of the objects of the law of evidence is to restrict the investigation made by Courts within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission on all occasions of every circumstance on either side having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a demonstration of fresh collateral issues, growing up in endless succession as the enquiry proceeded.(25)

4691. It is not intended to discuss here the general operation of this section of the Evidence Act, but it is submitted that these remarks have no application to the evidence of other acts of cheating which is admitted both in England(1) as well as in this country.(2) In England, such evidence is admissible, not as tending to establish the fact in issue, but as tending to establish a system and negativing accident or mistake, for which evidence, not only of acts prior to that complained of but of all acts subsequent thereto, is admissible. The defendant was indicted for obtaining certain furniture by false pretences from a furniture dealer at Brighton between October 14th and 17th. It was held that evidence that the defendant a few days afterwards obtained other goods from another at Brighton by means of false pretences the same as, or similar to, those charged in the indictment was admissible as tending to show that it really related to one transaction and was all part of the same system of fraud.(3) The fact that the transaction as to which evidence is tendered had already been the subject of a previous trial resulting in the acquittal of the accused would not seem to render evidence of it inadmissible. The defendant was indicted for obtaining money on a worthless cheque on the 5th of July from A, but he was acquitted. He was then indicted for obtaining money from other persons on the 24th and 26th of June and on the 6th of July on other worthless cheques, and A was called to prove the indictment dated the 5th July, and his evidence was held to be admissible on the second indictment.(4)

4692. It has been stated before, that the offence consists of deceit and inducement. It has already been seen that the facts constituting

(25) *Parbudas*, 11 B. H. C. R. 90.

(1) *Rhodes*, (1899) 1 Q. B. 77; *Wyatt*, (1904) 1 K. B. 188; *Smith*, (1905) 69 J. P. 51; *Walford*, (1907) 71 J. P. 215.

(2) S. 14, Indian Evidence Act; *Debendra Pershad*, 36 C. 573; *Girdhari Lal*, (1913) P. R. No. 12, 6 I. C. 964.

(3) *Smith*, (1905) 69 J. P. 51. In such case the evidence of a similar fraud is of course admissible. *Rhodes*, (1899) 1 Q. B. 77; *Wyatt*, (1904) 1 K. B. 188.

(4) *Ollis* (1900) 2 Q. B. 758.

deceit cannot be the subject of a general statement. They must be proved in such case and in which it will then be a question of fact whether the act, fact or conduct was intentional or accidental, and if intentional, what was the intention. The question whether it sufficed to induce the person deceived to deliver property is again a question of fact admitting of no general enunciation. It is not, however, necessary that the whole of the pretence charged should have been proved,(5) or that the inducement should be shown as due wholly to the deceit.(6)

4693. If the deceit was in writing as when it consisted of letters written by the accused to the prosecutor, it is again a question of fact whether the prosecutor was likely to have been influenced thereby, though it is a question of law whether it could have influenced him.(7) If the writing containing the pretence be lost, its contents may be proved by secondary evidence.(8)

The inducement, again, need not be shown to have been directly addressed to the person induced,(9) though it must be shown to have been intended for and have induced him.(10)

Where the inducement is alleged to be the result of a series of statements made at different times, it is again a question of fact whether those statements were so connected together as to constitute one pretence.(11)

4694. Lastly, there can be no cheating without proof of the consequence alleged to be due to the inducement. This cannot be presumed but must be proved. It is, indeed, a necessary part of the definition of the offence and must as such be established by the prosecution. But this subject has been sufficiently discussed already and need not be adverted to here (§§ 4608-4611).

Session. Pres. Mag or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Comp.

Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.

418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law or by legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[*Wrongful loss*—s. 23. *Cheats*—s. 415.]

Synopsis.

(1) *Analogous Law* (4695). (2) *Procedure and Practice* (4696).

(5) *Hill*, R. & R. 190; *Lince*, 12 Cox 451.
(6) *Hewgite*, Dears C. C. 315; *English*, 12 Cox 171; *Lince*, 12 Cox 451.
(7) *King*, (1897) 1 Q. B. 214.
(8) *Chadwick*, 6 C. & P. 181.
(9) *Mosely*, 31 L. J. M. C. 24; *Rouse*, 4 Cox 7.
(10) *Rouse*, 4 Cox 7.
(11) *Martin*, L. R. 1 C. C. R. 56.

(3) *Proof* (4697).
(4) *Form of Charge* (4698).
(5) *Principle* (4699).
(6) *Cheating one whom Accused was Bound to Protect* (4700-4701).

4695. Analogous Law.—This section introduces the first element of aggravation in the offence of cheating—that element being the abuse of trust coupled with cheating. The section is obviously applicable only to those who stand to the person deceived in the relationship of trustee such as mentioned in the section.

4696. Procedure and Practice.—This offence is non-cognizable, but warrant should, ordinarily, issue in the first instance. It is both bailable and compoundable with the permission of the court and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class. The points of practice calling for notice have been already set out under the last section (§§ 4667-4671).

4697. Proof.—The points requiring proof are:—

(1) That the accused cheated some person.

(2) That the accused was then under a legal obligation to protect the interest of that person.

(3) That the cheating related thereto.

(4) That the accused knew that he was likely to cause wrongful loss thereby.

4698. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you cheated A B by—— (*specify the act constituting the offence*) with the knowledge that you were thereby likely to cause wrongful loss to the said A B whose interest in the transaction to which the cheating related you were bound either by law (*or* a legal contract) to protect, and that you thereby committed an offence punishable under section 418 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4699. Principle.—This offence obtains its special aggravation by reason of the abuse of trust on the part of the cheat which makes his offence as much more aggravating as it is probably committed with comparative facility. For the parties stand to each presumably in the position of some confidence and the cheat is, therefore, not likely to encounter much resistance in practising his seduction with success.

4700. Cheating one whom Accused was Bound to Protect.—The general language advisedly used in this section eschews the necessity of establishing anything like trust between the deceiver and the deceived. All that the section requires is the existence of a legal obli-

gation—whether created by law or contract—by which the deceiver was bound to protect the interest of the deceived. Such relationship necessarily exists between a trustee and a *cestui que trust*, solicitor and client, principal and agent, banker and depositor, guardian and ward, master and manager, directors of an incorporated company and its shareholders; and the *Karta* of a Hindu family probably stands on the same footing.

4701. It is not necessary that the cheat should bear any defined relationship to the person deceived, or that he should know him, for all that is necessary is that if once he stands to him in a position when it becomes his duty to protect the interest of the other, he could not be suffered to cheat him in a transaction in which his duty had enjoined on him scrupulous regard for his interest, and the abuse of which is itself a breach of trust. So where the Manager, Assistant Manager and Accountant of the Himalaya Bank issued false balance-sheets to make the share-holders and depositors believe in the stability and solvency of the Bank, though the Bank was then bankrupt, Sir John Edge, C. J., told the jury: "The way these men are said by the prosecution to have conspired to cheat, whether true or not, was that to their knowledge these balance-sheets were false; that they were materially false; that they, acting in concert, concealed the true state of affairs from the depositors and share-holders, and by that concealment the share-holders who were depositors, and depositors not share-holders, were induced to allow their money which was in the Bank on deposit to remain on deposit. It stands to reason and common sense that if you, or I or anyone else, had Rs. 3,000 or Rs. 4,000 deposited in the Bank, and we were in a position to draw it out, we should draw it out if we knew from the balance-sheet that the Bank was insolvent; on the other hand, if the balance-sheet represented the Bank to be more or less flourishing, we should probably allow our money to remain in the Bank. If these men intending to defraud the share-holders or depositors knowingly put forward these balance-sheets knowing that they were false balance-sheets, then it is your province to find them guilty, under section 418."[12]

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Bailable. comp.

Punishment for cheating by personation.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[*Cheating by personation*—s. 416.]

Synopsis.

(1) *Analogous Law* (4702).
(2) *Procedure and Practice* (4703-4704).
(3) *Proof* (4705).
(4) *Form of Charge* (4706).
(5) *Evidence of Cheating by Personation* (4707-4711).

(12) *Moss*, 16 A. 88.

4702. Analogous Law.—This section only prescribes the punishment for the offence defined in section 416. The section is probably intended to deal only with a case of simple cheating by personation, for if the offence involves delivery of valuable property justifying proceedings under section 420, then there is no need to have recourse to this section.(13)

4703. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both bailable and compoundable, with the permission of the Court and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class.

4704. Where a person attempted to get himself reinstated in the post of a karnam by the production of a certificate of having passed a certain examination, which he alleged referred to him, whereas in fact it referred to another but it was not shown that his misrepresentation had caused damage or harm to the officer to whom it was made, the Court held this section inapplicable, and quashed his conviction opining that it might conceivably amount to an offence under s. 182.(14)

For other points relating to practice, reference should be made to section 415.

4705. Proof.—The points requiring proof are:—

(1) That the accused cheated some person.

(2) That he cheated him by—

(*a*) pretending or representing himself to be some other person, or

(*b*) knowingly substituting or representing one person for another.

4706. Charge—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you cheated A B by pretending to be C D (*or* representing yourself to be C D, *or* knowingly substituting C D for E F *or* representing that C D was E F) and thereby fraudulently (*or* dishonestly, etc.) induced delivery of property by A B, to wit——(*mention the property cheated*) [*or* intentionally induced the said A B to do (*or* omit to do) some act, to wit——]which caused (*or* was likely to cause) damage (*or* harm) to the said A B in body (mind, reputation *or* property) and that you thereby committed an offence punishable under section 419 of the Indian Penal Code, and

(13) *Sadanand Dass*, 2 W. R. 29; *Nga Po Lu*, (1902) 1 L. B. R. 356, discussed under s. 420, *post*.

(14) *Manikam*, (1908) 19 M. L. J. 271, 3 I. C. 600; following *Ganesh*, 13 B. 506.

within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4707. Evidence of Cheating by Personation.—It has already been seen (§§ 4659-4665) what constitutes this offence. It only remains to state that this offence being a special form of cheating must be established by proving not only cheating, but cheating affected in the manner specified in section 416. As that section provides, such cheating may be effected by false pretension, representation or substitution, or in short false personation. The cheat may falsely represent himself to be another, or he may falsely represent some one else. Such false personation must be intended to hoodwink another so as to make him believe the false to be the true representation, and thus act upon that belief. If he saw through the disguise before he was entrapped, the offence may be an attempt, but it falls short of cheating (§§ 4651-4655). The question whether a person was in fact deceived by a false personation is a question of fact, though the question whether he could have been so deceived is a question of law (§§ 4688-4694). The person substituted, if other than the cheat, may be either an innocent agent or he may be guilty. If he was innocent, his evidence would be sufficient to condemn the cheat, but if he was himself guilty, as if he lent himself to the deception contemplated by the cheat, then his evidence would be that of an approver, and as such calling for corroboration.

4708. The evidence required to establish this offence is not the same as is required to establish a case of simple cheating, for in addition to the proof of all those facts there must be proof of the further fact that the means employed to cheat were those described in section 416. This proof presupposes an inducement effected by the aid of false personation, though it is not necessary that it should have been the only means employed to cheat. Indeed, a cheat's armoury is seldom confined to a single weapon of attack. He may at times resort to false representation, at other times to false personation, and sometimes again to both as the occasion may require. It is, therefore, no defence to a charge under this section that false personation fell flat upon the person deceived, and that what had induced him was something quite different.

4709. It would be merely an attempt where the false personation had caused no actual deception. Such was the case of the accused who travelled from Trichinopoly to Podanur on a pass issued by the Railway to its Assistant Auditor. Being detected at Podanur he was convicted of this offence, but his conviction was altered to one for an attempt as there was no evidence that he had previously shown the pass to anyone else, as he was detected as soon as he presented it for check.[15]

For further commentary under this section, *see* section 416, §§ 4659-4665.

(15) *Govindaswamy*, 21 M. L. J. 748,11 I. C. 590.

420. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cheating and dishonestly inducing delivery of property.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Bailable. Comp.

[*Dishonestly*—s. 24. *Valuable security*—s. 30. *Cheats*—s. 415.]

Synopsis.

(1) *Analogous Law* (4710).
(2) *Procedure and Practice* (4711).
(3) *Proof* (4712).
(4) *Form of Charge* (4713-4714).
(5) *Principle* (4715).
(6) *Evidence of Cheating* (4716-4730).
(7) *False Tokens* (4721-4724).
(8) *Delivery of a valuable Security* (4725-4730).

4710. Analogous Law.—The relevancy of this section in the Code in view of the provision of section 417 has already been the subject of a previous reference (§ 4665), where it has been stated that this section should be more appropriately confined to serious cases of cheating in which there has been some delivery of property, as distinct from cases of cheating falling under clause 2 of section 415 (§ 4645), which should then be exclusively the subject of punishment under section 417. Even in case of delivery of property, it would seem that while dishonest inducement is punishable under this section a fraudulent inducement would only be punishable under section 417. The distinction between the two is at times sought to be justified by contrasting the connotations of the two words "fraudulently" and "dishonestly." It is said that there may be delivery of property in both but if it is obtained fraudulently the offence is punishable by s. 417—if dishonestly then by this section. For example, A may by a false representation induce B to advance him a sum of money in such circumstances that A is aware that he is exposing B to risk of loss but without intention of causing wrongful loss. A then would be acting fraudulently and would only be punishable under s. 417. But if he intended to cause wrongful loss he would be acting dishonestly and would be punishable under this section.(16) This is another ground for reconciling the two sections which would otherwise appear to be redundant (§§ 4666, 4675, 4715).

4711. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both bailable and compoundable with the permission of the Court and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the

(16) *Ba Shein*, 13 Bur. L. T. 239, 64 I. C. 33, 22 Cr. L. J. 721.

first class. The distinction between s. 417 and s. 420, though at times obscure is nevertheless important in view of the fact that while an offence under s. 417 is triable by a second class Magistrate, that under this section is only triable by a Magistrate of the first class. Where therefore the complainant was made drunk and a divorce deed taken from him, the offence was held to fall under this section and not under s. 417.(17) Where the complainant prosecuted the accused on the ground that he had paid the latter Rs. 35 in advance and that the latter had promised to send her daughter to him for concubinage which she had failed to do, thereby cheating him out of his bargain and his money, the Court refused to lend him its assistance.(18) The accused had executed a *kabala* in favour of the complainant which he presented for registration, but soon afterwards withdrew it on the pretext that he wanted to read it and tore it up. The complainant sued him for specific performance of the contract and also prosecuted him for cheating. It was held that the person cheated was the Registrar and that as the complainant had instituted a suit the charge should not be enquired into.(19)

Other points of practice will be found set out under section 417 (§§ 4665-4668).

4712. Proof.—The points requiring proof are:—

(1) That the accused cheated another person.(20)

(2) That he thereby induced—

(*a*) delivery of property to any person, which property did not belong to the accused, or

(b) to make, alter or destroy the whole or any part of a valuable security, or

(*c*) anything which is signed or sealed and capable of being converted into a valuable security.

(3) That he did so dishonestly.

4713. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you cheated A B, by dishonestly inducing him to deliver——(*mention the property*) to you which was the property of the said A B(21) [*or* to make, alter *or* destroy the whole or any part of a valuable security (*or* anything which is signed or sealed, which is capable of being converted into a valuable security)] and that you thereby committed an offence punishable under section

(17) *Bakhtawar Singh*, 3 L. L. J. 283, 67 I. C. 588, 23 Cr. L. J. 428.

(18) *Jani Hira*, 14 Bom. L. R. 503, 15 I. C. 793, 13 Cr. L. J. 521.

(19) *Hiralal* v. *Makhan Lal*, 30 C. L. J. 175, 54 I. C. 64, 21 Cr. L. J. 16.

(20) For which *see* s. 417; it is, of course, the most material ingredient of the offence; *Hanuman*, 57 I. C. 103, 21 Cr. L. J. 583.

(21) This clause is necessary; *Williams*, 1 M. H. C. R. 31.

420 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4714. The provision here made as to a valuable security is in accordance with the following section of the English Larceny Act[22]:—

"S. 90. Whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security; or to write, impress, or affix his name, or the name of any other person, or of any company, firm or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanour, and being convicted thereof shall be liable.....to be kept in penal servitude..... or to be imprisoned....."

Inducing Persons by fraud to execute Deeds and other Instruments.

And for this purpose the English Statute contains the following definition of a valuable security.—

"S. 1. In the interpretation of the Act the term 'valuable security' shall include any order, Exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order or other security whatsoever for money or for payment of money, whether of the United Kingdom or of Great Britain, or of Ireland, or of any foreign state, and any document of title to land or goods as hereinbefore defined.[23]

4715. Principle.—This section provides for an aggravated case of cheating generally defined in section 415. It has been there seen that that definition contemplates either (*a*) delivery of property, or (*b*) the doing of any other act or omission as a consequence of cheating which again may be effected by inducement brought about (*i*) fraudulently, or (*ii*) dishonestly, or (*iii*) intentionally. This section then provides only for the case (*a*) (*ii*), and a certain case of (*b*) (*ii*) when the act affects a valuable security, all other cases being relegated to the more general provisions of section 417. It will be seen that the two cases here dealt with are those in which the offence is committed under circumstances of great aggravation, which also show great malignity on the part of the offender.

4716. Evidence of Cheating.—Properly understood, the operation of this section should be confined only to the special cases of cheating last described (§ 4715), to which the drastic provisions of this section would seem to be appropriate. These cases of cheating are those in which the accused acts dishonestly in inducing the person deceived. Cases in which the inducement is fraudulent or intentional without being dishonest are thus excluded. Then, as cheating may as much relate

S. 417 Distinguished.

(22) 24 & 25 Vict., c. 96, s. 90. (23) 24 & 25 Vict., c. 96, s. 90.

to the delivery of property as to the doing of any injurious act or omission, this section specifies only those acts which relate to the making, altering or destroying the whole or any part of a valuable security or anything which is signed or sealed and which is capable of being converted into a valuable security, and which are moreover done by dishonest inducement. There thus remain still the following case to be disposed of under section 417:—

(*a*) fraudulently inducing delivery of property, under section 415, clause (*i*);

(*b*) the whole of clause (*ii*) of section 415.

4717. It will be observed that under the general provisions of clause (*ii*) of section 415 a person may be intentionally induced to make, etc., a valuable security but it will be then an offence punishable under section 417 and not this section, which requires that such person should have been induced dishonestly and as such it refers to a case not expressly mentioned in the section defining the offence. But the act of making, altering or destroying a valuable security is an act which causes or is likely to cause damage or harm to that person in body, mind or property, but inasmuch as that act was the effect of an intentional inducement, the Code regards it sufficiently met by the lighter punishment provided for in section 417.

4718. Confining this section then to the two special cases here expressly mentioned, it becomes necessary to inquire if the offence here described calls for any special rules of evidence.

4719. It will be observed that in discussing the effect of section 415 it was stated that it was not necessary to prove whether the inducement was made fraudulently or dishonestly by the accused (§§ 4612-4613). This must now be qualified for proof of the offence described in this section. For it requires proof of dishonest inducement and the burden of proof of which is on the prosecution. They must then prove that the delivery of the property was induced by the accused to cause wrongful gain or wrongful loss; or, in other words, that the inducement was intended to cause wrongful gain or loss by unlawful means of property to which the person losing was, or the person gaining was not, entitled.[24] If the delivery of property was the result not of the inducement of the accused but of the representation made by third parties the accused cannot be called to account under this section.[25] The inducement must relate to a fact and not to a future anticipation[1] (§ 4683). Unless it amounts to do a thing in future which, it is in one's power to do, in which case it is a promise.[2]

Dishonest inducement then implies: (*i*) knowledge of the unlawfulness of the method employed; (*ii*) an intention to employ it and to cause wrongful distribution of property thereby; and (*iii*) some degree

(24) Ss. 25, 26.

(25) *Malta Prasad*, 18 A. L. J. 371, 55 I. C. 730, 21 Cr. L. J. 362.

(1) *Ebrahimji*, 18 Bom. L. R. 297, 19 I. C. 328, 14 Cr. L. J. 232.

(2) Girdhari Lal, (1913) P. R. No. 12, 6 I. C. 964, 11 Cr. L. J. 428.

of personation effected for that purpose. These elements are common to the whole section, which is otherwise divided into two clauses:(*a*) that which relates to the delivery of property; and (*b*) that relating to a valuable security. The term "property" as used in this connection is wide enough to include anything capable of ownership. It includes money,[3] an examination certificate,[4] but not immoveable property.[5] Therefore, where the accused personated a Court peon and appeared in a village and proclaimed there by a beat of drum that a certain person had been dispossessed from his holding by the Court, and the Sessions Judge thereupon upheld his conviction under this section, Straight, J., quashed it, holding that the section had no application to the delivery of immoveable property, or as in the case before him, to the surrender of a cultivatory holding.[6] Indeed, the whole of this group of sections commencing with section 378 applies only to the protection of moveable property, though there are sections in which such property is more specially described than in others.

4720. Now, whenever there is dishonest inducement and delivery of property, this would seem to be the appropriate section for the punishment of the accused, even though the accused may have cheated by false personation. This was apparently the view taken in a case in which the accused went about pretending to hold the office of a police headconstable reprimanding certain villagers as to the state of the roads, receiving small sums as hushmoney, till he was surprised by the real police-officer, who thereupon had him convicted under this section.[7] In another case A was licensed to sell opium. B went with A's ticket and presented it to the shopkeeper who delivered him a certain quantity of opium. It was held that B had cheated by personation, and as he had obtained delivery of opium, he was liable to conviction under this section.[8] Of course, the offence is complete the moment the cheat obtains delivery of property as the result of his imposition. The fact that he afterwards returned it under pressure does not exonerate or exculpate his offence.[9] The following cases of cheating call for no notice. The accused induced the complainant to deliver him a receipt for money which he promised to pay. On securing the receipt he did not pay the money promised.[10]

False Tokens.

4721. Dishonest delivery of property may be obtained not only by false personation, but also by presenting false tokens. So where the accused was charged with selling or pawning as genuine gold mohars stated to be of the reign of Shah Jahan, which were really silver rupees of that reign coated over with gold, it was held that the offence of the accused was cheating under this section and not uttering of a false coin.[11] The fact that the coins used by the accused were not current does not affect the question. In another case the accused had in his possession a double pice coated

(3) *Birendra Lal*, 32 C. 22; *Sadanund Dass*, 2 W. R. 29.
(4) *Gangaram*, 16 N. L. R. 52, 67 I. C. 619, 23 Cr. L. J. 443.
(5) *Abdul Ahob*, (1882) A. W. N. 6.
(6) *Ib.*
(7) *Sadanund Dass*, 2 W. R. 29.
(8) *Nga Po Lu*, (1902) 1 L. B. R. 356.
(9) *Debendra Pershad*, 9 C. L. J. 605.
(10) *Jaffar Ayub*, 68 I. C. (N.) 621, 23 Cr. L. J. 589, (1922) A. I. R. (N.) 195.
(11) *Shushali*, (1907) 26 A. W. N. 308.

with mercury so as to resemble a rupee, which he delivered to A as a rupee to obtain change. It was held that the accused was not liable to a conviction under either section 232 or section 241. He could be only convicted under the former section if at the time of silvering it he intended to practise deception or knew it to be likely that deception would be thereby practised. If the idea of using the coin as a rupee was an after-thought, the only offence of which the accused could be convicted would be of abetting A to cheat the person to whomsoever A may deliver the coin for change.[12] Such a case stands on the same footing as cheating by delivery of forged notes, cheques, hundis[13] or other bills of exchange to which reference has been made already in discussing the cardinal requirements of the offence (§§ 4596-4655).

4722. But there are innumerable ways in which this offence may be committed. The accused was an unpaid apprentice in the Tehsildar's office at Gorakhpur, to which the military authorities sent a monthly requisition for reporting the current market rates to enable them to pay for the provisions purchased by them, and which was used to be prepared by the accused in vernacular, from which an assistant in the Collectorate drew up his report. The accused was induced by the interested suppliers of provisions to the military authorities to prepare a wrong schedule, so that he misread the prices current to the Collector's assistant, which were in due course reported to the military authorities. He was convicted of this offence,[14] but it would have been more correct to convict him of abetment. The accused represented to the complainant that he was a commission agent of an up-country purchaser who had indented on him for a bicycle. He was given a bicycle which he sold to a local customer. It was held that this offence was completed, as soon as the bicycle was delivered on his false representation.[15]

4723. The following is however a case which almost verged on the civil side, though it was a case of calculated fraud. Ralli Brothers had contracted to purchase from the accused *260 dokras* of fully good machine ginned cotton in lieu of which he delivered them *260 dokras* of cotton largely composed of cotton seed, unginned cotton and rubbish carefully packed into the middle of the *dokras* while all round the sides was placed good ginned cotton, the object being to evade its examination. The admixture of inferior stuff was proved to be 6 to 15 per cent. as against the normal of ½ to 1 per cent. The High Court held this sufficient to reverse the acquittal of the accused who was sentenced to imprisonment and fine.[16] But these cases should not be understood to break any new ground. They were decided upon their own facts in which the rubbish was carefully concealed in sound cotton. They are no authority for rendering all admixture and adulteration punishable as cheating, the difference between the two classes of cases being that while in the one case the concealment was cunningly made to elude detection, in the ordinary cases of admixture it is easily open to examination and detection.

(12) *Mikarban*, (1884) P. R. No. 9.
(13) *Uttam Lal*, 23 Bom. L. R. 340, 60 I. C. 993, 22 Cr. L. J. 305.
(14) *Parmeshar Dat*, 8 A. 201.
(15) *Banaji*, 2 Bom. L. R. 621.
(16) *Kanji Shivji*, 14 Bom. L. R. 137, 14 I. C. 669; *Mansing*, 15 Bom. L. R. 568, 20 I. C. 593.

4724. It is not a necessary ingredient of this offence that the person cheated should deliver the property to the cheat. For the offence would be equally complete if A cheats B and induces him to deliver property to C, and in this case it is not even necessary that A should stand to gain by its delivery to C; for if B suffered wrongful loss by the wrongful distribution of his property to C, A's act was dishonest, though he did not himself profit by it. But of course there is no legal impediment to A's conviction in such a case; still the question remains, why should A have cheated B to benefit C, to whom he was a stranger. But this is a question of fact and not of law.

Delivery of a Valuable Security.

4725. Apart from the delivery of property which suggests other cases of cheating already noticed (§§ 4608-4623), there remain the other cases connected with a valuable security which stand on the same footing. In this respect the present provisions coincide with the corresponding rule of English law (§ 4714). The question "What is a valuable security?" has been defined in section 30 of the Code, and the term has been of course used here in that sense. That term implies a document which is sufficient to be classed as, and to pass for, a valuable security. So, where A cheated B, by inducing him to execute a cheque in favour of C, and B executed a cheque payable to C, but not to bearer or order, and it required to be, but was not stamped, the Court held it not to amount to the making of a valuable security.(17) But a pay order under the signature of the president of a burial society was held to be a valuable security, when it was payable to bearer, and the fact that the society had not been registered was held to be no objection to its validity.(18)

4726. Now, as the term has been defined in section 30, not only a document payable to bearer or order, but one payable only to a specified individual, would fall within the comprehension of a valuable security. In short, so long as such document is a security for value, it is a valuable security whether it is negotiable or not. Consequently, not only the bills of exchange, such as a hundi, cheque or the like, which are payable to bearer of valuable security, but other documents, such as simple bonds, fall within that term. And the section deals not only with completed documents, but also with those which, though signed or sealed but still fall short of a completed valuable security, as, for instance, where they lack attestation which is legally required to complete them, as in the case of a deed of mortgage or of gift. A decree of a Civil Court is, however, not a valuable security, since it is only an order of the Court declaring the rights of parties. Where, therefore, several accused were found to have conspired to deceive a court into passing decrees and issuing executions, it was held that they could not be convicted of this offence: *first*, on the ground that decrees were not a valuable security; and *secondly*, on the ground that, even if they were so regarded, it is only the original decree which remains in Court that can be so described. Its copies supplied to parties could not be so treated.(19)

4727. In order to complete this offence the cheat must not only dishonestly induce another to make, alter or destroy a valuable security,

(17) *Yates*, 1 Mood. C. C. 170.
(18) *Greenbalgh*, Dears C. C. 26.
(19) *Charu Chandra*, 28 C. W. N. 414, (1924) A. I. R. (C.) 502.

but the inducement must fructify in action, so that the person cheated actually makes, alters, or destroys a valuable security, or anything which is signed or sealed and is capable of being converted into a valuable security. The word "make" implies completion of a valuable security by due execution, attestation as well as its registration, where its registration is compulsory. If, however, it is not so "made," it may still be "signed or sealed," which, being an act of its execution converting a draft into a deed, has the same effect as the making of a valuable security. But anything short of this is not included. So if a person be dishonestly induced to write a document, but which he did not sign or seal, the person so inducing may be guilty of an attempt, but he could not be convicted of this offence.

4728. The word "alter" implies any change in the text of the valuable security. For instance, if a person is induced to raise or lower the rate of interest stipulated therein, it would be an alteration, and punishable here if it was induced dishonestly. It is not necessary that the alteration should have been made by the executant, if it is made with his consent obtained by "dishonest inducement." An alteration made without such consent may be forgery, but it will not be cheating.

4729. The destruction of a security would ordinarily be induced in token of the extinguishment of an obligation. This may be done by a person falsely misrepresenting that he had discharged the debt, or that the security had become unenforceable in law, or that he should upon its destruction execute another security, or, indeed, under any circumstances which constitute the offence of cheating, provided only that the inducement was "dishonest" and not merely "fraudulent."

4730. Adulteration of food and drink has been already the subject of a previous discussion, where it has been stated that serious adulterations constitute cheating (§ 4632). It has been held under this section that the adulteration of saccharine with a mixture of soda bicarbonate and passing off the stuff as saccharine, and selling it as such, suffices to constitute an offence punishable under this section.[20]

For further commentary, *see* under section 415.

Of Fraudulent Deeds and Dispositions of Property.

4731. Topical Introduction.—This and the next three sections deal with the criminal aspect of fraudulent conveyances which are the subject of section 53 of the Transfer of Property Act,[21] and the Presidency and Insolvency Acts.[22] The effect of these Acts generally is to declare the nullity of deeds intended to defraud creditors and to ensure a certain degree of commercial honesty in dealing with one's property. The present group of sections are intended to subserve the same end by placing dishonest debtors under the lash of criminal law. But these sections, with those (ss. 206-210) already considered, which are closely analogous to these, have practically remained a dead letter in the Code, owing to the difficulty and expense of prosecuting dishonest debtors, and the disinclination of creditors to embark upon the uncertain issue of vindicating justice.

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(20) *Bhola Singh*, 26 Bom. L. R. 211.
(21) Act IV of 1882.
(22) Pres. Act (III of 1909); Prov. (III of 1907); 1 Gour's Law of Transfer (5th Ed.) §§ 941, 992.

4732. Taking, however, all the nine sections together, they will be all found to deal with the one subject of fraudulent transfer of property intended to defeat or delay creditors. But the mode in which this fraud may be perpetuated are the subject of the specific sections which deal with following typical cases:—

(*i*) Fraudulent concealment of property in one's possession (ss. 421, 424).

(*ii*) Fraudulent concealment of a chose in action (s. 422).

(*iii*) Fraudulent execution of a deed of transfer (s. 423).

(*iv*) Fraudulent release of debt (s. 424).

4733. All these are frauds perpetrated without the intervention of Court. But the same object may be achieved by taking advantage of the procedure of law. Consequently, fraudulent concealment of property may be made by suffering a collusive decree to be passed against oneself in which case the debtor commits the offence punishable under section 208, while the collusive decree-holder is provided against by section 207.

421. Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Not comp.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.

[*Dishonestly*—s. 24. *Fraudulently*—s. 25.]

Synopsis.

(1) *Analogous Law* (4734).
(2) *Procedure and Practice* (4735).
(3) *Proof* (4736).
(4) *Form of Charge* (4737).
(5) *Transfer in fraud of Creditors* (4738-4739).
(6) *Who are Creditors* (4739).
(7) *Mental Elements of Criminality* (4740-4745).

4734. Analogous Law.—This section relates to a voluntary transfer *inter vivos* of property without consideration and in fraud of creditor's whether of the transferor or of another, as for example, his creditor's creditor. The intention and knowledge of the transferee being immaterial, the transfer may be good so far as regards the transferee, though the transfer may be punishable under this section.(23) In short, under civil

(23) 1 Gour's Law of Transfer (5th Ed.), § 992.

law such transfer is only void if the transferee was privy to the fraud, but this section has nothing to do with the transferee, the offence being complete with the transfer or delivery of property by the transferor with the fraudulent or dishonest intent aforesaid. The section applies equally to property whether moveable or immoveable. Its provisions remain unaffected by any local or special law, *e.g.*, the Presidency Towns Insolvency Act, ss. 17 and 103.(24)

4735. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class.

4736. Proof.—The points requiring proof are:—

(1) That the accused removed, concealed, delivered or transferred to any person or caused it to be so transferred.

(2) That such delivery or transfer was without adequate consideration; and

(3) Dishonestly or fraudulently.

(4) That it was moreover intended to prevent or which the transferor knew to be likely to prevent the distribution of that property according to law among his creditors or the creditors of any person.

4737. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you dishonestly (*or* fraudulently) removed (*or* concealed *or* delivered *or* transferred *or* caused to be transferred to A B) without adequate consideration, certain property to wit——, intending thereby to prevent (*or* knowing it to be likely that he will thereby prevent) the distribution of that property according to law among your creditors (or the creditors of any other person, to wit C D), and that you thereby committed an offence punishable under s. 421 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

4738. Transfer in Fraud of Creditors.—This section makes it an offence to withdraw property dishonestly or fraudulently and without consideration, intending to prevent its being legally available for distribution amongst creditors. As the primary object of this section is to punish the fraudulent concealment of property from creditors, it will affect only those who have no other property available to satisfy their claims. Nor does it apply to secured creditors, who must *prima facie* look to the security for the satisfaction of their claims. The section is really applicable to an insolvent debtor who having no sufficient assets to meet the demands of his creditors, fraudulently removes whatever property is available to meet

(24) *Mulshankar*, 35 B. 63.

their claims, and thus defrauds them even of the little they had the chance of seizing upon to satisfy their claims. Such fraud by a debtor may be committed not only to defraud his own creditors, but also "the creditors of any other person"—that "other person" being presumably his own creditor. For instance, A being indebted to B, who is in his turn indebted to C may fraudulently remove his property so as to withdraw it from being seized by C in satisfaction of his claim against B. It is not, therefore, necessary that A should defraud his own creditors so long as he does the act in fraud of creditors.

Who are Creditors?

4739. The meaning of this term must not, however, be unduly enlarged. Nor should it be understood as restricted only to mean only money lenders or those situated to the debtor in the relationship of banker and customer. The term is rather used as a correlative to debtor, and means one to whom a "debt" is due. The word "debt" means a liquidated money obligation recoverable by suit.(25) It is either money or money's worth provided that its worth is ascertained. This will exclude a mere claim to damages, profits or the like, so that if a person fraudulently withdraws property knowing that a heavy decree for such claim is likely to be passed against him, he could not be dealt with under this section, whatever other liability may attach to him as a fraudulent debtor. The creditor, again, must be a present creditor with his claim enforceable in law, though that claim may not have been secured by a decree.

The subject will be found more fully discussed in the author's Law of Transfer to which reference should be made for more particular information on the subject.(1)

4740. Mental Elements of Criminality.—The section does not penalize all transfers made by a debtor, but only those made (*i*) "dishonestly" or "fraudulently," (*ii*) without adequate consideration, and (*iii*) with intent to prevent the lawful distribution of property amongst creditors. All these elements constitute the gist of the crime. They presuppose not merely a fraudulent preference which is in civil law sufficient to avoid a transfer, but a disposition of property in which the primary object of the transferor was not to satisfy a legal demand, but to shield his property against the claims of the creditors generally. For instance, it will exclude cases in which the transferor favours one creditor at the expense of the other, or those in which without intending to defraud them the necessary effect of his disposition is to prevent a legal dstribution of his assets amongst his creditors. And a transfer may even be fraudulent within the meaning of civil law, but it does not necessarily expose the transferor to the penalties of this section. In other words, these sections view the act from a different standpoint than civil law, and it may be that a transfer is not fraudulent within the meaning of one though it is so within the meaning of the other. And the reason for this is evident. The object of the civil law is remedial and not punitive, and consequently it declares what transfers are void and insufficient to pass property in the transferee, and what property may therefore be made available to satisfy the claims of

(25) 1 Gour's Law of Transfer (5th Ed.) § 104.

(1) *Ib.*, §§ 973, 974.

creditors in spite of the transfer. In determining the operation of fraud on the right of property, law necessarily regards the intention and knowledge of the transferee material, and the rule of civil law therefore is, that a transfer is not fraudulent if the transferee was not privy to the fraud.(2) But the rules here enacted approach the question from a wholly different standpoint, for they view it solely from the standpoint of the transferor, and wholly unconnected with the transferee. This distinction must be clearly kept in view, for though the Court may punish the fraudulent transferor, it has no power to order distribution of the property amongst the creditors held to have been so defrauded.

4741. But in considering the question of fraud, the duties of the civil and the criminal Courts are similar, though not identical. For they have both to inquire into the intention of the transferor and find whether his intention was *bona fide* or fraudulent. In this connection the section raises the three questions upon which the Court must be satisfied, namely:—

(*i*) Was the transfer made dishonestly or fraudulently;

(*ii*) Was it without adequate consideration;

(*iii*) Was it made to prevent lawful distribution of the property amongst creditors.

The question whether a transfer was dishonest or fraudulent depends upon the circumstances surrounding it. In civil law a number of rules have become stereotyped as badges of fraud,(3) and they are equally relevant for the present purpose. The question whether a certain transaction was dishonest, or merely fraudulent without being dishonest, has no practical value in view of the declared effect of the two being the same. But at the same time it is well to note that a transfer may be fraudulent without being dishonest, as, if a debtor should conceal his property out of a malicious intention to injure another and with no thought of wrongful gain or loss. Such a case may arise where A being indebted to B, who is in his turn indebted to C, conceals his property against C, though he subsequently pays his just debts to B. In such a case the question of the adequacy of consideration does not arise. In this respect the terms of this section are wider than those of section 53 of the Transfer of Property Act(4) and of the Insolvency Acts.(5)

4742. The words "removal, concealment or delivery" are again wider(6) and embrace cases of withdrawal of property unconnected with transfer from its being made available to creditors. Such a case may arise if the debtor removes his property to a native state where the creditors are unable to follow it, or where it is shuffled out of view, though there is no evidence as to what has become of it. The word "delivery" must be understood *ejusdum generis* with removal or concealment, for it was not intended to prevent a mere transfer of custody, though it may have been fraudulent and with intent to prevent just distribution of it amongst

(2) 1 Gour's Law of Transfer (5th Ed.), § 992.
(3) *Ib.*, §§ 992, 993.
(4) Act IV of 1882.
(5) 1 Gour's Law of Transfer (5th Ed.), §§ 941, 942.
(6) But they do not include a case of wanton destruction, which is not punishable under this section, though it may be punished as mischief, s. 425, *ill.* (*d*).

creditors. In this respect the terms of this section are narrower than those of section 53 of the Transfer of Property Act, which refer to defeating or delaying creditors, for they exclude acts which merely delay, but do not defeat their claims.

Of course, a concealment, removal or delivery of property would be for no consideration, for the object of the transferor is not to convey but merely to screen it from his creditors. But there may be cases in which there is a transfer, though it may not be for an adequate consideration, in which case the transferor is declared to be equally obnoxious to the penalties of this section. Such a case is, however, likely to present greater difficulties in practice, for the presence of consideration would invest it with a reality which, though not rendering it inexpugnable may still protect the transferor against this section. The question, however, whether the transfer is criminal or merely voidable, depends upon the quantum of consideration in proportion to the value of the property. If there was no consideration at all, as, when the transfer was *benami*, the transferor runs a greater risk of conviction than if it was supported by some consideration.

4743. Indeed, a *benami* transaction is nothing more than the removal or concealment of property, and if it is made in fraud of the creditors, the *benamidar* is liable to punishment under this section.(7) Of course, as has been elsewhere pointed out, a *benami* transaction does not of itself imply fraud, for the practice of *benami* transactions is inveterate in India; and although looked upon with jealousy by the Courts, it is applicable alike to Hindus and Mahomedans.(8) But though *benami* transactions may be common, they cannot be used to the injury of others. As it was observed in a Calcutta case: "While it is impossible to ignore the existence of *benami* transactions in Bengal, we have no doubt that they must be judged by the ordinary and well established rules of law, that a third party cannot be made to suffer by the voluntary acts of owners of property. It is not to be supposed that because the existence of *benami* transactions has been recognized by our Courts, parties are at liberty to use the system to the injury of others, whether by direct fraud or by putting other parties in a position to defraud, or take undue advantage of innocent persons."(9)

The fact that a transaction was *benami* does not therefore affect the present question, which must still be answered with reference to the three elements which render the act criminal. Of these three, the question of the adequacy of consideration is the most important, for if a transfer was supported by sufficient consideration, then it cannot be condemned as fraudulent, and indeed, as the section is worded, the two other questions then become immaterial. But the consideration must be *adequate*, that is to say, it must be sufficient to invest the transfer with a presumption of reality. It may not be such as would represent its fair market value, nor indeed even such as may be obtained in a forced sale, but it must at least bear such proportion to its value as would suffice to uphold the transfer in the Civil Court. The question whether the consideration was adequate is a question of fact, and it is on the prosecution to show that it was

(7) *Abdul Goni Sulaman*, (1898) P. J. L. B. 593.
(8) 1 Gour's Law of Transfer (5th Ed.), § 769.
(9) *Rakhaldass* v. *Bindoo*, 1 Marsh. 293, 295.

inadequate—indeed, so inadequate as to justify the Court to find that it was merely a cloak to invest the transfer with an appearance of reality, whereas in fact it was no transfer at all but a device to hoodwink the creditors.

4744. The question of intention to prevent satisfaction of the claims of creditors is no doubt the main question—and indeed, it is against the unjust distribution of property amongst creditors that the present rule is enacted. But here again this section bears no close analogy to the corresponding rules of civil law under which intention and not knowledge of likelihood is alone material.(10) Of course, every preference implies such knowledge, but a mere preference of one creditor to another is not fraudulent, much less criminal. What is then implied is that the transferor should have effected the transfer with the primary object of defeating the creditors generally, and that with that object in view he should have put it out of their reach taking whatever consideration was offered him in the hurry of the moment and when his thoughts were turned more on how to avoid his liabilities than dispose of his assets.

4745. The fraud must in any case affect the creditors generally, though it may not substantially reduce the debtor's assets available for rateable distribution. But in this case the question may arise whether the debtor would have planned a fraud to achieve so little an advantage to himself.

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Not comp.

Dishonestly or fraudulently preventing debt being available for creditors.

422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Dishonestly*—s. 24. *Fraudulently*—s. 25.]

Synopsis.

(1) *Analogous Law* (4746).
(2) *Procedure and Practice* (4747).
(3) *Proof* (4748).
(4) *Principle* (4749).
(5) *Dishonest Prevention of Payment* (4750-4752).
(6) *No Offence* (4753).

4746. Analogous Law.—This section was enacted at a time when the distinction between property and an actionable claim was more marked than it has been since in consequence of subsequent legislation.(11) All the same it may still cover cases not contemplated by the last section, as where the debtor fraudulently passes an acknowledg-

(10) S. 53, Act IV of 1882.

(11) *See* 1 Gour's Law of Transfer (5th Ed.) §§ 99-110.

ment in respect of a debt due to himself so as to prevent its being made available for the satisfaction of the claims of his own creditors. In short, the "prevention" here contemplated need not necessarily be by removal, concealment, delivery or transfer as enacted in the last section, nor, on the other hand, need it be without adequate consideration, so long as it is either dishonest or fraudulent.

4747. Procedure and Practice.—This offence is non-cognizable but warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Court of the Presidency Magistrate or Magistrate of the first or second class.

4748. Proof.—The points requiring proof are:—

(1) That there was a debt or demand.

(2) That the accused prevented it from being made legally available for payment towards a certain debt.

(3) That he did so dishonestly or fraudulently.

4749. Principle.—The last section dealt with the fraudulent withdrawal of property as distinct from a *chose in action* which is the subject of the present section. In the present view of law, a debt or demand is ordinarily classed as property, though the term "demand" is certainly much wider than an actionable claim as defined in section 3 of the Transfer of Property Act.[12] The gist of the offence lies in the dishonest or fraudulent evasion of one's own liability in abetting others in evading it.

4750. Dishonest Prevention of Payment.—For the purpose of this offence, there must be, in the first place, a debt or demand due to the accused or some other person. The debt or demand would have been presumably available for payment, but for the preventive action of the accused. It must then be obviously within time and such as had become due and payable, but was not paid owing to his criminal intervention. The word "debt" looks simple but has now acquired a somewhat loose significance. As legal concept it connotes a liquidated money obligation usually recoverable by suit.[13] But the term "demand" is wider and may mean any claim, whether liquidated or unliquidated, for money or other property. It may thus include a debt and a claim to money not in the nature of a debt, such as mesne profits or damages. Such demand or debt must be *due*, though it may not be due to the accused, but he must have prevented its payment, and it must have been "dishonestly" or "fraudulently."

4751. If the prevention was in breach of contract, or in assertion of a *bona fide* right, it is not criminal, though it may entail a civil liability. So where the accused assigned the benefit of a pending suit to the prosecutor as a security for the due payment of his debt due to the prosecutor, agreeing at the same time not to compromise the suit, but which, notwithstanding his agreement, he compromised, and where-

(12) Act IV of 1882.

(13) For a general discussion on the subject, *see* 1 Gour's Law of Transfer (5th Ed.), § 104.

upon he was prosecuted under this section, it was held that he could not be convicted under this section unless the compromise was shown to have been made fraudulently or dishonestly, that is, in fraud of the prosecutor or to cause him wrongful loss.(14) It was doubted whether a claim for unliquidated damages in a suit was a debt or demand within the meaning of this section,(15) but the nature of the suit compromised was not known to the Court, and the decision ultimately turned upon the point already noticed.

This case was followed in another case disposed of by Prinsep and Handley, JJ., on the following facts: Certain persons (A) mortgaged their property to B for a lac of rupees. The mortgage was a simple one, but contained a covenant that the property shall be mortgaged by B's nominee C during the continuance of the mortgage. As such, C was put in possession of the property for A in whose name he obtained a decree against an under-tenureholder D, in execution of which C brought D's estate to sale and purchased it in the name of A who was the decree-holder; but C agreed with D that if the latter should pay a certain sum within a certain time the sale should be set aside. D was, however, unable to pay this amount, and he went to A and induced him to agree to the sale being set aside on his depositing Rs. 1,000, to which A agreed, which amount was deposited in Court, and for which A applied to the Court for withdrawal. B then prosecuted A under this section and the Magistrate convicted him, but on revision the High Court held that A's conduct in compromising with D and in attempting to withdraw the Rs. 1,000 deposited by him was merely a breach of contract, which would probably have entitled B to realize at once the full amount of the debt. A's action was prompted by his desire to put an end to the management of B. But A's act could not be considered dishonest. It was true that B was hindered or delayed in the liquidation of his debt; but that did not render the conduct of A fraudulent or dishonest. It was, on the other hand, shown on the facts that the compromise was beneficial, and as in any case it had been entered into to put an end to B's management rather than to prevent the money from being available for payment of his debt under the mortgage, A's conviction for an attempt to commit this offence could not be sustained.(16)

4752. But these cases are instructive, for they show that the word "prevention" is here used in its widest sense as implying any act which leads to the non-satisfaction of a debt, whether that act be the removal or concealment of the property, or the realization of a debt due to the debtor which he had assigned over to his creditor. So if A assign over in favour of B an actionable claim, such as a debt or demand payable by C, and after assignment realize the claim from C and pass in his favour an antedated receipt to defraud B, both A and C would be clearly guilty of this offence. A because he had dishonestly prevented a debt due to himself from being made available for the payment of his debts

(14) *Nobin Chunder Mudduck*, 22 W. R. 46.
(15) *Ib.*, p. 46.
(16) *Hara Kumar Chaudhurani* v. *R Savi*, 28 C. 314.

due to B, and C because he had fraudulently prevented a debt due to B from being made available for payment to A, to which he was legally entitled. But if in such a case C had no knowledge of the assignment, he may be innocent though B may be guilty.

4753. No Offence.—The accused who executes successive mortgages of his property, or mortgages it to one and then sells it to another commits no offence under this section;[17] though he may be visited with the penalties prescribed in other sections (*e.g.*, ss. 417, or 420) if his convenants expose him to those charges.

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.

423. Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Non-comp.

[*Person.*—s. 11. *Dishonestly*—s. 24. *Fraudulently*—s. 25.]

Synopsis.

(1) *Analogous Law* (4754).
(2) *Procedure and Practice* (4755).
(3) *Proof* (4756).
(4) *Form of Charge* (4757).
(5) *Principle* (4758).
(6) *Meaning of Words* (4759).
(7) *Fraudulently False Recital of Consideration* (4760-4762).

4754. Analogous Law.—The false recital of consideration or a false statement of the beneficiary in a deed, is made an offence by this section, if the false recital or statemnt is made fraudulently or dishonestly. The object is to punish fraud, when it is perpetrated to the immediate prejudice of a third party.

4755. Procedure and Practice.—This offence is non-cognizable but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class.

4756. Proof.—The points requiring proof are:—

(1) That there was a deed or instrument.

(2) That it purported to effect a transfer or create a charge on any property.

(17) *Musal Lal*, 18 I. C. (A) 893, 14 Cr. L. J. 141.

(3) That the accused signed, executed or became a party to such deed or instrument.

(4) That it contained a false statement as to the consideration for such transfer or charge or as to the beneficiary.

(5) That the accused did as in (3) dishonestly or fraudulently.

4757. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——at——you dishonestly (or fraudulently) signed (*or* executed *or* became a party to) a deed (*or* instrument) which purported to transfer (*or* subject to a charge) any property, to wit——(*or* any interest therein, to wit——) which contains a false statement relating to the consideration for the said transfer [(*or* charge) or relating to the person (*or* persons) for whose use (*or* benefit) it is really intended to operate] and that you thereby committed an offence punishable under section 423 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

4758. Principle.—As has been stated before (s. 241) there is nothing fraudulent in executing a *benami* transfer, but such a transfer easily lends itself to fraud and may become fraudulent if it is executed against the provisions of the Code. If, in short, its object be dishonest or fraudulent, it is punishable either under the provisions of this section or of those which condemn such transfers. So far as regards this section its provisions are directed against two specific acts of fraud, *viz.*, (*a*) false recital of consideration, and (*b*) false name of the beneficiary. These are two of the most material particulars of a deed, and their mis-statement has the effect of creating evidence of a false claim; and law considers it an offence, the gravity of which is measured not by the mischief actually caused as by the mischief inevitably threatened.

4759. Meaning of Words.—"*Signs, executes, or becomes a party*": A person may sign as an attesting witness, execute as obligor and become a party as an executor or obligee. "*Any deed or instrument*": These words are intended to exclude all documents not having the operation of a deed or instrument, such as, for instance, a receipt. The deed or instrument must "*purport to transfer or subject to any charge any property,*" *i.e.*, transfer any property or create a charge thereon. A charge is distinguished from a transfer in that it does not convey any interest in the property in favour of the charge-holder, but merely indicates a fund out of which a claim is to be satisfied. As an instance of a transfer of any *interest* in property may be mentioned a mortgage or a lease. "*False statement relating to the consideration*" means only a statement of the price of a thing as distinguished from its description or value.(18)

4760. Fraudulently False Recital of Consideration.—This section is enacted to counteract a specific evil, the general purpose of which is to

(18) *Mania Goundan*, 37 M. 47.

ensure a certain irreducible degree of honesty on the part of those who obtain credit on the faith of it. As such, it punishes the creation of documentary evidence containing a false recital of consideration or a false statement of the name of the beneficiary, these two being the most material particulars of a deed against which a person affected thereby may be wholly powerless, for *scripta litera remanet*, and it is not always possible to overcome the testimony of a deed. But, since the object of the section is to protect third parties from being directly injuriously affected by the deed, it follows that there is nothing criminal, though it may be fraudulent to overstate the consideration or falsely state a beneficiary. Such a case would, however, arise where the consideration is over-stated to defraud a preemptor.(19) And in such a case the vendor no less than the purchaser may be held equally liable under this section. For the section treats all alike whether they be those who signed or executed or were a party to any deed. Even persons who attested such a deed as witnesses may become liable under this section if they signed it fraudulently. But in such a case it is not probably allowable to infer fraud from a mere knowledge of the fraudulent purpose of the parties to a deed. But there may be circumstances evidencing ill-will or dishonesty, as payment of a sum of money as a consideration for obtaining a person's attestation, from which the Court would be justified in finding the elements necessary to constitute this offence.

4761. But the same scrutiny would be unnecessary in the case of the purchaser of property subject to pre-emption, in whose case the overstatement of consideration may be reasonably attributed to an intent to defraud the pre-emptor. A sold a certain property to B for Rs 1,500, but induced him to enter the price as Rs. 1,900 to forestall the co-parcener's right of redemption. B was convicted under this section, but on revision it was contended for him that the over-statement of the price of a sale to resist a pre-emptor was permissible under Muhammadan law, but Blair, J., held that whatever might have been the view of Muhammadan law, as to the claim of pre-emption, the Court was bound to give effect to the plain terms of this section which clearly applied to such a case, but at the same time the Court remarked: "The prosecution under section 423 is no doubt somewhat novel.(20) After many years' experience in this Court, we have never had a prosecution under that section for the entry of false consideration in a sale-deed, and yet it is within the experience of this Court that considerations are habitually falsely entered. In respect of the dishonesty of such false entries, the popular conscience has never been aroused." The Court then commended this consideration in imposing sentence which the Court said "should be rather a warning than a punishment."(21)

4762. In such a case the offence, of course, depends upon the right of pre-emption being proved to exist in a third party. There can be no

(19) *Ram Dwaya*, (1868) P. R. No. 16; *Sandagar*, (1869) P. R. No. 23; *Gurditta Mal*, (1902) P. R. No. 10; *Chhajju*, (1908) P. R. No. 16; *Mahabir Singh*, 25 A. 31.

(20) It was represented to the Court that the reports contained no case on the subject. As a matter of fact there were three such cases cited in the last note.

(21) *Mahabir Singh*, (1902) 25 A. 31.

dishonesty if the accused erroneously believed in the existence of such a right, though in that belief he may have overstated the consideration.[22] So Chatterji, J., said: "The District Magistrate's view that the intention of the accused alone is material is erroneous, for it ignores the correlation of the existence of the right with intention which is essential to satisfy the connotations of the words 'dishonestly' and 'fraudulently,' and to constitute the offence."[23] In such cases then the criminal Court may have to try a question of a civil right for the purpose of this offence. But the fact that it has to do so does not entitle it to throw out the case holding it to be one of a civil nature, or for the purpose of having the civil right first determined by the Civil Court.[24]

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Not comp.

Dishonest or fraudulent removal or the concealment of property.

424. Whoever dishonestly, or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Dishonestly*—s. 24. *Fraudulently*—s. 25.]

Synopsis.

(1) *Analogous Law* (4763).
(2) *Procedure and Practice* (4764).
(3) *Proof* (4765).
(4) *Form of Charge* (4766).
(5) *Principle* (4767).
(6) *Fraudulent Concealment of Property* (4768-4770).

4763. Analogous Law.—This section bears a close analogy to, and must be compared with the provisions of sections 421 and 422. It generally provides for cases which may be equally punishable under those sections. Really speaking, it embraces three cases of fraud those consisting of concealment or removal of any property or assisting in its concealment, or relinquishing any debt or demand (§ 4767).

The penal provisions of the Madras Estates Land Act are merely supplementary to those enacted in this Code, and nothing therein contained affects this section.[25]

4764. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class. As to this section it was said in Madras: "The High Court have reason to believe that section 424 of the Penal Code is sometimes abused in the mofussil and that civil rights are disposed of in the criminal Courts. This should be checked as much as possible."[1]

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(22) *Chhajju*, (1908) P. R. No. 16.
(23) *Ib.*
(24) *Umrao Singh*, (1883) 3 A. W. N. 209.
(25) *Sivanupandia*, 38 M. 793.
(1) (1868) 1 Weir 483.

4765. Proof.—The points requiring proof are:—

(1) That the accused—

(*a*) concealed or removed any property, or

(*b*) assisted in its concealment or removal, or

(*c*) released any demand or claim to which he was entitled.

(2) That he did so dishonestly or fraudulently.

4766. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you dishonestly (*or* fraudulently) concealed (*or* removed) a certain property, to wit—— belonging to yourself (*or* to A B) [*or* dishonestly (*or* fraudulently) assisted in the concealment (*or* removal) thereof (*or* dishonestly released a certain demand, to wit——], and that you thereby committed an offence punishable under section 424 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

4767. Principle.—This offence is presumably intended to provide for a case not otherwise provided for. For concealment or removal of property of a certain kind is punishable under section 421, while the release of a demand may amount to a prevention of a demand due to a person from being made available for payment to another within the meaning of section 422 of the Code. The section is obviously restricted only to a fraudulent concealment or removal of property and not to its wanton destruction, which may be punished as mischief,[2] but which is not punishable under this section.

Of course, the section must be strictly construed, for otherwise it is likely to trench upon a number of cases which are the fit subject for civil adjudication.[3] But otherwise the section is wide enough to include any case of fraudulent concealment of property whether the fraud be practised on creditors or partners.[4]

4768. Fraudulent concealment of Property.—This section is not intended to punish an alienation of property, which, though fraudulent, is protected by civil law. Such is the concealment or alienation in anticipation of an attachment, though the case would be different if the attachment was in fact effected, provided that the attachment was then legally in force, and the burden of proving which is on the prosecution.[5] It was so held in the case of a distraint,[6] but its principle applies equally to the case of an attachment. It should be noted that both an attachment as well as a distraint only prevent an alienation of the pro-

(2) S. 425, ill, (*d*).
(3) *Karri Mangadu*, (1914) M. W. N. 791, 25 I. C. 514.
(4) *Gour Benode Dutt*, 21 W. R. 10.
(6) *Gopalasami*, 25 M. 729; followed *Gopalasami*, 25 M. 729.
(6) *Gopalasami*, 25 M. 729; followed in 1 Weir, 486.

perty by the person in possession. They do not effect a transfer of ownership or possession, so that a judgment-debtor who removes his standing crops after their attachment can only be convicted of this offence and not of theft.(7) Even where attachment involves transfer of possession, but possession in fact is not transferred, the only offence, for which the accused could be legally convicted is this offence, and not theft, because theft implies dishonest removal from the possession of another, and such possession must be actual and not merely constructive.(8) And the fact that the accused had deposited his crops in the village threshing floor when they were attached, would not affect his possession, if his control remained unaffected, though he may have been prohibited from removing them.(9)

4769. The rule that a removal of crop in violation of an order, which the person making it has no authority to make, constitutes an offence under this section.(10) It presupposes the presence of at least illegality in the act. This is necessarily implied in "dishonestly" and must be presumed to be implied in "fraudulently." Persons who remove their crops in spite of an illegal distraint are thus necessarily excluded.(11) So are those who remove their property in ignorance of a distraint, or being aware of it, with an object to preserve and protect them and not to remove them, so as to make them unavailable for the purpose of attachment or distress.

4770. These cases, however, present only one aspect of the question. The section is generally worded and would apply to any case of fraudulent removal or concealment connected with the purpose for which the section is enacted. The property removed may be of any kind and not exclusively his own. For it may be "of himself or any other person" and partly of one or of the other. So where a partner removed the account books of the firm with intent to defraud his co-partners, this offence was held to have been committed, it being held that this group of sections equally applied to co-partners as well as to creditors.(12)

So while a partner in cultivation, such as a *bataidar*, is entitled to joint possession of the crops raised by him and may even claim to remove them for threshing without detriment to the right of his co-sharer, still if he removes them fraudulently or dishonestly with intent to appropriate them to his own use in derogation of the right of his partner, he would be guilty of this offence, if by so doing he prevents their appraisement or distribution, but in such a case there must be evidence to show, as in the reported cases of conviction,(13) that he did so on purpose to defraud his partner by putting them out of his

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(7) *Obayya*, 22 M. 151.
(8) *Ib.*
(9) *Daya Karsan*, 1 Bom. L. R. 515.
(10) *Bavuri Magata*, (1882) 1 Weir 483.
(11) *Gopalasamy*, 25 M. 729; *Bavuri Magata*, (1882) 1 Weir 483; *Ananda Muttusami Aiyar*, (1882) 1 Weir 284; *contra* in *Brojokishore Dutt*, 8 W. R. 17, which was probably dealt with a case of impropriety as opposed to an illegality affecting jurisdiction.
(12) *Gour Benode Dutt*, 21 W. R. 10.
(13) *Sivanupandia*, 38 M. 793; *Kuldip Pandey* v. *Ramnath*, (1917) Pat. 71, 1 Pat. L. J. 353, 35 I. C. 491; *Lalu Gope*, 1 Pat. L. W. 691; *Khushi Ram* 2 L. L. J. 99, 59 I. C. 654, 22 Cr. L. J. 142.

sight to prevent their appraisement and division. Of course, the fact that such an Act may be equally dealt with under a Local Act, does not limit the operation of this section. The accused were tenants of the Darbhanga Raj who was entitled to nine annas of the value of all trees cut by the tenant on his holding, after sale. In order to avoid this payment the tenant clandestinely cut down certain trees. He was convicted of this offence.(14)

Of Mischief.

4771. Topical Introduction.—This group of section (ss. 425-440) consists of 16 sections dealing with the offence of mischief, its various and varying phases, the underlying elements in all of which are, however, those here described. Mischief corresponds to the "malicious injuries to property" in the Digest of the English Criminal Law,(15) the leading characteristic of which was described by the English Law Commissioners to be malice as distinguished from fraud. For this purpose, however, there must be malice in fact, or express malice which was described to be "some actual intention to cause hurt, damage, or injury."(16) And an act "is maliciously done or omitted to be done, where being prohibited to be done, it is wilfully done, or being commanded to be done, it is wilfully omitted to be done without lawful justification or excuse."(17)

The terms of this offence are wide, and they were objected to on the ground that it included offences so wide apart as arson and the scuttling of ships. But such was stated to be the effect of the English Law.(18)

In laying down the punishment for different degrees of the offence of mischief, the gradation observed refers to the amount of the loss sustained, a mode of distinction not admitted in estimating the degrees of criminality in other offences against property. But it is not the only circumstance of aggravation, for the Code recognizes the following as equally aggravating:—

(*i*) Value of property (ss. 427, 429).

(*ii*) Mode of mischief—as by killing, poisoning or by fire or explosives, or after preparation to cause hurt (ss. 428, 440).

(*iii*) Utility of the subject of mischief, *e.g.*, public road, bridges, river, channel or works of irrigation (ss. 430, 431), houses (s. 436), ships (s. 437), etc.

(*iv*) Its probable consequences—as by the destruction of landmarks, lighthouses, etc.,(ss. 432, 433).

The last three regulate the degree of criminality generally in the Code.

(14) *Panche Mandar*, 57 I. C. (Pat.) 273, 21 Cr. L. J. 609.
(15) First Rep., s. 603.
(16) First Rep., s. 604.
(17) *Ib.*
(18) *Ib.*, s. 606.

The provisions of these sections generally correspond with those of the Malicious Damage Act, 1861,[19] and the subject is sometimes also treated under malicious mischief.[20] The rules of English Law generally correspond with these sections, but there are points on which the two materially differ. This will, however, be the subject of reference under the various sections which present such coincidences and contrasts.

Mischief.

425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief."

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations.

(*a*) *A* voluntarily burns a valuable security belonging to *Z* intending to cause wrongful loss to *Z*. *A* has committed mischief.

(*b*) *A* introduces water into an ice-house belonging to *Z* and thus causes the ice to melt, intending wrongful loss to *Z*. *A* has committed mischief.

(*c*) *A* voluntarily throws into a river a ring belonging to *Z* with the intention of thereby causing wrongful loss to *Z*. *A* has committed mischief.

(*d*) *A*, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to *Z*, destroys those effects, with the intention of thereby preventing *Z* from obtaining satisfaction of the debt, and of thus causing damage to *Z*. *A* has committed mischief.

(*e*) *A*, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. *A* has committed mischief.

(*f*) *A* causes a ship to be cast away, intending thereby to cause damage to *Z*, who has lent money on bottomry on the ship. *A* has commited mischief.

(*g*) *A*, having joint property with *Z* in horse, shoots the horse, intending thereby to cause wrongful loss to *Z*. *A* has committed mischief

(*h*) *A* causes cattle to enter upon a field belonging to *Z*, intending to cause and knowing that he is likely to cause damage to *Z*'s crop. *A* has committed mischief.

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(19) 24 & 25 Vict., c. 97. (20) Arch., Cr. PL. (22nd Ed)., p. 633.

Synopsis.

(1) *Analogous Law* (4772-4773).
(2) *Principle* (4774).
(3) *Meaning of Words* (4775).
(4) *What is Mischief* (4776-4783).
(5) *Accidents* (4777).
(6) *Negligence* (4778-4779).
(7) *Right of Ownership* (4780).
(8) *Mischievous Harm* (4781-4782).
(9) *Legal Act with Criminal Intention* (4783).
(10) *Bona Fide Claim Excepted* (4784).
(11) *What is Damage* (4785).
(12) *But Erroneous Belief in Right Excepted* (4786-4789).
(13) *Cutting of Trees* (4787).
(14) *Bona Fide Mistake Excepted* (4790).
(15) *Mischief must Affect Property* (4791).
(16) *Destruction: Change in Situation: Injury* (4792-4793).
(17) *Case of Mischief* (4794).

4772. Analogous Law.—Though the offence here defined is designated "malicious injury to property" still, it is for all practical purposes an offence in which malice is presumed from the nature of the act and need not be proved. So Tindall, C. J., told the Grand Jury at Bristol: "Where a Statute directs that to complete an offence, it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law when a man wilfully does that which is illegal, which, in its, necessary consequence, must injure his neighbour, and it is unnecessary to observe that the setting fire to another's house whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him.[21] Similarly it has been laid down in other cases, that it was not necessary to prove express malice in a case of malicious injury to property,[22] and the definition of mischief is in accordance with this view.

4773. For the rest, the English Statute is more specific in its definition of indictable mischief. For instance, it punishes riotously demolishing houses[23] or riotously damaging them,[24] entering houses to destroy silk goods,[25] destroying agricultural machines,[1] flooding mines,[2] and other injuries relating thereto,[3] exhibiting false signals,[4] and doing other acts tending to the immediate loss of a ship,[5] arson and the like for which the Code makes correspondingly specific provisions. There is however no general offence of mischief to correspond with the next section in English Law, nor is its definition either so precise or comprehensive.

A definition was indeed framed by the English Law Commissioners for their Digest, but as it never became law, English Law remains without any definition of mischief.

(21) *Newill*, R. &. M. C. C. R. 458.
(22) *Davies*, 1 F. & F. 69; *James* v. *Phelps*, 11 Ad. & E. 483; *James*, 8 C. & P. 131.
(23) 24 & 25 Vict., c. 97, s. 11.
(24) *Ib.*, s. 12.
(25) *Ib.*, s. 14.
(1) *Ib.*, s. 15.
(2) *Ib.*, s. 28.
(3) *Ib.*, s. 29.
(4) S. 47.
(5) *Ib.*

4774. Principle.—This section enacts a rule of which the maxim *Sic uteri tuo ut alienum non laedas*[6] is but a partial exponent. It enacts a rule which while preserving to the owner the maximum rights of property, prevents his using it to the injury or damage of another, and *a fortiori* it punishes one who wantonly causes such injury or damage to another's property. Neither malice nor an intention to cause the injury is essential for the constitution of the offence which may be committed by injury caused with only the knowledge of likelihood, which must, however, be strictly proved.[7]

4775. Meaning of Words.—*"With intent to cause or knowledge that he is likely to cause"*: The distinction between an intention and knowledge of likelihood will be found discussed under s. 299 (§§ 3027-3037). From the examples there given it will be evident that there may be the knowledge of likelihood without intention, though the converse proposition is not always necessarily true. *"Wrongful loss or damage," i.e.*, without any corresponding gain or profit. No loss is wrongful if it is caused in the *bona fide* exercise of right over one's own property.[8] *"Causes the destruction of any property"*: The term "destruction" implies the causing of injury to the property by destruction—as by the demolition of a watercourse. So the cutting of green crops before they were ripe for harvesting would be mischief. The term "property" is here used in its wide sense as comprising both moveable and immoveable property. It does not however include incorporeal or intangible property such as an easement.[9]

Explanation 1.—This merely means that A may cause mischief to B's property so as to injure not B but C, as in illustration (*e*).

Explanation 2.—In fact as is pointed out in illustration 2, such mischief may be caused by A to his own property as in the illustrations *(d)* and *(g)*.

4776. What is Mischief.—The word "mischief" here defined has been used in a special sense as a term of art as implying the causing of such unlawful injury to property as is punishable by law. The first and its most essential element is the intent to cause, or knowledge that he is likely to cause, wrongful loss or damage to the public or to any person. This furnishes the *mens rea* but for which there can be no offence. In some cases the offence is said to lie in the intention[10] but this is inaccurate, for as is apparent from the section, the offence may be equally committed if there is no intention but merely a knowledge of likelihood, the question of intention being then material only as regards the sentence.[11]

But the question of intention and knowledge suggests another question: Should it be actual intention or knowledge, or such as may be presumed from the nature of the act ? It has been elsewhere point-

(6) "Use your own property so as not to injure that of another."

(7) *Benarsidas*, 4 L. L. J. 482, (1922) P. L. R. 53; *Hari Singh*, 52 I. C. (Pat.) 276, 20 Cr. L. J. 612.

(8) *Kondi Chetty*, 8 M. L. T. 385, 8 I. C. 128; *Fateh Din*, (1909) P. R. No. 14, *Muhammad*, 5 I. C. 560.

(9) *Keru*, (1888) B. U. C. 387.

(10) *Per* Kembell and Nanabhai, JJ., in *Shama*, (1874) B. U. C. 88.

(11) *Per* Jardine and Ranade, JJ., in *Rev Sing*, (1894) B. U. C. 690

ed out that the Code has no place for what is sometimes called secondary intention or knowledge. Whenever criminality in the Code depends upon the presence of intention or knowledge, it requires proof of the actual or primary intention or knowledge and not merely of a presumed state of the mind which, though admissible in English Law, is not consistent with the conception of crime in the Code.(12) But of course, while what the Court has to find is the primary intention, still the Court is well justified in inferring it from the nature of the act and the circumstances surrounding it. But what it has to find is the real and not a hypothetical intention or knowledge, though in most cases it is a matter of inference rather than of direct proof. As such it is a question of fact and not of law. But being a part of the definition of the offence it must be established by the prosecution, who must establish facts and circumstances from which the jury or the judge may justifiably infer the presence of the intention or knowledge, which makes the injurious act criminal. Such act must then negative a reasonable inference that it could be due to any other state of the mind, such as accident, carelessness or negligence, or *bona fide* belief in one's right.

Accidents.

4777. The question of accident presents no difficulty. Accident and misfortune may lead to a consequence of which the author is an involuntary agent. He may be perhaps guilty of recklessness or negligence, but his recklessness or negligence is too remotely connected with the effect, and at any rate the effect is caused in a manner which he could not have foreseen. Such was the case of the accused, who whilst driving his bullock cart ran against the carriage of a Colonel Lucas, who ordered him to get out of his way, whereupon he pulled the bullock in the wrong direction, thereby dashing the pole of his yoke against the footboard of the prosecutor's cart causing it damage. The Magistrate fined the accused under the next section, but the conviction was of course set aside on revision by the Court, who held it to be an accident due to the accused's stupidity, and for which the Magistrate had "lamentably failed in his duty for holding the accused to be criminally liable."(13) Of course, the prosecutor might have recovered damages in tort if he had brought action in the Civil Court, but it was not a case of mischief.

In another case the Magistrate had similarly erred in convicting the accused of this offence for having damaged a bridge as they were floating some timber through it, but the conviction was again set aside.(14) The accused set fire to some rubbish in his field which was close to a protected forest. The fire was carried by the wind to the adjacent protected forest and set fire to it. The accused tried to subdue the fire but failed. The Magistrate convicted him of mischief holding that as the accused set fire to the rubbish in such close proximity to a Government forest, he knew that he was likely to cause destruction by fire to Government property, if he did not take precautions to prevent the spreading of the fire he had lit, and he

(12) Gen. Intro., §§ 58-60.
(13) *Shama*, (1874) B. U. C. 88.
(14) 5 M. H. C. R. (App.) 40.

took no real precaution. But on revision it was held that the accused was merely guilty of negligence, in not preventing the spread of the fire, but he could not be held guilty of this offence, for he could not be said to have *caused* the destruction of the Government forest within the meaning of this section.(15)

Negligence.

4778. So an act may be negligent but it is not necessarily mischievous. Such was the case of the accused who negligently allowed one's bullocks to stray into another's garden, which uprooted the vegetables and plants causing loss to its owner;(16) or one whose buffaloes strayed into another's wheat-field causing damage to the crop and against which the accused took no precaution.(17) All these were cases of illegal omissions, but even an illegal omission may amount to mischief, if, for instance, the owner of cattle, who, knowing them to be not properly provided with fodder and accustomed to stray in search of food, intentionally omits to secure his cattle or neglects to take reasonable precautions for their care and custody.

The omission or neglect, however, must be such as to have an active effect conducing to the result, as a link in a chain of facts from which an intention to bring about the result may be inferred.(18) For this purpose it would be admissible to show that the accused was in the habit of letting his cattle into other people's pasture, or that he let them to graze at night in the vicinity of gardens, knowing well that they are likely to trespass therein. In such a case it may well be said that the accused causes his cattle to enter into those gardens within the meaning of illustration (*b*). So a person who lets loose his cattle near another's field in spite of remonstrance and promise to take better care of them in future, may be justly held to have caused his cattle to enter therein with knowledge of the injury they were likely to cause, and as such he could not be acquitted of his intention to commit this offence.(19)

4779. But the terms of this section should not be unduly enlarged. And in the case of straying cattle, it is not permissible to presume an intention or knowledge of likelihood from the mere fact of repeated trespass and its non-prevention,(20) unless it justifies an inference that the owner knew that it was likely to cause loss or damage to the public or to any person.(21) Such knowledge may be justifiably inferred from the owner wilfully driving them into another's land,(22) or where the omission to take care of them is such as justifies a finding that it was only reasonably consistent with such knowledge as in the case already cited.(23) Such inference was, for instance, held to be reasonable in a case where the defendants grazed their cattle on waste land on which the Government had by notification prohibited

(15) *Nandeyappagowda*, 8 Bom. L. R. 851.
(16) *Narsu*, (1882) B. U. C. 185; *Hyderally*, (1884) B. U. C. 199.
(17) *Rangu*, (1883) B. U. C. 189; *Anon*, 6 M. H. C. R. (App.) 36.
(18) *Thornotti*, (1886) 1 Weir 495.
(19) *Aruz Sircar*, 10 W. R. 29.
(20) *Forbes* v. *Grish Chunder Bhuttacharjee*, 14 W. R. 31.
(21) *Baibaya*, 7 B. 126; *Anon.*, 6 M H. C. R. (App.) 36.
(22) *Sheik Raju*, 9 B. 173.
(23) *Thornotti*, (1886) 1 Weir 495.

the public from grazing cattle, another plot being set apart for that purpose. The accused turned their cattle into the prohibited area, whereupon the Court held that though the accused had a right to graze in the Government waste, still their grazing them in the prohibited area constituted mischief, inasmuch as it caused wrongful loss to Government of the grass which the cattle consumed, which thereby caused the *destruction* of some property, namely the grass.(24) In such a case the *motive* of the accused may have been to provide his cattle with more abundant pasture than was available in the permitted area, but this could not be taken into consideration in judging of the offence (§ 253).

Right of Ownership.

4780. Another fact negativing this offence is the assertion of the right of ownership in exercise of which the accused is entitled to make use of his property, though it may cause damage to others. The accused had purchased the complainant's house in execution of a decree against him. He obtained symbolical possession but the complainant refused to vacate it whereupon he set fire to it. He was held justified in destroying what was his own property.(25) If a person removes a building constructed without his consent on his land, when the constructor of the building had no right to erect it, and had acquired no right to retain it, he cannot be convicted of this offence, because the loss he has caused is not a wrongful loss.(1)

So on a mortgage of a building, the mortgagor does not cease to be the owner of the property, and he and his heirs continue to enjoy the same rights of property subject however to the right of the mortgagee. But such right was in no way imperilled by the mortgagor's reversionary heir having sold some of the materials of the house, which had tumbled down during a flood, for the sum of Rs. 18 and which were otherwise lying perfectly useless on the ground. It was held that the accused had neither the dishonest intention, nor indeed did it materially affect the mortgagee's interest so as to make the act punishable as mischief.(2) In another case the two accused had dammed up their water channel causing inundation into and damage to the complainant's field. He prosecuted them for mischief, but the Court held that as there was doubt as to the *bona fides* of the accused, there could be no conviction for mischief adding that *prima facie* a man had a right to do what he liked with his own, and if his action indirectly prejudiced his neighbour, the latter's ordinary remedy was in the Civil Court.(3)

Mischievous Harm.

4781. But it will not warrant a wanton destruction of property merely in assertion of such a right. So where the prosecutor cultivated a plot of land having rented it from B, but before the produce was harvested the accused

(24) *Gurram Siddugadu*, (1886) 1 Weir 492.

(25) *Ram Krishna Singh*, 3 Pat. L. J. 335; 66 I. C. 817, 23 Cr. L. J. 321; *Kesho Singh*, 72 I. C. 883, 24 Cr. L. J. 467 (The owner is entitled to block his own channel); *Kullappa*, (1920) M. W. N. 131, 54 I. C. 617, 21 Cr. L. J. 137 (or to cut open his own bund).

(1) *Grove (Daniel)*, 1 Weir 489.

(2) *Bhuban Mohan Banerjee* v. *Tansuk Ray*, 6 C. W. N. 34.

(3) *Kondi Chetti*, 8 M. L. T. 385, 8 I. C. 128.

entered upon the land, assaulted the complainant and carried away some of the produce trampling on and destroying whatever remained, the lower Court held that the prosecutor had proved his possession, and the accused his title to the land, and therefore in the exercise of his right of ownership the accused was entitled to destroy the crop, but Kindersley, J., held that even if the accused was the owner of the land he was not justified in establishing his right by violence but by a civil suit, though the Court declined to interfere with the acquittal.(4)

The owner of land has a right to eject a trespasser, but he has no right to destroy whatever property of the trespasser the owner may find on the land. If the trespasser be found using the owner's tools on the land trespassed upon, he may destroy them, for the tools are his own. But if the tools belonged to the trespasser he might be guilty of mischief if he destroyed them, though they were being used upon his land. The complainant held land of the accused, and his lease terminated though he continued to hold on, but he was found to have no right and was in fact a trespasser. The accused went up to him and snatched his ropes used for watering the land and as protest against his possession threw them into the well, whereupon he was convicted of this offence, and his conviction was affirmed by Batty, J., who held the act of the accused to be unjustifiable, adding: "The applicant's pleader, I understand, is unable to contend that if a trespasser left his watch in the room of another person, that would justify that other person in smashing the watch or throwing it down a well.(5)

4782. Mischief implies the causing of wrongful loss or damage and no loss or damage is wrongful unless it involves invasion of a legal right. In any other case it is *Damnum sine injuria.*(6) (§ 362). So if A build a mill near to B's on purpose to diminish his profits, he intends to cause damage to B but A's act is neither punishable nor actionable becaused it is perfectly legal. So where A and B were joint owners of a parcel of land whereon A erected an edifice without the consent of B who sued him and obtained a decree for its demolition, and whereupon B's servants went and pulled it down, it was held that they could not be convicted of this offence because their act had caused no wrongful loss to A.(7) The same view was taken of the accused who removed an illegal obstruction put up by the Municipality, which the accused removed as it barred his right of way.(8)

The same view was also taken of the owner of a bullock, who buried its carcass to prevent its being skinned by the village skinner, and who had apparently a right thereto, but who would presumably have duly become entitled to the skin if the owner had abandoned his right of property in the carcass. The case was, however, held to be one involving merely an infraction of a civil right.(9) So a person could not be convicted of mischief for demolishing a wall which another has

(4) *Vengappaiyan*, (1883) 1 Weir 491.
(5) *Dinkar*, 7 Bom. L. R. 86 (87).
(6) "Damage without injury."
(7) *Rajcoomar Singh*, 3 C. 573.
(8) *Abdul Aziz*, (1895) B. U. C. 745.
(9) *Govinda Panja*, 8 B. 295.

erected on his land.[10] But if so why should the owner be held liable for uprooting the standing crops grown by a trespasser upon his land? It is submitted that in such cases criminality depends not so much upon the act of the accused, as upon his intention and knowledge of the likelihood of causing loss or damage to the public or to any person. If the act itself is legal then the question of intention becomes immaterial.

Legal Act with Criminal Intention.

4783. But even the assertion of a legal right may involve the doing of an illegal act, and in that case the question of intention and knowledge may convert an innocent act into a criminal act. The accused dug up some of the graves and removed the stones placed over some of the graves in order to extend his cultivation. It was held that though the primary object of the accused was to extend his cultivation, still he was guilty of mischief as his act involved such a change in the graves as would injuriously affect them, if they could be treated as property. The Court could not say that they were not property so as not to be the subject of trespass or mischief, and it held the accused to possess the knowledge that the act was likely to cause such a change in the property as either to prevent its identification or affect it injuriously.[11] But in this case it was found that though the graves stood on the accused's land, they belonged to a class of persons by whom a care-taker was appointed to look after them. The case would have been different if they had been discarded graves in possession of the accused, or such in which another person had not a vested right.[12] Such was the case of the accused who cut down his tree under which the idol of a god had been for years exhibited once a year for public worship, and whereupon he was prosecuted for this offence, but it was held that that fact alone did not amount to a dedication of the tree to the idol or the public in the absence of which the accused could not be divested of this right of ownership.[13]

4784. Bona Fide Claim Excepted.—The principle deducible from these cases is then this, that while there can be nothing wrong in the owner exercising the ordinary rights of property, his act becomes wrongful if in the exercise of that right he infringes the right of another, and his act would amount to this offence if it is done with the intention or knowledge so as to cause "wrongful loss or damage to the public or to any person."[14] Now the causing of wrongful loss implies the causing of loss by *unlawful* means of property to which the person losing it is legally entitled. Such loss, therefore, implies the adoption of an illegal means to cause an illegal loss, which again implies the existence of some right over the accused's property. That right may not be capable of separate enjoyment or possession. It may be even inchoate and undefined but still it must be in the nature of a right, as in the illustration (*d*). Such a right comes into existence in favour of a purchaser of immoveable property on the formation of a contract for its sale, though it is declared by civil law that it does not of itself create any interest in or charge on the property.[15]

(10) *Sankar Lal*, (1887) A. W. N. 101.
(11) *Rumala Nagayya*, (1889) 1 Weir 496.
(12) *Chotu Ally*, 4 Bom. L. R. 463.
(13) *Venkata Purnandam*, (1902) 1 Weir 496.
(14) *Packriya* v. *Muthukrishna*, 11 M. L. W. 348, 56 I. C. 510, 21 Cr. L. J. 478; *Dharmalinga*, 39 M. 57.
(15) S. 54. Transfer of Property Act (IV of 1882).

Where therefore the accused's land was sold by the Collector, and purchased by the complainant, who paid a portion of the purchase-money in accordance with the sale law under which the sale was to be confirmed on expiration of sixty days. Before the expiration of this period the accused cut down some of the fruit trees standing on the holding, and he was thereupon charged for this offence, it was held that this offence may be committed not only when the damage consists of the infringement of an existing present and complete right, but also when it is intended to defeat and render infructuous a right about to come into existence. The Court referred to illustration (*d*) and added: "A very little alteration in the words makes the case fit the present. A, knowing that his property has been sold in satisfaction of a public demand in order to satisfy that public demand, and that the purchaser's title will, after the lapse of sixty days, become final and conclusive, destroys the fruit trees upon the land with the intention of thereby preventing the purchaser from obtaining the benefit of the purchase he has made, under which his title now inchoate, will become final and conclusive after sixty days: A has committed mischief."[16] But where an act is done in the exercise of a right of ownership in which another has no interest there can be no mischief. So while A would be guilty of mischief if he shot down a horse which he owned jointly with Z intending thereby to cause loss to Z,[17] A could not be convicted of that offence if the horse was his sole property. So it was put to the Law Commissioners if A, a collector, having a duplicate specimen of a rare coin, painting or other article of vertu was guilty of this offence if he destroyed it so as to enhance the value of the other, and to which the Commissioners had no difficulty replying in the negative, for by destroying what is his own property he causes no wrongful loss to any person.[18]

What is Damage ?

4785. But the collocation of "damage" with wrongful loss may suggest a question whether that term was intended to enlarge the meaning of the other. It is apprehended that the term is used *ejusdem generis* with "loss" as implying an unlawful loss, and not merely a pecuniary loss or inconvenience caused by the act of another. Indeed, such loss cannot be even the subject of a civil action, much less of a criminal prosecution. The term "damage" must then involve invasion of a right, though it does not necessarily contemplate damage of a destructive character, but it does imply diminution of the value of one's property caused by that invasion of right, which to be punishable as mischief must have been contemplated by the doer of it when he did it.[19]

The accused was the servant of the owner of a *hat* in which the complainant had a stall. He, however, wanted to shift it to another *hat*, and for that purpose loaded his goods in a cart when he was accosted by the accused who refused to permit him to shift, but on the complainant's insisting upon it he overturned his cart throwing the boxes on to the road. He was convicted of wrongful restraint, but the Court held it to be a

(16) *Dharma Das Ghose* v. *Nusseeruddin*, 12 C. 660.

(17) Ill. (*g*).

(18) First Rep., s. 609; *Ram Krishna Singh*, 3 Pat. L. T. 335, 66 I. C. 817, 23 Cr. L. J. 321; *Kesho Singh*, 72 I. C. 883, 24 Cr. L. J. 467; *Jang Bahadur*, 93 I. C. 40, (1926) Pat. 244.

(19) *Per* Pigot, J., in *Juggeshwar Dass*, 12 C. 55.

case of mischief, adding: "There was an unlawful removal of goods from the cart, and an unlawful change in their situation, with the knowledge that that change must amount to an inconvenience, more or less serious, to the owner of the goods, and must, to some extent, diminish the utility of the goods which it was desired to remove from one place to another by the fact of their being cast out of the conveyance in which they were to be removed. To that extent the utility of those goods was diminished and to that extent they were injuriously affected."(20) As remarked before, there can be no offence where the act though legal is done with malicious intent, as where a person sets up a rival establishment to ruin his neighbour by competition, in which case, the competition being legal the setting up of a rival establishment cannot be relieved against, because it is not illegal. It is in short a case of *Danum sine injuria*, of a damage without an injury.

But Erroneous Belief in Right Excepted.

4786. There can be then no mischief without the invasion of a right. But all invasion of a right, though wrongful, is not mischievous which involves an intention to *cause* damage or knowledge that he is likely to cause it. Now there can be neither such intention nor knowledge when the right is itself the subject of dispute, and when what is done is itself in vindication of a right. The accused were the servants of a zemindar B who claimed a right to fishery which was claimed by another zemindar A, and who obtained a decree in the Civil Court declaring his right thereto, but to which B was not a party. A's servants put up a bar across the watercourse to prevent the escape of fish, which the servants of B removed as an obstruction to the enjoyment of their right. They were convicted of mischief, but on revision the High Court quashed the conviction, holding that the accused could not have been convicted without a finding that A was entitled to the fishery as against B, and that the act of the accused was done on purpose to cause wrongful loss to A and that it was not done in good faith for the protection of their master's interests, and for repelling what they believed to be an unlawful intrusion on the part of A. If the accused really acted in the belief that the fishery belonged to their masters, it could not be said that in removing a bar which interfered with that fishery they acted with intent to cause or knowing they were likely to cause injury to A. Such belief was perfectly consistent with A's decree by which B was not bound and of which the accused may have had no knowledge, if their act had been in its nature malicious and wanton, and one which could have had no other object than that of the injury or destruction of the property, or to prevent the title to the property being ascertained, or otherwise to injure A.(21)

The determination of a right to fishery involves the determination of an intricate question of civil right, for as has been already seen (§§ 4072-4073) it is not in every case that fish is capable of private ownership,(22) but where a right to fishery is once established, any invasion of that right would constitute as much this offence as theft. For this purpose the

(20) *Juggeshwar Dass* v. *Koylash Chunder Chatterjee*, 12 C. 55.

(21) *Bakar Halsana* v. *Dinbandhu*, 12 W. R. 1.

(22) As to when they are, *see* s. 378, §§ 4072-4073; and *Mayaram Surma* v. *Nichala Katani*, 15 C. 402; *Bhagiram Dome* v. *Ahar Dome*, 15 C. 388.

Indian Fisheries Act[23] divides water into private waters and public waters, the latter of which alone has been specially legislated for,[24] a person being liable to a conviction thereunder though he may not be punishable for mischief. But a person may be punished for mischief if he commits an act which amounts to that offence in a "private" water though he could not have been punished under the Indian Fisheries Act. Such a case arose where the two rival persons had right to fish on either bank of a river; one bank which was the property of Government being leased to the prosecutor, while the other bank was the property of a private owner who had leased his fishery right to the accused. The latter diverted the course of the river so as to reduce a section of it to practically dry land and thereby destroyed a quantity of mature and immature fish. He was convicted of mischief, and it was held that by diverting the course of the stream the accused knew of the damage he was likely to cause to the prosecutor. He was therefore guilty of this offence, as he had caused a change in the stream or in the situation thereof and diminished its value or utility within the meaning of this section.[25] In this case the question of the accused's good faith was not considered.

A person is justified in exercising not only his private right but also his public right. The complainant had encroached on the site of a public road and built upon it. The accused, as a member of the public pulled down the construction and exercised his right of way. He was held justified.[1] So a mortgagee (presumably in possession) was held justified in cutting down some trees on the property mortgaged to him in order to repair another part of the mortgaged premises; it being held that the waste even if excessive could be adequately compensated for in the accounts between mortgagor and mortgagee.[2] So where the tenant removed some earth from zemindar's land and pleaded a customary right, the Court threw out the case observing that criminal Courts were not intended to decide civil dispute, and that the one under reference was too petty to be the basis for conviction under s. 426.[3]

4787. Cutting of Trees.—The right to cut down trees standing upon the tenant's land has given rise to several prosecutions for mischief, in which it has been held that if the cutting was protected by a plausible claim it cannot be punished as mischief whether the motive in cutting the trees was *mala fide* or dishonest.[4] The question in such cases is, was the cutting at least defensible on the ground of a *bona fide* claim,[5] a *bona fide* dispute,[6] or at least a *bona fide* mistake (§§ 4789-4790).

4788. An illegal act done in the belief that it is legal is a good defence to a criminal prosecution for an offence in which the criminality depends upon the presence of criminal knowledge or intention. The

(23) Act IV of 1897.
(24) *Ib.*, s. 6.
(25) *Chanda*, 28 A. 204. To the same effect, *Ramakrishna* v. *Palainyandi*, 1 M. 262, F. B.; *Athimoolam* v. *Palaniyandi*, (1920) M. W. N. 131, 54 I. C. 617, 21 Cr. L. J. 137; *Jaganath*, 10 B. 183.
(1) *Dharmalinga*, 39 M. 57.
(2) *Ramasamier*, 1 M. L. W. 274, 23 I. C. 498, 15 Cr. L. J. 290.
(3) *Hukum Chand*, 73 I. C. 805, 24 Cr. L. J. 693, (1923) A. I. R. (A.) 544.
(4) *Sham Lal Lohan*, 5 Pat. L. W. 114, 46 I. C. 409, 19 Cr. L. J. 729.
(5) *Pitam Singh*, 58 I. C. (A.) 828, 21 Cr. L. J. 828, *Gerish Chandra* v. *Akhay Kumar*, 62 I. C. (C.) 331, 22 Cr. L. J. 507.
(6) *Gainu Panday*, 68 I. C. (M.) 40, 23 Cr. L. J. 504.

prosecutor was a tenant of the accused B's employer, and as his rent fell into arrear the latter obtained a distress warrant the execution of which was entrusted to the accused A, who accompanied by B proceeded to execute it, and in doing which they forced open the complainant's lock, which neither had any right to do. They were both convicted of this offence, but the High Court quashed their conviction holding that neither could be held to possess the knowledge of causing wrongful loss, and as for A his act was further protected under section 79. The proper remedy of the complainant was a civil suit for trespass, but it was not a case of mischief.(7)

Such was the view taken of the owner of a dead bullock who buried its carcass to prevent its being skinned by the village Mehar who claimed a right to it, which was held to be a mere infraction of a civil disputed right and in nowise a case of mischief.(8) The accused who demolished the wall constructed on his land by the complainant who was found to be a trespasser, stood on a higher ground, for his act though wanton, could not be wrongful. As Tyrrell, J., observed: "Whatever loss might result to the complainant from interference with his building materials, it is plain that such loss.....would not have been wrongful, inasmuch as he was not wrongfully kept out of, or deprived of, the wall in question, the placing of which on Shanker's land was wrongful on his part."(9)

4789. But this view should not be pushed too far, for otherwise what should we say of the owner who uprooted the immature crops grown on his land by a trespasser (§§ 917, 4767). The true test in such cases appears to be: was the act done out of malice or in the assertion of a *bona fide* claim of right.(10) Of course, such a claim may be legal or illegal. If legal, the question of *bona fide* does not arise, for if the act was legal, the question of intention is immaterial (§§ 917, 4767). It is only when the act is indefensible on the ground of its legality that the question of a *bona fide* belief arises. But there can be no *bona fide* belief where the act manifestly was, or known to be, illegal. That plea has a place only in case of a doubtful right, or a right which a person may still believe in as his own.

The appellants and other members of a Christian congregation were found to have had a joint interest in a graveyard, which was in the possession of the complainant who was their priest, and who had the key of the gateway. The appellants asked his permission to bury a deceased person. It was refused. The appellants thereupon broke open the gate and buried the deceased. They were prosecuted for this offence, but it was held that as they had the right of burial in the graveyard, they were justified in breaking open the gate using no more force than was necessary if the priest refused them admission. They were in any case protected because they acted in the exercise of a *bona fide* claim of right.(11) This was the *ratio decidendi* of the case in which the accused who were members of a Municipal Committee permitted a tree standing within the Municipal limits

(7) *Kaikhusro*, (1898) B. U. C. 949.
(8) *Govinda Punja*, 8 B. 295.
(9) *Shankar Lal*, (1887) A. W. N. 101.
(10) *Per* Brodhurst, J., in *Rustam Ali*, (1882) A. W. N. 209; *per* Muttusami Aiyar, J., in *Jagannathan*, (1892) 1 Weir 490.
(11) *Viagula Fernandez*, (1890) 1 Weir 489.

to be cut down for a public purpose against a formal order of the Municipality.(12)

4790. Bona Fide Mistake Excepted.—In order to exculpate the accused it is not sufficient merely to assert a claim of right, for if it were so, such assertion would be readily made in every case where it is said that the accused is protected if he deals injuriously with the property of another. What is meant is, that law cannot punish a man for a *bona fide* mistake, and that if he really though erroneously believed that he had the right to do the act he did, he is protected not because he causes no loss nor because it is not actionable, but because his act was not committed *with intent* to cause wrongful loss or damage to any person.(13) The question whether the act of the accused was such as to amount to mischief raises the question whether the act was done in the assertion of a claim of right, and it would not therefore be a question which the accused is bound to plead in his defence, provided that the plea may equally be established from the evidence on record.(14) Such a person acts on a misconception of facts, and his knowledge or intention must then be judged on the assumption of those facts in which he believed.

So if a person being ignorant of the true boundary of his land removes a building from land he in good faith believes to be his own, he cannot be convicted of this offence inasmuch as he acts on a misconception of fact, provided that he does no more than he believes himself justified in doing in the view he entertains of the ownership of the land.(15) It is no fact rebutting the plea of a *bona fide* claim of right that the accused's right to do the act had long since been the subject-matter of dispute. For impulsive action is not an invariable index of *bona fides*. So where there was a longstanding dispute about a wall between the prosecutor and the accused and who one day ordered his servant to pull it down to enforce his right, which he did, the accused constructing a new wall in its place, it was held that the dispute was one for settlement by the Civil Court.(16) The same view was taken by the Bombay Court of the accused who put up a hut on a piece of land, to protect the right he believed himself to possessed, which the complainant had been disputing for years.(17)

4791. Mischief must Affect Property.—The offence of mischief must affect some property in one of the injurious modes, described in the section. If a thing was not property within the meaning of the law, then there can be no mischief, whatever may have been the nature of the act The term "property" as here used means and includes only tangible property and not merely an easement.(18) So where the accused was found to be the owner of a staircase to which the complainant had the right of use, it was held that the accused's destruction of the building with the staircase could not be punished as mischief, because the destruction of the

(12) *Amir Chand*, (1878) P. R. No. 9.
(13) S. 23; *Budh Singh*, 2 A. 101.
(14) S. 102, Indian Evidence Act (I of 1872). *Madhu Sudan* v. *Sasti Prosad*, 7 C. W. N. 859; (1881) 1 Weir 488; *Issur Chunder Mundle* v. *Rohim Sheikh*, 25 W. R. 65.
(15) *Grove* (*Daniel*), (1882) 1 Weir 488 (489).
(16) *Jagannathan*, (1892) 1 Weir 490; *contra* in *Mahadeo*, 96 I. C. 210, (1926) A. 704, decided upon its own facts.
(17) *Nandu*, (1889) B. U. C. 465.
(18) *Keru*, (1888) B. U. C. 387.

staircase led only to the destruction of an easement which the complainant had acquired over the staircase.[19] For the same reasons, things which are *nullius proprietas* cannot be the subject of this offence (§§ 4077-4082). But if a thing is " property " in the sense in which that term is understood in law then it may be the subject of this offence, though it may be practically valueless. The accused received a registered postal article, but being called upon to sign its acknowledgment he tore it up, whereupon he was prosecuted for this offence and Chatterji, J., convicted him holding the receipt to be the property of the Post Office having some value, however small, the tearing of which caused wrongful loss to its owner which the accused was likely to know. He was consequently convicted and fined two rupees.[20]

In another case the accused was convicted for destroying two documents which were both immoral agreements whereby the complainant permitted his wife to live in adultery on her foregoing her claim to maintenance. It was reported to the High Court that inasmuch as the consideration for the agreement was immoral, the documents were worthless and their destruction therefore did not constitute mischief. But it was held that as one of the documents contained a declaration that she had no right of maintenance against the accused, and as both of them might be used as evidence of the adultery on the part of the wife and of the cessation of the liability to maintain her on the part of the husband, they were both property the destruction of which was sufficient to constitute this offence.[21]

4792. Destruction: Change in Situation: Injury.—Besides the necessary criminal intent, the next essential requisite of this offence is the causing of " destruction of any property, or any change in any property, or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously."[22] These words imply a physical injury from a physical cause. They do not include any metaphorical injury to property by affecting it ritually. Such was the case of the accused who attended a caste dinner and being late asked those who had already seated themselves to move elsewhere, which they declined, whereupon the accused threw down a shoe in front of the diners which made the food ritually impure, and in consequence of which the guests refused to partake of it and left in confusion. The Magistrate convicted the accused of this offence, but Blair, J., held it to be inapplicable to such a case.[23] So there can be no destruction where the standing crops of another are cut when they are mature for harvesting;[24] but if they are cut when immature then this offence may be committed. But in any other case the taking may cause wrongful loss to the grower, and if it be dishonest, a conviction may be had for the theft. But it cannot be mischief. If, therefore, a person is accused of mischief, by cutting paddy, it is not sufficient for the prosecution to prove that he cut it under the circumstances so as to make it mischief, but it is necessary to prove, and the Court must find it also, that the paddy was unripe and not in a fit state to be cut when it was cut by the accused.[25]

Meaning of Injury.

(19) *Keru*, (1888) B. U. C. 387
(20) *Sukha Singh*, (1905) P. R. No. 24.
(21) *Vyapuri*, 5 M. 401.
(22) *Fateh Din*, (1909) P. R. No. 14, 4 I. C. 863.
(23) *Moti Lal*, 24 A. 155.
(24) *Nga Si*, (1903) 10 Bur. L. R. 126 *Mohomed Foyaz* v. *Khan Mahomed*, 18 W. R. 10.
(25) *Miras Chowkidar*, 7 C. W. N. 718 (714).

4793. So where the accused was convicted of this offence for having forcibly cut and removed certain bamboos standing on his land, the Court quashed the conviction holding that as bamboo was a thing which is grown to be cut, the cutting and removing it could not amount to the destruction or other injury here contemplated.(1) The same view was taken in Madras in a case in which the accused had erected a dam across a river which it was alleged the accused knew was likely to submerge the prosecutor's lands. The accused justified his act by right of an old custom. But the Court threw out the case holding that the construction of the dam did not cause the destruction of any property. It was the alleged probable consequential damage to other property which was the cause of complaint, and though that would authorize increased punishment under section 432, it did not of itself constitute mischief.(2) This was, however, not concurred in by Collett, J., who held it to be mischief on the ground that the dam constituted a change in the river likely to be attended with damage, and affected it injuriously. But it does not appear how the dam injuriously affected the river, though it so affected the adjacent property.

But this was apparently held to be sufficient to constitute mischief in another case of which the facts have been already recapitulated. In that case the prosecutor held a lease of fishing rights of one bank of a river which belonged to the Government, the other bank of which was the property of the accused's lessor. The latter diverted the course of the river by placing dams above and below a certain section which had the effect of reducing that portion to practically dry land. In convicting him of this offence, Richards, J., said: "The accused caused a change in the river and he must have known that the alteration of the river and the destruction of thousands of fish, mature and immature caused thereby, would injuriously affect the Dehra Dun Fishing Association (the prosecutors). I accordingly think that when he deliberately changed the course and condition of the river he was guilty of the offence mentioned in section 426."(3) But in another case of the same Court the view taken harmonizes with that of the Madras High Court. There the accused had maliciously impounded the prosecutor's cattle, so as to cause him to be mulcted in fine which he had to pay. It was held that the offence of the accused did not amount to mischief, in that it had caused no change in the impounded cattle so as to affect them injuriously and that the accused could only have been convicted under the Cattle Trespass Act.(4)

4794. Case of Mischief.—The transition between such cases and those which obviously fall within the definition of this offence is naturally a gradual but a perceptible one. For example, it has been stated before that the owner of land has a perfect right to use his own property in any way he pleases, but he has no right to injure the rights of others which they may have therein or in any other property adjoining thereto. If,

(1) *Shakur Mahomed* v. *Chunder Mohan Sha*, 21 W. R. 38. But some dissatisfaction was expressed with this ruling in *Sonai Sardar*, 25 W. R. 46; *Gamirullah Sarkar* v. *Abdul Sheikh*, 10 C. 408.

(2) *Per* Scotland. C. J., Bittleston and Ellis, JJ., in 4 M. H. C. (App.) 15, Collett, J., *contra*, on the ground that a knowledge of a likelihood to cause damage was sufficient, and placing a dam across an irrigation channel was a change in its situation likely to be attended with damage, and affected it injuriously.

(3) *Chanda*, 28 A. 204: to the same effect *Ram Golam Singh*, 12 W. R. 59 (60).

(4) *Ramjiwan*, (1881) A. W. N. 158.

therefore, the accused trenches upon their rights he may be guilty of this offence, supposing that his act otherwise conforms to the other requirements of the offence. The accused were the servants of a person who owned land up to a certain *jhil* which belonged to the complainant. They cut a channel through that land and extended it to the *jhil* with the result that it ran it dry and destroyed its fish, mature and immature. The Court found that while the accused had undoubtedly a right to cut a channel on their own land, they had no right to cut it through the complainant's *jhil* and thereby cause him wrongful loss or damage of which they could not be unaware, and which act therefore amounted to mischief.(5) As compared to this the act of the accused in cutting down trees standing on his land after its sale to another, presents no difficulty, for it is clearly mischief.(6) So is the notorious habit of the *Gaolis* to let loose their cattle for grazing at large, which is punishable because the *Gaolis* know that their cattle feed upon other people's plants, shrubs and garden produce. In one case the High Court went to the length of reversing on appeal an acquittal by the Sessions Judge, of the owners of cattle which had been ineffectively impounded by the owners of farms upon the produce of which they had fed. The two accused were convicted and sentenced to rigorous imprisonment for 3 months on each count in addition to fine.(7)

For other cases of mischief, *see* the foregoing and ensuing commentary. (§§ 4802-4808).

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Any Mag. Non-cog. Summons. Bailable. Comp. if only private person injured. Summary.

Punishment for mischief.

[*Mischief*—s. 425]

Synopsis.

(1) *Analogous Law* (4795).
(2) *Procedure and Practice* (4796-4800).
(3) *Punishment* (4800).
(4) *Proof* (4801).
(5) *Form of Charge* (4802).
(6) *Evidence of Simple Mischief* (4803-4808).
(7) *Injuring Property When Mischief* (4805).
(8) *Injury Classified* (4806).
(9) *No Mischief* (4809).

4795. Analogous Law.—This section prescribes the sentence for the simple case of mischief as defined in the last section, and not otherwise provided for. It naturally presupposes the loss or damage done by the act to be below Rs. 50, for if it amounts to that sum, the offence is then subject to the higher penalty prescribed in section 427.

4796. Procedure and Practice.—This offence is not cognizable and summons should ordinarily issue in the first instance. It is bailable,

(5) *Soshi Bhusan* v. *Gobind Chandra*, 7 C. W. N. 663.
(6) *Sonai Sardar* v. *Bukhetar Sardar*, 25 W. R. 46; *Dharma Dass* v. *Nusseruddin*, 12 C. 660.
(7) *Punja Godad*, 21 Bom. L. R. 247, 50 I. C. 995, 20 Cr. L. J. 387.

but only compoundable when the loss or damage caused is loss or damage to a private person only. It is triable by any Magistrate, and summarily.

4797. In a summary trial held under this section the Magistrate had to dispose of the plea of an act done in assertion of a claim of right, but Macpherson and Morris, JJ., held that a *bona fide* claim of right deprives a Magistrate of jurisdiction to deal with a criminal charge in a summary way. Indeed, as was there pointed out, a summary trial is intended to apply only to short and simple cases in which but little evidence is needed. It is wholly inapplicable to contested cases and those in which the trial is likely to be protracted and the evidence adduced voluminous.(8) It is also pointed out that the authority vested in the Criminal Court of punishing persons for acts of mischief is one which must be exercised with great caution, and it must be very clear before conviction, that the accused had brought himself within the true meaning of section 425; otherwise this provision of the law will be frequently resorted to as a trenchant mode of deciding disputed civil question of right,(9) which it is not their function to decide and which in petty cases, in any case, they should refrain from deciding.(10)

4798. The accused cannot be tried on the same facts both for mischief as well as theft. So a person who has been charged with theft cannot be separately charged with and convicted for the subsequent killing of it.(11) This was also the view at one time taken in Bombay.(12) But a different note was struck by Jardine and Candy, JJ., in a similar case going up before them in revision. In both the cases the accused had stolen the bullock and then killed and consumed its flesh, whereupon, in the first case the Court held a double conviction for theft and mischief illegal, but in a subsequent case it upheld such conviction on the ground that the two acts were separate and distinct, and as no property was transferred by the theft to the thief, the accused was held to have been properly convicted for a fresh act of mischief.(13) But it was conceded that if the theft were committed for the flesh, then the intention being one, the accused could be punished only for a single intention.(14) But this view has apparently been since abandoned by that Court, for in a more recent case a double conviction in such a case was held to be illegal,(15) and this view not only accords with that of the other Courts,(16) but is in entire harmony with the other sections of the Code (§ 517).

4799. It is not open to an appellate Court to add a charge under s. 143 to one under sections 426 and 451 as it would have the effect

(8) *Issur Chunder Mundle* v. *Rohim Sheik*, 25 W. R. 65; *Gamirullah Sarkar* v. *Abdul Sheik*, 10 C. 408.

(9) *Ram Golam Singh*, 12 W. R. 59.

(10) *Hukum Chand*, 73 I. C. (A.) 805; 24 Cr. L. J. 693; *Sarat Chandra* v. *Yakub*, 28 C. W. N. 736.

(11) *Mader Saheb*, (1902) 1 Weir 497; *Genya*, (1877) B. U. C. 129, in which the accused had stolen the bullock and then killed it.

(12) *Genya*, (1877) B. U. C. 129.

(13) *Krishna*, (1889) B. U. C. 430; following *Narayan Krishna*, 2 B. H. C. R. 392.

(14) *Krishna*, (1889) B. U. C. 430, distinguishing *Dod Basya*, 11 B. H. C. R. 13.

(15) *Ramla Ratanji*, 5 Bom L. R. 460.

(16) *Bichuk Aheer*, 6 W. R. 5; *Hamira*, (1866) P. R. No. 37; *Nga Paik*, (1894) 1 U. B. R. 241; *Nga Aung So*, (1899) P. J. L. B. 633.

of imposing a constructive responsibility for individual acts of all persons who were members at the time of the assembly, whereas if the charges were only under ss. 426 and 451 it would be necessary to prove the guilt of each of the persons charged for his individual acts.(17)

Punishment.

4800. As regards the punishment, this section evidently provides for the simplest case of mischief, the gravity of which is measured not only by the absence of any of the aggravating circumstances forming the subject-matter of distinct offences under this set of sections, but also by the value of the loss or damage caused by the offence. In this respect this offence introduces a novelty not to be found elsewhere in the Code (§ 4771). There may, however, be cases in which two or more aggravating circumstances may supervene, but in which it will not be right to take them each as further aggravating the offence, unless it is proved that there was in the view of the offender a wholly separate intention. For instance, if the accused should commit mischief by fire by setting fire to a warehouse, destroying its contents to the value of over Rs. 100, he could not be convicted both under sections 436 and 435.(18)

4801. Proof.—The points requiring proof are:—

(1) That the thing in question was property.

(2) That the accused, caused its destruction or such change therein, or in the situation thereof, has destroyed or diminished its value or utility, or affected it injuriously.

(3) That the accused did so intending or knowing that he was likely to cause loss or damage to the public or to any person.

(4) That such loss or damage was wrongful.

(5) That it was below Rs. 50.

4802. Charge.—The charge under this and the next section should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed mischief, by causing wrongful loss or damage to the property of A B estimated at Rs.——and that you thereby committed an offence punishable under section 426 (*or* s. 427) of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

4803. Evidence of Simple Mischief.—In the discussion describing the essential elements of this offence as defined in the last section, all the points necessary to establish a case under this section have been set out (§§ 4776-4794). They will all have to be established by

(17) *Mukka Muthiriyan*, 31 I. C. (M.) 337. (18) *Dod Basaya*, 11 B. H. C. R. 13.

the prosecution, for it is on it to show that the act of the accused is such as falls under the penal visitation of this section.[19] It may be said that the plea being taken in exoneration of the crime, it must be both pleaded and proved by the accused.[20] But this would have been the case were it on the prosecution to establish that the loss or damage caused by the act was *wrongful* and proof of which could only be reached by negativing any right or *bona fide* belief in a right on the part of the accused.[21]

4804. The proof of wrongful loss or damage is necessary, and its establishment would make the mischief-maker liable, though only civilly liable for damages in tort. To convert it into a crime the prosecution must prove the further fact that the accused had the intention to cause such loss, or that he knew that he was likely to cause it. This intention or knowledge is an aggravating circumstance, which would not only enhance the civil liability but exposes the person to a further risk of criminal prosecution. Now this intention may be inferred, as it has often to be inferred, from the proved facts of the case. But it is not to be readily assumed in every case, for there is such a thing in logic, as *post hoc ergo propter hoc* and it is a fallacy which too often passes for proof. Of course, the question of intention and knowledge is one of fact and it has to be inferred from all the circumstances of each case. It cannot be made the subject of a general dissertation. But something has been said in the foregoing commentary to show what facts are and what are not relevant to establish it. The wrongful loss or damage must be to property," which implies a thing capable of ownership (§ 4789). If therefore the property was such as had not an owner at the time of the mischief, that offence could not be committed in respect of it, for there would then be no loss or damage, nor would that loss or damage be wrongful. The other constituents of this offence are the destruction or injury caused to such property. This may be caused in several ways, but whatever the mode or nature of the injury, its one essential feature is that it causes loss or damage to its owner or the public at large, through its own destruction or deterioration.

Injuring Property When Mischief.

4805. The gravamen of mischief then consists not so much in causing loss as in causing it by injuring the property. This distinction would at once put out of account such cases as the cutting of mature crop or trees, because such act does not cause injury to the thing cut though it may cause loss to its owner.[22] It may then be theft, but is not mischief (§§ 4792, 4793). This principle would explain why the cutting down of fruit trees is mischief, but the cutting down of timber is not. The one are not intended to be cut, the other are planted only for that purpose. So any act injuriously affecting property would be mischief, as when a person should dam up the water channel irrigating one's crops, or let out water from a bund used for the same purpose and from which the crops of his neighbour suffer some injury.

(19) *Issur Chander Mundle* v. *Rohim Sheik*, 25 W. R. 65; *Gamirullah* v. *Mahadshet*, (1889) B. U. C. 432.

(20) S. 105, Indian Evidence Act (I of 1872).

(21) *Mahadshet*, (1889) B. U. C. 432.

(22) *Talebar*, (1917) 2 Pat. L. W. 49.

In one case this section was put in force to punish the accused who had stolen water from the Government canal by breaking through its wall to enable them to sow their fields. They were convicted under s. 430, but on revision their conviction was altered to one under this section, the Court observing. "It is an act of wilful mischief for any person to make a breach in the wall of a canal. It is an act which causes such a change in property as destroys or diminishes its value or utility or affects it injuriously."(23) In another case the accused finding their fields flooded proceeded to let the water out by making a breach in the Railway. Their intention was clearly to let the water out, but nevertheless they were convicted of mischief and in view of the serious consequence to the travelling public sentenced to rigorous imprisonment for four months.(24) But though the section is widely worded and would embrace the case of any injury however small, still it must not be forgotten that *De minimus non curat lex.*(25)

Injury Classified.

4806. The injury contemplated by the section may be varying and caused in a variety of ways. Section 425 specifies at least four such cases of injury: (*i*) where it consists of the total *destruction* of any property; (*ii*) where it consists of the destruction or diminution of its value, or (*iii*) utility; or where (*iv*) it is injuriously affected. Then again the section contemplates at least three ways of causing the foregoing injury by: (*i*) destruction of the *corpus*, or (*ii*) any change in the *property*, or, (*iii*) any change in the *situation* of the property. Such change in the property must be a physical change caused by a physical means. It would thus exclude such a change as the pollution of food caused by the touch of a low-caste man.(1) This case has been already noticed under section 298 and in the preceding discussion on this offence (§ 2992).

4807. Lastly, while the objective of the offender under this section is to hit another through property it is not necessary that the property be his, for it may belong to a third person as in the illustration (*e*) or it may, indeed, belong to the accused himself as in the illustrations (*d*) and (*g*) appended to section 425. The former is in fact drawn with reference to Explanation 1, while the other two illustrations are intended to refer to the other explanation.

4808. It is perhaps unnecessary to add after what has been made clear in another connection (§ 4077) that the term "property" is large, but it does not include a human being. If therefore A poisons B to enable him to claim the money due on his life policy the offence committed by A would be either murder or hurt but not mischief, which it would have been if B were classed as property.

4809. No Mischief.—As already observed (§§ 4807-4808), a person may commit mischief by destroying or injuring his own property. But where it is so, the question of motive or intention becomes very material. The accused who was the servant of a ward of Court des-

(23) Bansi, 34 A, 210; *Chengamma*, (1911) 2 M. W. N. 349.

(24) *Chulhan Ahir*, 16 C. W. N. 263; 13 I. C. 826.

(25) "Law does not concern itself about trifles." *Hukum Chand*, 73 I. C. (A.) 805; 24 Cr. L. J. 693.

(1) *Motilal*, 24 A. 155.

troyed some bamboos of his master for which he was convicted of mischief. The act was alleged to be done with a view to bring the management of the Court of Wards into disrepute. The accused was acquitted, presumably on the ground that there was no evidence to strengthen the surmise.(2) Other cases follow the same trend. The accused who was the father of the sonless widow of the complainant's deceased brother ploughed up some land over which he had no right but which he did in assertion of his daughter's claim to maintenance. His conviction for mischief and trespass was quashed by the High Court on revision on the ground that to plough up land was not to injure it and that to sustain a conviction for trespass the necessary intention was lacking.(3) The accused who was a mortgagee had openly cut a few trees to repair another part of the mortgaged premises. The Court held it to be no mischief, as being an actionable waste the mortgagor had his remedy in the Civil Court.(4) There can be no mischief where the act is merely negligent and not wilful.(5) So where property was injured owing to the rash and negligent driving of the accused, the latter could not be convicted of mischief.(6)

For further commentary on this section *see* s. 425 (§§ 4772-4794).

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Comp. if only private person injured. Summary.

Mischief causing damage to the amount of fifty rupees.

427. Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (4810).
(2) *Procedure and Practice* (4811).
(3) *Proof* (4812).
(4) *Charge* (4813).
(5) *Evidence of Mischief Causing Damage of Rs. 50* (4814).
(6) *No Mischief* (4815).

4810. Analogous Law.—This section only prescribes a higher punishment for the offence of simple mischief as defined in section 425, which is punishable under section 428 if the loss or damage incurred is below Rs. 50.

4811. Procedure and Practice.—This offence is non-cognizable but warrant should ordinarily issue in the first instance. It is bailable but is compoundable only when the loss or damage is caused to a private person, otherwise it is non-compoundable. It is triable by the

(2) *Parmeshwar Singh*, 7 I. C. (C.) 812; *Saravana*, 8 M. L. T. 222, 7 I. C. (M.) 855.
(3) *Mannikka*, 8 M. L. T. 246, 8 I. C. (M.) 318.
(4) *Ramasamier*, (1913) 1 M. L. W. 274, 23 I. C. (M.) 498.
(5) *Baju*, 9 B. 173.
(6) *Akidullah*, (1911) 5 S. L. R. 263, 15 I. C. 898.

Presidency Magistrate or a Magistrate of the first or second class and summarily.

For other points of practice calling for notice reference should be made to the last section (§§ 4796-4799).

4812. Proof.—The points requiring proof are the same as for an offence under to the last section (§ 4801), for clause 5 of which prove—

(5) That the loss or damage caused amounts at least to Rs. 50.

4813. Charge.—*See* under s. 426 (§ 4802).

4814. Evidence of Mischief Causing Damage of Rs. 50.—The elements necessary for the proof of this offence are all those set out under section 426 from which this section differs only in the heavier loss or damage caused—the section requiring proof that it is valued at least at Rs. 50. This must be the value of the actual injury and not of any prospective or resultant loss to the owner.(7) Thus if the loss complained of be the destruction of immature crop or fish, the value of the crop or fish on the date of destruction should be ordinarily reckoned. But this is not an invariable rule. For in the case of growing crops they have no present value beyond as grass, and in that case the Court is not incompetent to assess the damage by calculation of the approximate loss which the owner was likely to have suffered by the destruction of his property.

So where the accused were found to have removed the complainant's fishing stakes in the open sea within three miles of the shore, West, J., held it to amount to mischief under this section, though the accused did not appropriate the stakes, his view being that in this case the loss suffered by the complainant was the pecuniary loss the value of which was the fish which he would have caught and sold, which he could not do owing to the act of the accused, and which loss the accused knew his act was likely to occasion to the complainant.(8) In short, in such a case the loss may be calculated not only on the injury actually caused but on the injury immediately consequent. So where the accused set fire to a summer house in a wood, and the fire was thence carried to the wood, he was held to have been properly convicted on an indictment charging him with setting fire to the wood.(9) But in this case the accused was held liable because he was held to have been aware of the probable consequence of his act.(10) Where several things are destroyed or injured by an act or a series of acts forming one transaction, the loss or damage may for this purpose be taken in the aggregate. So where the accused stole or cut several trees at the same time, or so continuously as to form one transaction, it was held permissible to calculate the value of the trees cut in the aggregate.(11)

(7) *Whiteman*, 23 L. J. M. C. 120 (case of the larceny of a tree).
(8) *Kastya Rama*, 8 B. H. C. R. 63.
(9) *Price*, 9 C. & P. 729.
(10) *Natrass*, 15 Cox. 73; *Harris* ib., 75.
(11) *Shepherd*, L. R. 1 C. C. R. 118; *cf.* s. 235, Cr. P. C.; *Bleasdale*, 2 C. & K. 765; *Firth*, L. R. 1 C. C. R. 172; *Henwood*, 11 Cox. 526.

4815. No Mischief.—A person is not vicariously liable for mischief. The accused who lived in Calcutta employed a contractor to build him a house in Benares. In digging up the foundations the contractor did not prop up the next door neighbour's wall or take such precautions which a builder ought to have taken, with the result that the neghbour's wall sank and cracked. It was held that the accused could not be held liable for his contractor's negligence.(12)

Pres. Mag or Mag. of 1st or 2nd class. Cognizable. Warrant. Bailable. Not comp.

Mischief by killing or maiming animal of the value of ten rupees.

428. Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Animal*—s. 47. *Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (4816).
(2) *Procedure and Practice* (4817).
(3) *Proof* (4818).
(4) *Form of Charge* (4819).
(5) *Principle* (4820).
(6) *Meaning of Words* (4821).
(7) *Mischief by Injuring Animal* (4822-4825).
(8) *Maiming* (4823).
(9) *Rendering Useless* (4824-4825).

4816. Analogous Law.—The provisions of this section correspond to ss. 40 and 41 of the Malicious Damage Act, 1861, (13) which run as follows:—

"40. Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle shall be guilty of felony and being convicted there of shall be liable.....to be kept in penal servitude for any term not exceeding fourteen years."

"41. Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose shall be imprisoned, etc."

Both these sections re-enact 7 & 8 Geo. IV, c. 30,(14) from which also were the present provisions presumably drawn. It should be observed that neither the provisions of the English Statute nor those of this section apply to a mere cruelty to animals as distinct from mischief as defined in section 425.

This section is not the only section prescribing a punishment for injuries to animals, for the next section deals with the subject and prescribes a higher penalty, for injuring certain specified animals, and other animals of the value of Rs. 50 or more.

(12) *Srish Chandra*, 17 A. L. J. 343, 50 I. C. 347, 20 Cr. L. J. 299.
(13) 24 & 25 Vict., c. 41.
(14) Malicious Injuries to Property Act (England), (1826) 7 & 8 Geo. IV, c. 30, ss. 16, 17.

4817. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by a Presidency Magistrate or a Magistrate of the first or second class.

4818. Proof.—The points requiring proof are:—

(1) That the accused committed mischief (s. 426).

(2) That the property injured was an animal.

(3) That the injury was caused by killing, poisoning, maiming or rendering useless such animal.

(4) That the value of the animal at the time of injury was at least Rs. 10.

4819. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at———you committed mischief by killing (*or* poisoning *or* maiming *or* rendering useless) any animal, to wit —(*describe it*) which was the property of A B, then valued at Rs. 10, and that you thereby committed an offence punishable under section 428 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

4820. Principle.—Mischief by mutilation of animals is regarded as an offence of a higher degree of gravity owing to the cruelty thereby inflicted on the animals injured and the resultant loss thereby caused to the owner. The maiming of cattle was thus an offence of some gravity at common law.(15) The Statute defines the offence to lie in unlawfully and maliciously killing, maiming or wounding,(16) but the section extends it to "rendering useless" any such animal, which is a variant from the expression "diminishes its value or utility" as used in section 425. Probably the phrase is used *ejusdem generis* with the rest, and is intended to cover cases of "causing infirmity" as used in section 319, which though not exactly wounding produces a result not different from it.

4821. Meaning of Word.—"*Maiming*," *i.e., multilation* implies permanent injury and thus differs from "wounding," which implies an injury not necessarily permanent. "*Rendering useless any animal*," *i.e., ejusdem generis* with "killing, poisoning or maiming" (§ 4820). "*Of the value of ten rupees*": This means the market price of the animal at the moment of injury, and not its value to the owner which as in the case of a pet animal may be great.

4822. Mischief by Injuring Animal.—Mischief has been described before as the causing of wrongful loss or damage to any person by causing destruction of any property, or by causing any change in the property as destroys or diminishes its value or utility, or affects it injuriously. In an offence under this section the "property" must be an animal worth Rs. 10

(15) *Haywood*, R. & R., 16. (16) 24 & 25 Vict., c. 97, ss., 40, 41.

or more and the mode of causing injury should be by "killing, poisoning, maiming or rendering useless" such animal. The term "animal" is defined in section 47 and "denotes any living creature other than a human being." It would thus include a quadruped as well as birds and fowls, insects and reptiles, and in fact any lower animal. The animal must be the subject of ownership, otherwise there can be neither theft nor mischief (§ 4791). So if an animal originally *ferae naturae* is reduced into possession by being confined or kept in a fold, its destruction in its state of confinement would be mischief. But it would be otherwise if the animal had been abandoned,[17] or the accused had no reason to suppose it to be the subject of ownership. The value of the animal must be at least Rs. 10 at the moment of the offence. Such value must be its market value and not the special value which the animal may possess to its owner (§ 4821). The value must, of course, be before it is killed, poisoned, maimed or rendered useless. An animal may be "poisoned" but not killed, and it may be killed though not by poisoning. If it is poisoned, the offence is complete, though the poisoning may not injure the animal. The administration of poison must, of course, be with intent to commit mischief. If it is given not to injure but to cure the animal, it is no offence. So, of course, will killing be justifiable if it is done in self-defence.[18]

Maiming.

4823. But the killing, poisoning, maiming or rendering useless an animal in any other case if it falls within the intent and provision of section 425 is punishable. The term "maiming" is nowhere defined or described in the Code. But it is a term of well-known import in English Law, and is the same as "Mayhem"[19] which meant the deprivation of a member proper for defence in fight, as an arm, leg, finger, eye, or a foretooth, yet not a jaw-tooth, nor an ear, nor a nose, because they have been supposed to be of no use in fighting.[20] It has, however, since acquired a wider significance, and now means the privation of the use of a limb or member, and implies a permanent injury. It does not then mean merely "wounding," but wounding or otherwise injuring so as to entail a permanent injury.[21] Permanent injury is of the essence of maiming.

So where the accused was shown to have poured nitrous acid into her ears, some of which either ran into her eye or was poured into it and behind her, in consequence of which she was killed by the owner, and the surgeons proved that the injuries done to the ear were not wounds, but ulcers, it was held that the accused had been rightly convicted of maiming.[22] So in another case the accused was similarly convicted for having administered sulphuric acid to a horse.[23] The cutting off the ears of a horse is unquestionably maiming[24] as it permanently affects the sense of

(17) *Subbarayadu*, (1888) 1 Weir 498.
(18) *Hanway* v. *Boultbee*, 4 C. & P 350.
(19) O. E. *main*, to hurt.
(20) Brit. Bk. J. C. 25; Hawk. P. C. 111; 1 Black, 130; 3 Black, 121; 4 Black 205; Text followed in *Marowdha* v. *Srinivasa*, 35 M. 594; *Rangasawmy*, 22 M. L. T. 68; 39 I. C. 938.
(21) *Jeans*, 1 C. & K. 539; *M'Laughlin*, 8 C. & P. 635; *Moriarty* v. *Brooks*, 8 C. & P. 684; *Beckett*, 1 M. & Rob. 526; *Nga San Yun*, (1885) S. J. L. B. 404; *Narain Singh*, (1905) U. B. R. P. C. 25, *Suterao*, 3 Bom. L. R. 503; *Bhawal Singh*, (1891) P. R. No. 7.
(22) *Owens*, 1 Mood. C. C. 205.
(23) *Mogg*, 4 C. & P. 364.
(24) *Marogowdha* v. *Srinivasa*, 35 M. 594; *Rangaswami*, 22 M. L. J. 68, 39 I. C. 988; 18 Cr. L. J. 620; *Anna Laxman*, 18 Bom. L. R. 289, 34 I. C. 973, 17 Cr. L. J. 253.

hearing; but it would not be maiming if only half a ear is slit off because it does not impair the hearing,[25] and so would probably be any form of mutilation such as cutting off the end of a horse's tongue[1] or the like. But an injury which causes a mere disfigurement without a permanent injury is not maiming.

Rendering Useless.

4824. In England, "wounding" an animal is an offence, but that term is not used in this section which uses a term of wider import. For an animal may be rendered useless by wounding no less than by the infliction of other injuries which though they do not maim, may still cause permanent infirmity. So wounding an animal if it has the effect of rendering it useless would be punishable under this section. But since the section refers to the offence by the effect rather than the act, an injury which wounds but does not render an animal useless cannot be punished under this section, though it would be under section 426. So where the accused threw a stick to drive a bullock away from his cow-shed, which hit and blinded one of its eyes, the Court held that since the injury thus caused was not shown to be permanent, and it appeared in evidence that the animal was still under treatment, the accused could not be convicted under this section, and as there was no criminal intention, the accused was held to be guilty of no offence.[2] This was a case of accident, such as caused the death of the buffalo whom the accused hit with a clod of earth to drive away from his backyard which caused its death.[3]

But where the accused inflicted three severe wounds on a bullock found trespassing on his master's land, the Court held the injury wholly unjustifiable and such as constituted mischief, though they did not amount to maiming.[4] Here the act showed a reckless disregard of the injury caused to the animal and it was out of all proportion to the provocation given. Such was also the view taken in the following case. The accused, intending to gratify his own depraved tastes, thrust the handle of a stable fork into the vagina of a mare and pushed it two feet and more into the mare's body, working it backwards and forwards in that position, whilst this was being done the mare put her ears back and stamped her feet, thereby indicating signs of pain. The mare was injured in two places there being a hole in the base of the bladder and three holes in the large intestines. He was indicted for maliciously wounding the mare, and on a case reserved on the question of malice the Judges agreed that there was sufficient malice to sustain the conviction.[5]

Where the accused beat a pony breaking the ribs thereby diminishing its utility and value, the Court held it to amount to maiming.[6] But where the accused cut a scar on an animal's forehead, it was held to be neither a case of maiming or rendering the animal useless, and the accused's conviction was accordingly altered to one under s. 426.[7] Of course, it is not necessary to rendering useless that the animal should be wounded, or that

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(25) *Anna Laxman*, 18 Bom. L. R. 289, 24 I. C. 973; explaining *Marogawdha* v. *Srinivasa*, 35 M. 594.

(1) *Jeans*, 1 C. & K. 539.

(2) *Narain Singh*, (1905) U. B. R. P. C. 25.

(3) *Obammal*, (1901) 1 Weir 502.

(4) *Subrao Sukhal*, 3 Bom. L. R. 503.

(5) *Welch*, 1 Q. B. D. 23 (24); *Pembliton*, L. R. 2 C. C. 9.

(6) *Nga San Yun*, (1885) S. J. L. B. 404.

(7) *Fatteh Din*, (1881) P. R. No. 33.

the wound should be caused by any instrument other than the hand,(8) or indeed, that the injury should be inflicted by the accused himself. Upon an indictment for wounding a sheep, it appeared that the prisoner set a dog at the sheep, which bit it, it was held by Parke, J., that this was not wounding within the meaning of the Statute.(9) This case proceeded upon the peculiar wording of the Statute, but in any case injuries caused to animals by setting dogs and the like would be within the section if they have the effect of rendering the animal useless, otherwise the offence would be punishable as simple mischief.

4825. The term "rendering useless" is not intended to include a case of over-work or ill-use which has that effect upon an animal in course of time. It is intended to apply only to such cases as the last which have the effect of permanently impairing the utility of an animal by an act which is otherwise mischief within the meaning of that term as defined in s. 425. The question whether the animal had been rendered useless by reason of the injury is a question of fact which will have to be decided, having regard to the ordinary service rendered by the animal and the diminution of its value since the injury. The uselessness referred to, must, of course, be permanent, in the absence of which the offence cannot be punished under this section.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Bailable. Not comp.

Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.

429. Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

[*Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (4826).
(2) *Procedure and Practice* (4827).
(3) *Proof* (4828).
(4) *Form of Charge* (4829).
(5) *Mischief by Killing Domestic Animals* (4830-4834).
(6) *Nullius Proprietas* (4833-4834).
(7) *Maiming Trespassing Cattle* (4835).

4826. Analogous Law.—This section enhances the offence a step further in consequence of the greater value and importance of the animals enumerated, and in consequence of the other animals being of the higher value of Rs. 50 or more. In other respects this section is the same as the last.

(8) *Bullock*, L. R. 1 C. C. R. 115.

(9) 4 *Geo.* IV., c. 54, s. 2; *Hughes*, C. & P. 420; but in *Elmesley*, 2 Lew. 126, the bite of a dog was held to be within the Statute; and so where the prisoner set fire to a cow-house in which was a cow which was burnt to death, Punton, J., held that the prisoner could be convicted for killing a cow.

4827. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court of Sessions, Presidency Magistrate or a Magistrate of the first or second class.

For other points of practice, reference should be made to section 426 (§§ 4795-4809).

4828. Proof.—The points requiring proof are:—

(1) That the accused committed mischief (s. 426).

(2) That the mischief related to an elephant, camel, horse, mule, buffalo, bull, cow or ox, irrespective of value, and if to any other animal than that, it was then valued at least at Rs. 50.

4829. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the———day of———at———you committed mischief by killing (*or* poisoning, *or* maiming *or* rendering useless) the elephant of A B (*or* the tame panther of A B, valued at Rs. 50), and that you thereby committed an offence punishable under section 429 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4830. Mischief by Killing Domestic Animals, etc.—The last section punishes mischief by injuring any animal generally, provided that the value of the animal does not fall below Rs. 10. This section carries the offence a step further by prescribing a higher penalty for doing the same act to any one of the eight enumerated kinds of animals, *viz.*, an elephant, camel, horse, mule, buffalo, bull, cow or ox, of whatever value and, in the case of any other animal, where the value amounts to Rs. 50 or more. The animals specifically enumerated are those classed as domestic animals, and the section protects them against mischief, which renders them useless to their owners, by visiting the offenders with specially deterrent penalties.

4831. The terms "killing, poisoning, maiming or rendering useless" any animal call for no explanation—for they form the gist of the offence described in the last section (§§ 4819-4820). The question whether the words "elephant, camel, horse, mule, buffalo, bull, cow or ox" include also their young ones has been answered in the affirmative by Norris and Beverley, JJ., in a case in which they said: "It seems to us that this section specifies the more valuable of the domestic animals without any regard to age, but in respect of other animals not so specified, the section would not apply, unless the particular animal in question was shown to be of the value of fifty rupees or upwards."(10) This is obviously the meaning, and the term "elephant" must then be held to include a baby

(10) *Hari Mandal* v. *Jafar*, 22 C. 457; *Jaga Bundhoo Mythee* v. *Golam Ali Sha*, *ib.*, *note*; *contra* in *Cholay*, (1864) Mad. Unrep. *Per* Scotland, C.J., dissented from.

elephant, as the term "horse" must be held to include a mare, gelding, colt or filly, and a bull or ox to include a heifer or calf of whatever age and value.

4832. In the last case, the lower Court had taken the view that the section intended only to apply to the animals specially enumerated, their young ones being then treated as "any other animals" so that the accused, who was detected butchering and skinning a calf, could not be convicted under this section unless the calf be shown to be valued at Rs. 50; but the Court held the phrase "any other animal" to refer only to an animal of a different *genus* altogether, such as a dog or a goat.(11) The killing of another's calf for the sake of its skin or flesh was therefore an offence under this section irrespective of its value, and the accused was to convicted.(12)

Nullius Proprietas.

4833. Of course, the animals enumerated must be domestic animals and such as are the subject of ownership. The section could not, for example, apply to wild elephants or bulls not reduced to possession, but only to those which have been captured and are no longer *ferae naturae*, but *domitae naturae* (§ 4076). Now it is evident that property in such animals continues only so long as they are in possession, and it may be relinquished or abandoned by the owner at any moment. So a bull set at large by its owner in accordance with religious usage, would *prima facie* cease to be property, so that a person killing it could not be convicted under this section.(13) But this is evidently not the view taken in Madras where the view taken appears to be that a person wholly abandoning a bull without any precaution taken for its future control may still be the property of the temple by which its dedication is actually or inferentially accepted, and it would then *prima facie* be the property of the temple, even though the animal were allowed to be at large free from all control. "If such animals in their wanderings at times trespass on and do damage to private property with impunity, it is because superstition induces villagers to regard them with veneration, and to endure the mischief which they commit, without seeking redress as of right."(14)

4834. But, as was pointed out in a subsequent case, there is really no conflict of views between the several Courts, for in such cases the question whether a bull so set at large continues or ceases to be property within the meaning of section 425, is a question of fact and not of law, and depends upon the nature of the dedication and the renunciation or abandonment of the right, or rather upon the question whether it was a transfer of ownership or an abandonment.(15) If, for instance, the bull was not released but dedicated to a temple, property therein would vest in the temple, and it would then be as much the subject of larceny as of mischief. On the other hand, if it was merely set at large it would be *nullius proprietas*, and as such no longer "property" within the meaning of section 425.

(11) *Hari Mandal* v. *Jafar*, 22 C. 457.
(12) *Ib.*
(13) *Jamura*, (1884) A. W. N. 87; *Bandhu*, 8 A. 51; *Nihal*, 9 A. 348; *Romesh Chander Sannyal* v. *Hiru Mondal*, 17 C. 852.
(14) *Nalla*, 11 M. 145.
(15) *Ghanta Veeranna*, (1887) 1 Weir 500.

In the Allahabad cases, the Court found as a fact that the ceremony of abandonment involved complete divestiture of all rights therein without the translation of any rights in favour of anyone in particular. In such a case, there having been a complete extinguishment of a right, anyone finding the bull, and taking it, acquired a right to it which would be good even as against its former owner, if the latter should be minded to resume it.(16) And, as was pointed out by Norris, J., such total surrender is not inconsistent with the fact that the bull continued to be fed by its late owner or was taken care of by his cowherd: "A bull thus dedicated and set at liberty is regarded as sacred by all Hindus, and it is a religious and meritorious act on the part of strangers even to feed it; but it is peculiarly sacred in the eyes of the person who performed the *shardha* and set the animal at liberty, and he regards it as a moral duty to feed it after it has been set at liberty."(17)

4835. Maiming Trespassing Cattle.—Every owner or occupier of land has unquestionably the right to drive away cattle trespassing into his land; and for this purpose it is permissible to use such force as is necessary. The accused was convicted under this section for mischief in killing a young buffalo at which she threw a stone to drive it out of her backyard. The case failed because there was nothing "to show that the accused had, in throwing the stone, any intention to cause injury to the animal or reasonable cause to suppose that loss or damage was likely to be caused.(18) But it would be mischief if the missile selected was a heavy stone and it was hurled with violence which broke the animal's leg.(19) But this is probably an extreme case. That there is such a thing as a private defence of property cannot be questioned, and the only question in such cases then is whether the force used was in excess of the requirements of the case; and even then it is still a question whether the matter is not one for civil redress.(20)

Mischief by injury to work of irrigation or by wrongfully diverting water.

430. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Bailable. Comp.

[*Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (4836).
(2) *Procedure and Practice* (4837-4838).
(3) *Proof* (4839).
(4) *Form of Charge* (4840).
(5) *Principle* (4841).
(6) *Mischief by Diminution of Water-supply* (4842-4846).

(16) *Per* Cockburn, C. J., in *Glyde*, L. R. 1 C. C. 139.
(17) *Romesh Chunder Sannyal* v. *Hiru Mondal*, 17 C. 852.
(18) *Obammal*, 1 Weir 502.
(19) *Mahadeo*, 12 N. L. R. 188.
(20) *Proceedings*, 1 Weir 497, 498

(7) *Cases Excepted: Bona Fide Right* (4844-4846).
(8) *No Diminution* (4847).
(9) *Mischief by Omission* (4848).

4836. Analogous Law.—This section specifies another instance of aggravated mischief—that consisting in an act causing a diminution of water supply. Where, however, the act fouls the water without causing any diminution, it is a public nuisance punishable under section 278 and not mischief punishable under this section.

4837. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable and compoundable with the permission of the Court, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class.

4838. This is another section which is liable to abuse and in which Criminal Courts are often requisitioned to decide a question of a purely civil right between contending disputants. It need scarcely be reminded that the offence here punishable must be mischief first and then mischief of the kind here described, and that if it is not one it cannot be the other. So if the accused closed a channel in the *bona fide* assertion of a right and not with a mischievous intent, he could not be convicted under this section, for the question of a disputed right is one for the adjudication of the Civil Court and cannot be really made the subject of a criminal prosecution.[21] But this does not imply that the Criminal Courts are to stay their hand in every case till the aggrieved party has obtained an adjudication of his right by the civil right, for if it were so, a mischievous act would have to be endured till the formality of the civil action is complied with. But criminal law creates no such estoppel and on a proper case arising the Criminal Courts would be well justified in inquiring into the right and adjudicating upon it themselves for the purpose of this offence.[22] It is competent to the Magistrate inquiring into this case to make a local inspection of the channel or other source of water supply, regarding which this offence is alleged to have been committed.[23]

4839. Proof.—The points requiring proof are:—

(1) That the act constituted mischief as defined in section 425.
(2) That the mischief in question caused or was likely to cause a diminution of the supply of water.
(3) That the accused knew it.
(4) That the diminution was in the supply of water used for—
  (*a*) agricultural purposes; or
  (*b*) food or drink for human beings or their animals; or
  (*c*) cleanliness; or
  (*d*) any manufacture.

4840. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

(21) *Athinarayanasawmy Pillai* v. *Subbier*, (1888) 1 Weir 505.
(22) *Muruga Pillai*, (1883) Weir 508.
(23) *Ib.*

"That on or about the——day of——at——you committed mischief by doing an act, to wit—(*specify it*) which caused (*or* which you knew to be likely to cause) a diminution of the supply of water of A B for agricultural purposes (*or* for food or drink, etc.), and that you thereby committed an offence punishable under section 430 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court on the said charge)."

4841. Principle.—This section prescribes a high penalty for mischievously cutting off one's water-supply used for cultivation, and manufacture, washing and drink. The offence must necessarily involve the mental state of criminality constituting the offence, that is an intent to cause or knowledge that the act is likely to cause *wrongful* loss or damage to the public or any person (§ 235). Now no loss is *wrongful* unless it was illegal, and consequently no one can be punished for causing a diminution of water supply if it was not illegal and what is more, unless the accused knew of its illegality.[24] But it is no part of the offence that the act should be a wanton act of waste. It is sufficient that it is done without any show of right.[25] Evidently the diminution must be appreciable, otherwise the act may be excusable under section 95.

4842. Mischief by Diminution of Water-supply.—This section protects the source of water-supply against mischief. As such, it applies equally to irrigation channels as to the other sources of irrigation, such as tanks and ponds,[1] and in fact to any source of water-supply whether natural or artificial, such as a river, lake or pond or a reservoir, well, or canal or channel, provided that it was used for the purpose of agriculture, or manufacture, or for food or drink, or for cleanliness, thereby excluding water-supply used for horticulture or for a purpose other than those specially mentioned. Of these, the supply of water for agricultural purposes plays a most conspicuous part having regard to its value and importance in this country and the frequent disputes to which it gives rise. The supply of water for such purpose may be natural or artificial and the right of a person thereto may be exclusive or joint. The fact that it is joint and not exclusive does not render the commission of this offence by a co-sharer impossible, for to vary illustration (*g*) of section 425: A having joint property with Z in an irrigation canal dams it up intending thereby to cause wrongful loss to Z. A has committed mischief. The case would be no different if Z had merely the customary right to the use of its water.[2]

4843. The water-supply must, of course, be "property," that is to say, it must be the subject of ownership whether by Government or a private person. It would ordinarily exclude navigable channels and rivers which are *res publicae* and property in which vests in the public generally, though even in such cases it is possible to commit the offence. The

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(24) *Indra Talavar* v. *Narasiha*, 29 I. C. 670; 16 Cr. L. J. 542.

(25) *Ramkrishna Chetti* v. *Palaniyandi*, 1 M. 262, F. B.; *Jagannath Bhikaji*, 10 B. 183.

(1) *Syton Chinna Mangaiya*, (1885) 1 Weir 510.

(2) *Krishna*, 88 I. C. 188, (1925) M. 577.

supply of water must in any case have been shown to have been used either solely or mainly for any of the four purposes specified in the section, namely: (*a*) agriculture, (*b*) drink, (*c*) cleanliness, or (*d*) manufacture. It may be that water drawn for agriculture is also used for other purposes, as for instance for watering the roads, but in that case it does not cease to be water used for agricultural purposes Water used for watering the roads would, however, be water used for cleanliness, which ordinarily implies water used for washing man and beast, clothes and the like. So water used for flushing the gutters of a city for the purpose of cleansing them would be so treated. In all such cases any act calculated to diminish the water-supply would be mischievous if it is done with intent to cause wrongful loss or with knowledge of the likelihood of such loss.(3)

Cases Excepted Bona Fide Right.

4844. Such knowledge of likehood cannot be presumed, but must be proved, though it may be inferred from circumstances. Where, for instance, the accused diverted the water-course constructed by the complainant and in his exclusive possession, and the accused who had no right of any kind thereto contended it to belong to him jointly, the Court held the assertion of a false claim, to support a criminal act, was merely an additional wrong and was no plea which could extenuate the offence.(4) The plea of right to be admissible, must then be a plea supported by some evidence of title which, though not exclusive, is at least sufficiently plausible. It is at any rate such as would justify the Court in finding that the accused honestly believed in his right though that belief was in fact wholly unjustifiable. That belief may, however, either relate to the right to cut off the water-supply or it may relate to the knowledge of the likelihood of diminution. The accused is protected in either case. But he is not protected if he should plead that he was using the water withdrawn from the accused in his own fields or selling it to other tenants, and that he was causing no waste,(5) since it would suffice if he had caused wrongful loss to another or knew that it was likely.(6) But, of course, no loss is wrongful which is not actionable at law. In other words such loss must amount to the infringement of a legal right.(7)

So where the accused cut the dam erected by the complainant to irrigate his own crops, and it appeared that they cut the dam to save their own crops from submersion, it was held that they could not be convicted of this offence as there was no proof of intention or knowledge of causing wrongful loss to the complainant.(8) So there could be no mischief where there was a right, as in the case of the zemindar who stopped a water-channel running over his own land, on the complainant's

(3) *Nafar Chandra Bhattacharjee* v. *Helaluddin*, 8 C. W. N. 370; *Sheikh Arif*, 35 C. 437; *Mohur Singh* v. *Lalloo*, 3 A. L. J. 142-*n*; *Mohammad*, 5 I. C. 560.

(4) *Jagannath Bhikaji*, 10 B. 183; following *Ramkrishna Chetti* v. *Palaniandi*, 1 M. 262, F. B.

(5) *Chidambaram* v. *Mhd. Khan Sahib*, 34 M. L. J 206, 44 I. C. 580, 19 Cr. L. J. 356.

(6) *Deenabandhu* v. *Viswarasarayi*, (1923) M. W. N. 634; 75 I. C. 862, 24 Cr. L. J. 330.

(7) *Budda Reddi*, 44 M. L. J. 234, 69 I. C. 59, 23 Cr. L. J. 655.

(8) *Nafar Chandra Bhattacharjee* v. *Helaluddin*, 8 C. W. N. 370; *Budda Reddi*, 44 M. L. J. 234, 69 I. C. 59, 23 Cr. L. J. 655.

refusing to pay him the rent he demanded.(9) So where the accused had, equally with the complainant, the right to draw water, the fact that in the assertion of his right, he diminished the flow of water required by the complainant, was no ground for convicting him under this section. Both the complainant and the accused were entitled to the use of an irrigation channel which was the property of Government Ordinarily, the accused were content to irrigate their fields with the surplus water leaving the complainant's field. But in the year in dispute they diverted the channel to their own fields, presumably because they considered the surplus water insufficient for the purpose of irrigation. They were held to have committed no offence.

4845. In such cases, the act is protected because it is presumed to be done by the accused for the protection of his own interest. But where there is no such justification, the act of the accused would be mischievous unless it is shown to be otherwise protected.(10) Such would be the case where the act, though intended to be mischievous, neither causes nor is likely to cause any diminution of the water-supply, as in the case where the accused closed a watercourse by which water had been supplied to the complainant's land, but which caused him no damage, in which case it was contended that though the act did not cause diminution of the watersupply, it still destroyed the utility of the water-course in which the complainant was interested, but which the Court considered as bringing the offence possibly under section 426, but not under this section.(11) But in order to bring an offence under this section, it is not required to prove an actual loss or diminution of water-supply; its likelihood is sufficient, so that the offence is complete as soon as a channel is dammed, and which is likely to cause a diminution of the supply of water in future, and not when such diminution or the resultant loss actually occurs.(12)

4846. These exceptions only establish the line beyond which the provisions of a penal statute could not be extended. Besides them there still remain other cases in which some of the elements necessary to constitute the offence, may be wanting. The offence is one in which the machinery of criminal law is as likely to be readily resorted to as it is likely to be abused. But to say that all disputed rights are for the adjudication of the Civil Court is to underrate the preventive value of criminal law. On the other hand, to put it in force in every case of trivial infraction of a civil right is to unnecessarily extend the domain of criminal law and to use it for a purpose which will defeat itself. As observed by the Madras Full Bench: "Under section 430 of the Penal Code, the physical requisites of the act are the doing of an act which causes, or, to the doer's knowledge, is likely to cause, a diminution of supply. He also fulfils the mental requisites when he does this with intent to cause wrongful loss, and the intention is properly held to be such when he takes it without any sort of right, and it matters not that he claims to set up such a right

(9) *Mohur Singh*, v. *Lalloo*, 3 A. L. J. 142-n.

(10) *Vatukaran*, (1881) 1 Weir 507; *Rangana*, (1890) 1 Weir 510; *Bansi*, 34 A. 210; *Deputy Legal Remembrancer* v. *Matukdhari*, 20 C. W. N. 128 (134); *Indra Talawar* v. *Narasimha*, 29 I. C. (M.) 670.

(11) *Kalaya*, (1885) B. U. C. 217; *Bansi*, 34 A. 210.

(12) (1881) 1 Weir 503 (504).

if the facts are so clear that the claim is manifestly only an additional wrong. It is for judicial tact to distinguish where the case is sufficiently doubtful to prevent the inference of a wrong intent."(13)

4847. No Diminution.—This section is intended to conserve the water-supply used for the purposes specified in the section. But mischief may be committed by diverting a watercourse without causing any such diminution. Such was the case of the accused who wanted water to sow their fields. Consequently, they cut open the bank of a canal, whereupon they were convicted of mischief, but their conviction was altered from this section to one under s. 426, as there was no evidence of any diminution of water.(14) There is, of course, no case of mischief of any kind where a person used a canal cut for a period in excess of that allotted to him.(15) The question in such cases is one of intention and knowledge.(16)

Mischief by Omission.

4848. But it is not necessary to constitute mischief that the accused should do a positive act, for he may equally commit it by an illegal omission as distinct from a positive act. Such was the following case. The accused obtained permission from the Public Works Department to cut their channel and draw water for twenty-four hours. They failed to close the breach which it was their duty to do on expiry of that period, and the complainant suffered in consequence, in that he thereby received a shorter supply of water than to what he was justly entitled. The act of the accused was found to be intentional and they were convicted under this section.(17) As compared to this, the case in which the accused opened without permission the sluice of a channel in order to take water for his field, presents no difficulty except that the act was as much mischief because it lessened the supply of others more entitled to it,(18) as theft, because it involved dishonest deprivation of property belonging to Government.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Bailable. Not comp.

Mischief by injury to public road, bridge, river or channel.

431. Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river, or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

[*Act*—s. 32. *Mischief*—s. 425.]

(13) *Ramakrishna Chetti* v. *Palaniyandi*, 1 M. 262, F. B.; *Kondi Chetti*, 8 M. L. T. 385; 8 I. C. 128; *Fateh Din*, (1909) P. R. No. 14, 4 I. C. 863; *Chengema*, (1911) M. W. N. 349, 12 I. C. 527.

(14) *Bansi*, 34 A. 210.

(15) *Fateh Din*, (1909) P. R. No. 14, 4 I. C. 363; but see *Chengama*, (1911) M. W. N. 349.

(16) *Kanda Kamarla* v. *Kumari Rae*, (1913) M. W. N. 179, 19 I. C. 305.

(17) *Nallappa*, (1899) 1 Weir 505 (506).

(18) *Aiyannagowd*, (1881) 1 Weir 507.

Synopsis.

(1) *Analogous Law* (4849).
(2) *Procedure and Practice* (4850).
(3) *Proof* (4851).
(4) *Form of Charge* (4852).
(5) *Meaning of Words* (4853).
(6) *Injury to Public Ways* (4854).

4849. Analogous Law.—This section is wider in its terms than sections 279, 280 and 283, which deal with a public nuisance as distinct from mischief. The difference between the two offences lies in the intention or knowledge required in this case which is not invariably necessary in an offence punishable under those sections.

4850. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class.

4851. Proof.—The points requiring proof are:—

(1) That the accused committed mischief (s. 426).

(2) That it was committed by doing an act which rendered, or the accused knew it likely to render, a public road, bridge, navigable river or channel, impassable or less safe for travelling or conveying property.

4852. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed mischief by doing an act, to wit——[(*specify it*) which rendered or which you knew to be likely to render a public road, to wit——(*describe it*) or a bridge, navigable river or a navigable channel] impassable (*or* less safe for travelling *or* conveying property), and that you thereby committed an offence punishable under section 431 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4853. Meaning of Words.—"*Public roads*": This does not include a track through a jungle.[19] For its meaning *see* section 279 (§§ 2765). It means the same thing as a public way. "*Bridge*" must be a public bridge. It would include also a viaduct or an aqueduct.[20] "*Navigable river*" means a river which affords passage to ships, vessels, or boats. A river may be navigable at certain seasons, *e.g.*, during high tide or the rains.

4854. Injury to Public Ways.—Two sets of sections punish the causing of injuries to public road, bridge, navigable river or a navigable

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(19) *Nga Shwe Laukke*, (1899) P. J. L. B. 629.

(20) The analogous provisions of the English Statute (24 & 25 Vict., c. 97, s. 33), Malicious Damage Act, 1861, includes it.

channel. Sections 277-283 refer to acts which are rash or negligent, but not mischievous, while this section punishes only acts which are mischievous and which may be of the nature described in those sections. But in order to support a conviction for this offence there must be evidence of intention to cause wrongful loss or damage, or knowledge that such loss or damage was likely.(21) The intention or knowledge must, moreover, relate to the act causing an obstruction so as to render the public or water way less safe for the purpose for which it is used. The fact that the accused caused an obstruction may be some evidence of intention, but it is neither conclusive nor even sufficient to constitute mischief. The accused cut timber on the bank of a river some eight miles above a bridge and left it lying there. Two of such pieces came floating down the river in a flood and coming in contact with the bridge destroyed two of its piers. He was convicted under this section, but the High Court naturally quashed the conviction, holding that there was no proof of intention or knowledge.(22) The act was not even criminally negligent, for the effect was as unexpected as it was due to a cause beyond human control.

So where the accused dug a trench on a waste land alongside a public road to drain his land, he could not be convicted of this offence even though "the act be calculated to do mischief incidentally to the public road."(23) As was pointed out in another case,(24) the offence of mischief implies the destruction of some property or "such a change in the property or the situation of it as destroys or diminishes its value or utility or affects it injuriously." The excavation of a channel could not be said to have affected the road injuriously, and therefore neither the act nor the intention was criminal. The section is intended to refer to such acts as the removal of buoys or other seamarks, the putting in of stakes across a navigable channel or the like which endangers it as public way, and of which the doer of the act has knowledge. An act such as the mooring of a barge in a narrow channel may block the passage or render it less safe for travelling, but if it is not moored with the intention to cause wrongful loss to the public or with knowledge of its likelihood, he could not be convicted under this section, though his act may fall under section 283.

For a further commentary on this section, *see* ss. 277-283.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Bailable. Not comp.

Mischief by causing inundation or obstruction to public drainage attended with damage.

432. Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or with both.

[*Act*—s. 32. *Mischief*—s. 425.]

(21) S. 425; *Nga Shwe Laukke*, (1899) P. J. L. B. 629.

(22) *Malayan Kalan*, (1883) 1 Weir 510.

(23) *Kairthadi Anantha*, (1888) 1 Weir 511 (512).

(24) 4 M. H. C. R. (App.) 15.

Synopsis.

(1) *Analogous Law* (4855).
(2) *Procedure and Practice* (4856).
(3) *Proof* (4857).
(4) *Form of Charge* (4858).
(5) *Mischief to Public Drainage* (4859).

4855. Analogous Law.—This section is confined to punishing mischief caused to a public drainage by an act which causes or is likely to cause an inundation or obstruction resulting in injury or damage. The provisions of this section and the last generally correspond with those of sections 32-34 of the Malicious Damage Act, 1861.(25)

4856. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class.

4857. Proof.—The points requiring proof are:—

(1) That the accused committed mischief (s. 426).

(2) That the mischief was caused by an act which caused or was likely to cause an inundation or an obstruction to any drainage.

(3) That the drainage in question was public.

(4) That such inundation or obstruction was, or was likely to be attended with injury or damage.

(5) That the accused knew that his act caused or was likely to cause such inundation or obstruction attended with injury.

4858. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed mischief by doing an act, to wit——(*mention it*) which caused, (*or* which you knew to be likely to cause) an inundation (*or* an obstruction) to a public drainage, to wit——(*describe it*) attended with injury or damage, and that you thereby committed an offence punishable under section 432 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4859. Mischief to Public Drainage.—This section deals with the mischievous interference of a "public drainage," a term which includes natural or other channels by which the water from a place is carried away. Revers and streams are such natural drains whilst drainage pipes serve the same purpose in towns and cities adopting drainage as a means of sanita-

(25) 24 & 25 Vict. c. 97, ss. 32-34.

tion. The act punishable here is an act by which the inundation or obstruction is caused to such drainage and which causes or is likely to cause injury or damage whether to the public at large or to any person in particular. Any interference with the natural flow of a public drainage is consequently not mischievous, unless it causes injury, and the accused is aware of it. The accused erected a dam across a river, which they claimed to do under an ancient custom. There was no evidence that it was likely to cause injury to any one. They were, however, fined by the Magistrate who held it to cause inundation of the adjacent villages. But on revision it was held that even assuming this to be the case the act fell short of mischief since it did not injuriously affect the property dammed, namely, the river, and the fact that it threatened damage to other property, would not of itself constitute mischief under this section.(1)

This view would then appear to suggest that the "injury or damage" caused by the inundation or obstruction must be to the drainage itself and not to any property other than the drainage. But this does not appear to be the intention of this section, which is directed against an injury to the public rather than to the drainage itself. Of course, damage to one would lead to damage to the other, but it does not appear to be the gist of the crime. This appears to have been conceded in a case(2) in which the accused was convicted of having cut away a portion of the top of a bund in consequence of which the Magistrate apprehended an inundation of the town of Maldah, but it was held by Jackson, J., that the damage anticipated was too remote and that, in any case, the accused having merely intended to cut the bund to erect a house and extending a mango garden could not be said to have intended to cause wrongful loss or damage to the public, nor could it be said that he had knowledge of such a remote contingency. His conviction was accordingly quashed.

Session. Cognizable. Warrant. Bailable. Not comp.

Mischief by destroying, moving or rendering less useful a light-house or sea-mark.

433. Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of ether deiscription for a term which may extend to seven years, or with fine, or with both.

Synopsis.

(1) *Analogous Law* (4860-4862).
(2) *Procedure and Practice* (4863).
(3) *Proof* (4864).
(4) *Principle* (4865).

4860. Analogous Law.—The provisions of this section must be regarded as supplementary to section 281, which deal with a public nuisance connected with a sea-mark, while this section deals with a mischief committed in respect of it.

(1) 4 M. H. C. R. (App.) 15.

(2) *Pran Nath Shaha*, 25 W. R. 69 (70).

4861. Its provisions correspond to the following section of the English Statute[3]:—

"S. 48. Whosoever shall unlawfully, and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat buoy, buoy rope, perch, or mark used or intended for the guidance of seamen, or for the purpose of navigation, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding seven years.....or to be imprisoned.....and if a male under the age of sixteen years with or without whipping."

4862. In England, the Merchant Shipping Act, 1894,[4] further prescribes a summary procedure for injuring light-houses, removing buoys, or the like.

4863. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is exclusively triable by the Court of Session.

4864. Proof.—The points requiring proof are:—

(1) That the accused committed mischief (s. 426).

(2) That it was committed by destroying or moving any light-house or other light used as a sea-mark or any sea-mark or buoy or other thing, placed as a guide for navigators; or by an act rendering such mark or thing less useful as a guide for navigators.

4865. Principle.—Sea-marks are the main guides of navigators, and any tampering with them may lead to serious consequences. Both section 281 as well as this section consequently visit such malefactors with high penalties, but the act done must be mischievous within the meaning of section 425, which excludes a case of accident or inadvertence.[5] But if the act was not mischievous, it may still be punishable as a public nuisance (§ 2783).

Mischief by destroying or moving, etc., a landmark fixed by public authority.

434. Whoever commits mischief by destroying or moving any landmark fixed by the authority of a public servant, or by any act which renders such landmark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Not comp.

[*Public servant*—s. 21. *Act*—s. 32. *Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (4866).
(2) *Procedure and Practice* (4867).
(3) *Proof* (4868).
(4) *Form of Charge* (4869).
(5) *Principle* (4870).
(6) *Mischief by altering Landmark* (4871-4873).

(3) Malicious Damage Act (24 & 25 Vict., c. 97.) s. 48.
(4) 57 & 58 Vict., c. 60, ss. 666, 680.
(5) Cf. *Senior*, (1899) Q. B. 283 (291)

4866. Analogous Law.—This section prescribes the penalty for an offence of the same kind as is punishable under the previous sections, but as the destruction or removal of a landmark is not to be compared with the perils of the sea the penalty provided therefor is comparatively lighter.

4867. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable and is triable by a Presidency Magistrate, or a Magistrate of the first or second class.

4868. Proof.—The points requiring proof are:—

(1) That the accused committed mischief (s. 426).

(2) That it was committed by destroying or moving a landmark or by doing any act which renders it less serviceable.

(3) That the landmark was fixed by the authority of a public servant.

4869. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the———day of——at——you committed mischief by destroying (*or* moving, etc.) a landmark, to wit——(*describe it*) which was fixed by the authority of A B, a public servant, and that you thereby committed an offence punishable under section 434 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

4870. Principle.—The removal of landmarks confuses boundaries, and the confusion of boundaries leads to confusion of titles, litigation and riots. The sanctity of landmarks has thus been always a matter of great concern with all nations; and so the Hebrew Prophet cursed those who removed their neighbours' land marks. In this respect the Code is more tolerant and punishes only those who tamper with a landmark fixed by order of a public servant.

4871. Mischief by Altering Landmark.— The landmark, the removal of which is punishable under this section, may be temporary or, a permanent one. But it must have been put up under the authority of a public servant. And it must be landmark, that is to say, a marked or fixed object by which the limits of a portion of territory may be known and preserved. A commemorative tablet is not a landmark. Again, when it is said that the landmark should have been fixed by the authority of a public servant, what is meant is that it should have been fixed by his *lawful* authority,(6) that is to say, he must be legally empowered to fix such landmarks. Such authority is necessarily conferred on survey and settlement officers, and the Civil Courts who have to adjudicate upon boundary disputes. But no such power is possessed by a Magistrate acting under section 145 of the Procedure Code. Consequently, a Magistrate, while so

(6) *Rameshar*, 27 A. 300.

acting, could not legally order that the property which was the subject of a dispute and which he declared as belonging to one of the disputants to be demarcated by boundary pillars, and if he does so, a person destroying or removing such boundary pillars cannot be convicted under this section. As Banerjee, J., put it: "Section 145 of the Code of Criminal Procedure did not authorize him to order boundary marks to be effected. The only order which under sub-section (*vi*) of that section he was competent to pass was an order declaring one of the parties to the proceedings to be entitled to possession of the subject of dispute until evicted therefrom in due course of law, and forbidding all disturbances of such possession until such eviction. The section does not empower the Court to put any party into possession or to lay down the boundary marks of the property, the subject of dispute."(7)

4872. Again since the offence here punishable is mischief of a special kind, no removal of a landmark is punishable unless it was intended to cause or known as likely to cause wrongful loss or damage to the public or to some one in particular. So where a Municipality placed a barricade to demarcate land which was for sale, which having interfered with the accused's ingress and egress from his house, he removed it, it was held that he could not be convicted under this section, for the necessary intention was lacking.(8)

4873. The landmark fixed by the authority of a public servant may consist of anything—a heap of stones, a tree painted to mark a boundary, a pillar of brick or mud, or indeed even a wooden post. It must, however, bear on its face some distinct and distinguishing feature of being a landmark, otherwise the accused might justifiably excuse himself on the ground that he did not know that what he was removing was a landmark.

435. Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards, or (where the property is agricultural produce) ten rupees or upwards shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Bailable. Not comp.

Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.

[*Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (4874-4875).
(2) *Procedure and Practice* (4876).
(3) *Proof* (4877).
(4) *Form of Charge* (4878).
(5) *Principle* (4879-4880).
(6) *Mischief by fire* (4881-4886).

(7) *Rameshar*, 27 A. 300.

(8) *Abdul Aziz*, (1895) B. U. C. 745.

4874. Analogous Law.—This section has been amended by the insertion of the words "or (where the property is agricultural produce) ten rupees or upwards."[9] The object of the amendment was to place agricultural produce which is stacked in the open under special protection. Mischief by fire is arson, and the offence dealt with in this and the next section is therefore that offence which is the subject of more elaborate enactment under English Law.[10] In England the gravity of this crime is determined according to the nature of the property whether it was a place of divine worship,[11] a railway station,[12] or a public building,[13] or a house with some person therein,[14] or whether a place was fired to defraud or injure any person,[15] or whether the intent was to set fire to goods contained in a building.[16]

4875. This and the next section view the crime from a double standpoint, *first*: as in England, from the nature of the property and the necessity of its requiring protection; *secondly*, from the nature of the property burnt, *e.g.*, agricultural produce; and, *thirdly*, from the extent of the damage done or threatened. These three considerations will be found to be present in the two sections which provide for the three cases of varying gravity.

4876. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Court of Session, Presidency Magistrate or Magistrate of the first class.

4877. Proof.—The points requiring proof are:—

(1) That the accused committed mischief (s. 426).

(2) That the mischief was caused by fire or any explosive substance.

(3) That the damage caused thereby amounted to Rs. 100; unless the property destroyed was agricultural produce, in which case it need not amount to more than Rs. 10.

(4) That the accused intended or knew that he was thereby likely to cause such damage.

4878. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (***name of the accused***) as follows:—

"That on or about the——day of——at——you committed mischief by fire (*or* any explosive substance) intending thereby to (*or* knowing it to be likely that you will thereby) cause damage to a property, to wit——to the amount of Rs. 100 (*or* Rs. 10, *if the property was*

(9) Indian Penal Code Amendment Act, s. 10 (Act VIII of 1882).
(10) Malicious Damage Act, 1861 (24 & 25 Vict., c. 97), ss. 1-8.
(11) *Ib.*, s. 1.
(12) *Ib.*, s. 4.
(13) *Ib.*, s. 5.
(14) *Ib.*, s. 2.
(15) *Ib.*, s. 3.
(16) *Ib.*, s. 7.

agricultural produce), and that you thereby committed an offence punishable under s. 435 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4879. Principle.—This section prescribes the same punishment for arson resulting in the destruction of two kinds of property—agricultural produce of the value of Rs. 10 or more, or any other property if the damage caused is valued at least Rs. 100. The special protection thus afforded to agricultural produce was justified by the exposure of that produce in the open for considerable portion of the year and the comparative immunity with which it might be so destroyed. Cases of agricultural incendiarism were, moreover, becoming all too frequent which it has been the purpose of the amendment of 1882 to prevent by prescribing a specially deterrent penalty.

4880. The offence punishable under this section is naturally an offence excluded from the purview of section 436, which relates to arson of a house or building irrespective of value, and in that case the *quantum* of loss is of course immaterial. This section would then apply to arson causing loss of property when it is not destroyed when contained in a building. Again, in order to justify a conviction under this section, it is, moreover, necessary to show not only the destruction of property worth Rs. 100 or Rs. 10, as the case may be, but also that the accused intended or knew loss to that extent to be probable. If the amount falls short of that amount, the accused may be convicted under section 427 or section 426, but he could not be convicted of this offence.

4881. Mischief by Fire—This section merely prescribes an enhanced penalty for mischief committed under the circumstances here described, that is to say, the mischief must be in the first place committed by means of fire of an explosive; in the second place, it must cause damage to property; and in the third place, the damage must be to the extent of Rs. 10, if the property be agricultural produce and Rs. 100 in any other case.

4882. But before all, the act must amount to mischief as defined in section 425. It must be an act intended to cause or knowing it likely to cause wrongful loss to property. If there was no such knowledge or intention, the act may still be criminal if it was rash or negligent and causes injury as defined in sections 285 and 286 of the Code, but it is not punishable under this section. And it may not be even punishable under those sections if it was neither so rash nor negligent as to be criminally punishable, or if it was the result of an accident or misfortune, or such as was too remote from the effect. Such was the case of the accused who set fire to a heap of rubbish in his field which was in the proximity of a Government forest, and from which the fire was carried by the wind to the Government reserve which was burnt down. The accused was convicted under section 426 and fined Rs. 6 but his case was reported to the High Court, when Aston, J., was for upholding the conviction, holding that the accused was found to have had the knowledge of the fire extending to the Government forest, which was a

finding of fact, upon which the High Court could not interfere in revision. But Heaton, J., was of opinion that the act was in itself innocent and natural, and the effect wholly unintended and unforeseen, being wholly due to the wind. Owing to this difference of opinion the case was referred to Russel, A. C. J., who agreeing with Heaton, J., held that the High Court has power to interfere in revision and that it would exercise its power if it is of opinion that there has been a conviction of a clearly innocent person, that in the case before him the act of the accused did not show anything more than a mere neglect or carelessness, but it was a very different thing to the intention and knowledge of likelihood necessary to constitute mischief. The accused was therefore acquitted.(17)

4883. Between such negligence and that which is criminal there is a clear line of demarcation elsewhere noticed (§§ 2817-2829). Between such criminal negligence and an act intended, there is obviously a wide gulf. For, a person who is reckless or negligent may not advert to the consequence, but a mischievous person is not only presumed to advert to it, but intends that it should ensue, or at any rate knows that it is likely. There is, for instance, a very marked difference between lighting a cigarette in a gunpowder magazine and throwing down the lighted lucifer upon an open canister of gunpowder. The one may be guilty of inadvertence, the other may be properly charged for incendiarism.

4884. The special mischief here punishable is mischief by fire or an explosive substance. What these words mean has already been noticed (§§ 2814-2840). The word "fire" would include anything that generates fire, as for example, phosphorus, while an explosive substance would include anything that explodes or detonates owing to a rapid chemical reaction such as gunpowder or dynamite. The question of a gun or a pistol firing an explosive substance has been also considered before (§§ 2826-2827). It will suffice here to add that it is not an explosive substance.(18)

4885. The fire or explosive must have been used as a means for causing damage to any property, and the damage must be worth Rs. 10 or Rs. 100 according as the property is agricultural or non-agricultural. This does not mean that the property of that value should have been actually burnt down. All that it means is that it must be at least the value of the deterioration caused to such property.

4886. Lastly, the distinction between agricultural produce and other property is material. The former includes the product of agriculture, such as grain, chaff, and the like. Even standing crops are such produce. Non-agricultural property would include anything which is not the product of cultivation, such as grass trees and shrubs of spontaneous growth. As it is on the prosecution to establish a case under this section, all points essential to constitute this offence would have to be established by it.

This commentary is continued under the next section.

(17) *Nandeyappagowda*, 8 Bom. L. R. 851.

(18) *Kasiya Pillai*, (1886) 1 Weir 235.

436. Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Session, Cognizable Warrant. Not bail. Not comp.

Mischief by fire or explosive substance with intent to destroy house, etc.

[*Building*—s. 380, § 4141. *Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (4887).
(2) *Procedure and Practice* (4888-4889).
(3) *Measure of Punishment* (4889).
(4) *Proof* (4890).
(5) *Form of Charge* (4891).
(6) *Arson of a Building* (4892 4897).
(7) *What is a Building* (4898-4901).

4887. Analogous Law.—This section adds yet another circumstance of aggravation to the ordinary offence of arson punishable under the last section. In doing so it closely follows the provisions of the English Statute relating to malicious damage to property[19] (§§ 4874, 4875).

4888. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable exclusively by the Court of Session. In drawing up a charge under this section it is necessary to state that the mischief was caused intentionally, or knowingly that destruction of a building would follow,[20] the nature of which should be described, whether it is one ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property.[21] The evidence of previous fires unconnected with the accused is inadmissible, and a conviction based upon such evidence was quashed.[22]

4889. It is evident that in prescribing the maximum sentence the legislature has left a good deal to the discretion of the Judge. It was, indeed, expressly so stated by the Law Commissioners to whom was pointed out the great difference that existed between a thatched hut of the lowest classes and the substantial secure and valuable dwellings of the upper classes, but which the Commissioners thought was a matter well left to the discretion of the Judge.[23] So it was pointed out by the High Court of Calcutta that the amount of mischief done is not to be the sole

Measure of Punishment.

(19) Malicious Damage Act. 1861 (24 & 25 Vict., c. 97) ss. 1-7.
(20) 3 W. R. Cr. L. 7.
(21) *Per* Hobhouse, J., in *Durharro Polic*, 8 W. R. 30.
(22) *Abdul Kadir*, 20 C. W. N. 1267, 35 I. C. 981, 17 Cr. L. J. 421.
(23) First Rep., ss. 614, 615.

measure of the penalty to be inflicted. A person who sets fire to a human dwelling may put in jeopardy the lives and the property not only of those dwelling therein, but of others dwelling in adjoining houses, of persons assisting to put out the fire, and so on. These will be fit cases for condign punishment.[24] Then, again, the punishment must be proportioned to the malignity of the intention of the incendiary; for instance, between the case of one who deliberately plots and sets fire to the house of another and one who in a fit of temper in consequence of a domestic quarrel breaks his crockery and desiring to put an end to his habitation goes out and sets fire to the eaves of his house, thereby endangering the safety of neighbouring houses,[25] (s. 285).

4890. Proof.—The points requiring proof are:—

(1) That the accused committed mischief (s. 426).

(2) That the said mischief was committed by fire or an explosive substance.

(3) That it destroyed or damaged a building.

(4) That such building was ordinarily used either as a—

(*a*) place of worship, or

(*b*) human dwelling; or

(*c*) place for the custody of property.

4891. Charge.—In drawing up a charge under this section regard must be had to the points already noticed. (§ 4889). It should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed mischief by fire or an explosive substance, to wit——(*describe it*) intending to cause (*or* knowing it to be likely that you would thereby cause) the destruction of a building (of A B)[1] which was ordinarily used as a place of worship (*or* as a human dwelling *or* as a place for the custody of property) and that you thereby committed an offence punishable under section 436 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

4892. Arson of a Building.—This section prescribes a penalty for setting fire to a building of any of the three kinds enumerated in the section: (*a*) a building used as a place of worship, (*b*) as used for human dwelling, and (*c*) as used for the custody of property. The foundation for the offence being mischief as defined in section 425, all

(24) *Deebo Nath Jogee*, 8 W. R. Cr. L. 14.

(25) *Hari*, (1887) B. U. C. 126.

(1) This may be added as descriptive of the house, but it is not necessary to prove that the house belonged to *A. B.*; *Newboult*, L. R. 1 C. C. R. 344.

the elements which are the pre-requisites of that offence would have to be necessarily established (§§ 4776-4794). In fact, it may be even generally stated that both the last and this section possess common ingredients except that the property affected is a building. Under either section there must, of course, be the intention or knowledge which distinguishes this offence from those in which there is nothing more beyond rashness or negligence, or acts which are too remote to cause the effect or in which the effect is due merely to accident or misfortune (§§ 4777-4790).

4893. Of course proof of such intention or knowledge does not presuppose proof of an intention or knowledge to cause injury to any individual in particular. And, of course, the question of motive is immaterial for the purpose of the offence,(2) though it has high evidentiary value. For it will establish whether an act was intentional or accidental.(3) In England, law presumes every person to intend the necessary consequence of his own act; but this is not the view of the Code.(4) Consequently, though the intention has to be inferred, it may be held to have been proved from the nature of the act, but it cannot be presumed as a matter of course. Even in England the artificial presumption is subject to the rule that the act must be wilful.

4894. The intention or knowledge must be with regard to the destruction of a building. It is not necessary that any particular building should be aimed at, but what is necessary is that the incendiary should have for his object the destruction of a building. If, therefore, intending to set fire to the house of A he accidentally sets fire to that of B, it is felony, and so if a man wilfully set fire to his own house and thereby burn also the house of one of his neighbours, it will be felony.(5) In England it has been even held that if a person intending to commit a felony, by accident set fire to another's house this would be arson, both by common law and under the old Statute.(6) But the soundness of the view has been rightly doubted in Ireland(7) and at any rate, it is a view unacceptable to the Code (§§ 708-710). So it has been held in England that if a person do an illegal act, as shooting without a license and thereby set fire to the thatch of a house, it will be felony.(8) But the Code views the question in a different light. (§§711-713).

4895. As to actual proof of arson, direct evidence in many cases may not be available. In that case the jury must be content to determine the question in the light of such circumstantial evidence as may be available. So where a house was robbed and burnt the prisoner being found in possession of some of the goods which were in the house at the time it was burnt, the fact was held to be relevant as tending to prove the accused guilty of the arson.(9) So it is relevant as showing that the fire was intentional and not accidental, that the accused was on another occasion seen making an attempt to set fire to the house.(10) But it is not relevant to show that a few days previously

(2) *Farrington*, R. & R. 207.
(3) *Salmon*, R. & R. 26; *Davies*, 1 F. & F. 69.
(4) General Introduction, §§ 58-61.
(5) *Probert*, 2 East P. C. 1030; *Isac*, ib., 1013.
(6) Fost, 258, 259.
(7) *Faulkner*, 13 Cox (Ir.) 550.
(8) *Dosset*, 2 Cox 243; *contra* in *Hole*, 569.
(9) *Rickman*, 2 East P. C. 1035.
(10) *Dossett*, 2 C. & K. 306; *Taylor*, 5 Cox 138; *Bailey*, 4 F. & F. 342; *Gray*, 4 F. & F. 1102.

to the fire in question, another building of the prosecutor's was on fire, and that the accused was then standing by evidently gratified or indifferent to it,[11] or that there had been previous fires in the village of which the accused had some motive to be the incendiary.[12]

In order to establish the possibility of the fire, it is allowable to make experiments to see how a building could have been set on fire.[13]

4896. The intention or knowledge must under this section relate to the setting a house on fire. If, therefore, one intending merely to burn another's goods, sets fire to such goods in his house, and from which the fire extends and destroys the house, the accused could not be puinshed for this offence unless there was evidence to show that he set fire to the goods knowing that it may probably destroy the house as well.[14] On the other hand, the mere knowledge of such probability would not aggravate the offence so as to bring it under this section, unless the house was in fact set on fire.[15] And for this purpose it would seem that there must be evidence of "destruction" and not merely that some part of it was scorched or singed,[16] though it would be otherwise if it was charred.[17] Indeed, this section provides a punishment for only serious cases of mischief caused by fire, and not every case of mischief by fire. The use of the word "destruction" and the absence of other words used in the same connection in section 425 is significant, for it limits the operation of the section only to the case in which the damage caused by the fire amounts to the destruction of a building—any damage falling short of it may amount to an attempt, but it does not expose the offender to the full penalties of this section.

4897. But as the section is worded it is not necessary that the building should have been wholly destroyed by fire, for all that it requires is that the accused should commit mischief intending or having knowledge of the likelihood of causing destruction of the building. But how can the accused be said to possess this intention or knowledge unless he does some definite act from which the Court could justifiably infer that intention. Such inference may, according to the English Common Law, be reasonably made if the act caused an *actual burning* of the whole or some part of the house, though it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance, or that it should immediately be put out or go out itself. But without burning at least a part of the house no such inference can be drawn from a bare intention, or an actual attempt to burn the house by putting fire into or towards it.[18]

But there may be fire without flame, and if the effect of the fire was to destroy the building it will be sufficient to constitute arson, though the fire emitted no flames and was at no time seen ablaze. So

(11) *Harris*, 4 F. & F. 342.
(12) *Todan Mir*, 20 C. W. N. 1287, 35. I. C. 981.
(13) *Heseltine*, 12 Cox. 404.
(14) *Nattrass*, 15 Cox 73; *Harris*, ib., 75.
(15) *Child*, L. R. 1 C. C. R. 307.
(16) *Russell*, C. & Mar. 541.
(17) *Parker*, 9 C. & P. 45.
(18) 3 Inst., 66; 1 Hale P. C. 568 to 569, 1 Hawk. P. C. C. 36, ss. 16, 17; 1 East. P. C. 1020.

Cresswell, J., said: "We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn, and entirely consume, without blazing at all."(19) This was the view taken in another case in which the accused was charged with arson for having set fire to some straw piled on the wooden roof of an outhouse, which was pulled out when several handfuls were found burnt and two half thatches were also discovered in the straw on the ground. There was evidence of emission of smoke out of the straw but no flame was seen. On a case reserved as to whether this constituted the setting on fire,(20) and whether the house was a building and, if so, whether the straw was a part of the building the Judges answered all the three questions in the affirmative.(21)

4898. What is a Building?—The question what constitutes a "building" without the meaning of this section was put to the Law Commissioners, to whom it was pointed out that the grass or mat huts of the lowest classes were placed on a level with the substantial, secure, and valuable dwellings, of the better classes, to which the Commissioners replied that the distinction would be naturally taken into consideration by the Judge in apportioning the sentence.(22) But so far as regards the import of the term, it is intended to embrace all structures more particularly described in the English Statute(23) as "house, stable, coach house, outhouse, warehouse, office, shop, mill, malt-house, hopoast, barn, store-house, granary, hovel, shed, or fold, farm building, or any building or erection used in farming land." The term would include anything from a costliest palace down to a lowliest hovel, and whether made of stone, brick, clay or wood, and with whatever substance covered. It would include even an unfinished structure, provided that it was nearing completion, as where all the walls external and internal are built and finished, the roof put on and finished, the flooring of a considerable part laid, and the internal walls and ceilings are prepared for plastering.(24) But a house the walls of which had been raised only a few feet from the ground could scarcely be said to fall within that term. So a shed used for the storage of seasoned timber and made of wooden sides, glass windows, and slated roof was held to be a building.(25)

4899. The term "building" would however be scarcely applicable to a temporary *tattie* shed put up by coolies for shelter. This is obvious from the exclusion of "tent" in the same collocation as used in section 380. A temporary erection put up for shelter is not building which should have at least a permanent foundation. So a cattle-pen or grain-bin bind of mud or stripped bamboos could be scarcely designated a building.

4900. The building here intended must not only be building in the proper sense of the term, but a building *ordinarily* used as a place of

(19) *Russel*, C. & M. 541.
(20) Under 7 & 8 Geo. 4, c. 30, s. 2.
(21) *Stallion*, R. & M. C. C. 398 (Tindle, C. J., *dissentiente*, on the second and third point).
(22) First Rep., ss. 614, 615.
(23) 24 & 25 Vict., c. 97, s. 3.
(24) *Manning*, L. R. 1 C. C. R. 338, decided on the meaning of "building" as used in 24 & 25 Vict., c. 97, s. 6.
(25) *Amos*, 20 L. J. M. C. 103; *Munson*, 2 Cox. 186.

worship, or as a human dwelling or as a place for the custody of property. The first would include such place as a church, mosque or a temple, a *Kyaung*(1) or a pagoda. A tomb or a graveyard is not such a place though it may be used by the pious for the purpose of saying their prayers (§ 3091). A building ordinarily used as a prayer house must be a building set apart for that purpose by the community who use it for worship. Such community may be small but it must customarily use it for divine worship. It may be even used once or twice a year as in the case of an *Idgah* or it may be a place of daily resort as in the case of mosques and temples. A building used for human dwelling must answer the same purpose. If a person takes up his abode in a tunnel or a public archway it does not convert it into a building ordinarily used as a human dwelling, for the word "dwelling" implies something more than merely obtaining shelter. It implies that the place is used for residence or more or less permanent habitation. A structure may be a human dwelling but not a "building," as where a field watchman sets up an erection on posts to scare away wild birds and thieves, or a person puts up a shed in his fruit garden for the same purpose.

4901. A place used for the custody of property will however admit of a still greater variety. But in any case it must be a building. A place, such as an open timber yard or a hurdle used as a cattle pen is clearly not intended. But the term is otherwise wide enough to include a goods' shed, an outhouse, a warehouse or a godown. The fact that a building is used for a certain purpose implies its adaptability to that purpose but it is not in special requirement. And the question whether a place is a building and whether it is one ordinarily used for any of the three purposes specified in the section, is a quesion of fact dependent upon the evidence adduced in each case.

Session. Cognizable. Warrant. Not bail. Not comp.

Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.

437. Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Vessel*—s. 48. *Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (4902).
(2) *Procedure and Practice* (4903).
(3) *Proof* (4904).
(4) *Form of Charge* (4905).
(5) *Mischief Endangering Ship* (4906-4909).

(1) (1894) U. B. R. 198.

4902. Analogous Law.—This section applies to an ordinary case of mischief committed on board a ship or boat when plying in water. The insertion of the qualifying word "decked," or the words "of a burden of twenty tons or upwards" were intended to exclude the small native crafts of all kinds such as a ferry boat, a dug-out or a canoe, the object of the Legislature being to reserve its high penalties to mischief aboard of a ship imperilling the lives of many on board. Originally this purpose was intended to be served by restricting the provision of this section only to a "decked" vessel, but it was pointed out that though the *dhonies* or native coasting crafts in the Bay of Bengal were for the most part decked those used on the western coast of India and those navigating the northern part of the Indian Ocean to the Red Sea were undecked and for which some provisions were necessary.(2) This led to the addition of the alternate qualification which while excluding all vessels such as fishing boats, cross-ferries and the like not plying in the open sea or deep rivers or lakes would yet include all vessels of any importance and for which alone this provision was intended to apply.

4903. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session or the High Court.

4904. Proof.—The points requiring proof are:—

(1) That the accused committed mischief (s. 426).

(2) That the mischief was committed against a vessel.

(3) That the vessel was either decked or of a burden of at least 20 tons.

(4) That when committing the mischief the accused intended to destroy or render unsafe that vessel or that he knew it to be likely that he will thereby destroy it or render it unsafe.

4905. Charge.—The charge under this or the next section should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed mischief [(*in case of s.* 438 *add* by fire or any explosive substance)] to a decked vessel of A B (*name it*) (*or* to a vessel of A B of a burden of——tons) intending to destry (*or* render unsafe) the said vessel (*or* knowing it likely that you will thereby destroy it, *or* render it unsafe), and that you thereby committed an offence punishable under section 437 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

4906. Mischief endangering Ship.—Vessels plying on the unstable element naturally incur great risks, and this section therefore prescribes a stringent penalty for mischief committed on board. But the section

(2) First Rep., s. 619.

justifiably draws a line as regards the vessels deserving of this special protection. In an insular country like England such vessels are naturally of greater dimensions than here, where small canoes and crafts do much of the inland and coasting trade. This section excludes all vessels that are not "decked" or which have not the carrying capacity of at least 20 tons. The word "decked" implies that the vessels are furnished with a deck, which is a horizontal platform or floor extending from side to side of a ship, and formed of planking supported by the beams. Such deck is only possible in a vessel of a comparatively large size. But as even such vessels may not be provided with a deck (§ 4902), the section insures the same result by requiring vessels to be of at least a certain tonnage that is large enough to carry on board property weighing at least 20 tons. As the carrying capacity of ocean-going vessels is invariably registered, a reference to the registered tonnage should be sufficient to prove its capacity, but this would be in most cases superfluous, for if a vessel is an ocean-going vessel, it must be taken as a matter of course that its carrying capacity is at least 20 tons. In other cases this fact will have to be established by evidence. In England, a pleasure-boat eighteen feet long was held to be a vessel within the meaning of the English statutes.(3)

4907. The special form of mischief here punishable is that which is directed against the destruction or damaging of such a vessel, so as to render it unsafe for the conveyance of person or property. The mischief need not be necessarily perpetrated on board a ship while it is on water, for a vessel in the docks may be equally the subject of this offence. And it is equally immaterial whether the ship was complete or in an unfinished state (§ 4906)

4908. But, of course, the act done must amount to mischief, the special purpose of which must be the destruction or damage of the ship so as to render it unsafe for the purpose for which it was ordinarily intended. Now since mischief implies the doing of some physical injury to the subject of mischief, it follows that if a ship be only run aground and be afterwards refloated in such a condition as to be easily refitted, it would not be mischief.(4)

4909. The intention or knowledge is, of course, necessary to make the doer of the act complained of criminally responsibe. Criminality would as a rule vary with the nature of such intention and knowledge. For example, a person deliberately sinking a ship to defraud the underwriters,(5) would deserve exemplary punishment as compared to one who throws away its rudder in a drunken brawl.

Session. Cognizable. Warrant. Not bail. Not comp.

Punishment for the mischief described in section 437 committed by fire or explosive substance.

438. Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(3) 24 & 25 Vict., c. 97, ss. 42—44; *Bowyer*, 4 C. & P. 559.

(4) *De Londo*, 2 East P. C. 1098.

(5) *Gilson*, R. & R. 138.

Synopsis.

(1) *Analogous Law* (4910-4912).
(2) *Procedure and Practice* (4913).
(3) *Proof* (4914).
(4) *Charge* (4915).
(5) *Arson Endangering Ship* (4916-4917).

4910. Analogous Law.—This is really a proviso to the last section prescribing a still higher punishment for the offence if it amounts to arson, which, of course, exposes the vessel to a greater risk of destruction.

4911. The provisions of this section correspond to those of section 42 of the Malicious Damage Act.(6) But the English Statutes contain more exhaustive provision against this offence; but this section though simpler has, when read with section 425 and 437, the same effect.

4912. It will be noticed that this is another section in which an attempt is regarded as of the same heinousness as the completed crime,(7) and both are punishable alike.

4913. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable and is exclusively triable by the Court of Session or the High Court.

For other points of practice calling for comment, *see* s. 426.

4914. Proof.—The points requiring proof are:—

(1) That the accused committed or attempted to commit mischief (s. 426).

(2) That the mischief was committed or attempted by fire or an explosive substance.

(3) That it was committed or attempted to be committed to any decked vessel or a vessel of a burden of 20 tons or more.

(4) That when committing the mischief the accused intended to destroy such vessel or render it unsafe, or that he knew that he was likely to do so.

4915. Charge—*See* last section (§ 4905).

4916. Arson Endangering Ship.—This section prescribes a still higher penalty for mischief—indeed, it is the highest provided for it any where. And the reason is clear. For, there can be no greater peril to a sailing ship than when it is on fire. The ship may, however, be set on fire when it is at anchor in the docks or is in harbour, but in that case the Court will have to take into consideration the fact

(6) Malicious Damage Act. 1861 (24 & 25 Vict., c. 97), s. 42; re-enacting 1 Will. & 1 Vict., c. 89, ss. 4, 6. Other provisions relating to the same subject are contained in the Dockyards Protection Act, 1772 (12 Geo. III) s. 1; Naval Discipline Act, (29 & 30 Vict., c. 109), s. 34; 24 & 25 Vict., c. 97, s. 43 (setting fire to defraud insurance), s. 44 (attempting to set fire.)

(7) Introduction, § 58.

that it was not then exposed to the same risks, though this fact may be counteracted by the evil intention of the incendiary which may be, for instance, to defraud the underwriters.

4917. On the other hand, though the fire may be the work of the accused, still he may not be guilty at all because of the want of criminal intention (§§ 722-735). So where the accused, a sailor, entered the spirits room of the ship for the purpose of stealing rum, and while tapping a cask of rum a lighted match held by him accidentally came in contact with the rum which was flowing from the cask tapped by him and a fire ensued which destroyed the vessel, it was held by the Irish Court that the accused could not be convicted of arson [8] (§ 708-709).

Session. Cognizable. Warrant. Non-bail. Not comp.

Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.

439. Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Dishonestly*—s. 24. *Vessel*—s. 48.]

Synopsis.

(1) *Analogous Law* (4918).
(2) *Procedure and Practice* (4919).
(3) *Proof* (4920).
(4) *Stranding a Ship for Plunder* (4921-4922).

4918. Analogous Law.—This is an offence allied to piracy, and pirates and their abettors are equally liable to be punished under this section. But the offence relates to a preparatory stage in which the vessel is stranded to enable its being robbed. The subsequent stage of actual robbery may or may never be reached, but the offender is all the same liable to the penalty here prescribed.

4919. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

4920. Proof.—The points requiring proof are:—

(1) That the accused ran aground or ashore a vessel.

(2) That he did so intentionally.

(3) His intention being to commit theft of the property contained therein or to dishonestly misappropriate any such property, or that such theft or misappropriation may be committed.

(8) *Faulkner*, 13 Cox (Ir.) 550.

4921. Stranding a Ship for Plunder.—The subject of piracy has been elsewhere dealt with (§§ 79-87). This section prescribes the punishment for an allied offence, committed within territorial waters, that offence consisting in the stranding of a ship, by running it aground or ashore for the purpose of committing theft or criminal misappropriation of any of its contents. The ship may be run aground by deliberately altering its course through shoal and thus plunging it into a sandbank. It is not necessary that the ship should be injured, nor is it necessary that the person running it aground should himself plunder it. The only thing that the section requires is that he should have done so with the intention of facilitating its plunder. It will be noticed that in this connection the section makes criminality depend upon intention and not merely a knowledge of likelihood, for it is conceivable that a person may run a ship aground and thus expose it to the attack of thieves, though his intention was to save it, say, from sinking.

4922. The proof of criminal intention may be furnished by the subsequent act, or by the evidence of previous or contemporaneous acts and declarations, or by those circumstances from which it is allowable to infer such an intention.

Mischief committed after preparation made for causing death or hurt.

440. Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

[*Hurt*—s. 319. *Wrongful restraint*—s. 330. *Mischief*—s. 425.]

Synopsis.

Analogous Law (4923).

4923. Analogous Law.—This section punishes mischief accompanied by duress, the aggravation lying in the armed resistance got ready to overcome opposition.

Of Criminal Trespass.

4924. Topical Introduction.—This branch of the chapter dealing with the offence of criminal trespass contains 22 sections, and of these the first section defines the term "criminal trespass," which is by itself an offence punishable under section 447. That offence may however be committed under various circumstances of aggravation, of which the following are noticed as calling for special penalties:—

(*i*) *Time of trespass*—trespass by night being an unexpected intrusion into one's privacy and causing greater alarm without the ordinary means of resistance available at daytime, being regarded as more serious than a trespass at daytime.

(*ii*) *Purpose of trespass*—the penalty varying with the intention to commit serious offence against person and property.

(*iii*) *The nature of the property trespassed upon*—trespass into a house being naturally more serious than on one's field.

So the draftsmen wrote:—

"We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass, as such, an offence, except when it is committed in order to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Even then we propose to visit it with a light punishment, unless it be attended with aggravating circumstances.

4925. "These aggravating circumstances are of two sorts. Criminal trespass may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed.

4926. "There is no sort of property which it is so desirable to guard against unlawful intrusion as the habitations in which men reside, and the buildings, in whch they keep their goods. The offence of trespassing on these places we designate as house-trespass, and we treat it as an agravated form of criminal trespass.

4927. "House-trespass, again, may be aggravated by being committed in a surreptitious or in a violent manner. The former aggravated form of house-trespass we designate as lurking house-trespass; the latter we designate as house-breaking. Again, house-trespass, in every form, may be aggravated by the time at which it is committed. Trespass of this sort, has, for obvious reasons, always been considered as a more serious offence when committed by night than when committed by day. Thus, we have four aggravated forms of that sort of criminal trespass, which we designate as house-trespass, lurking house-trespass by night, and house-breaking by night.

4928. "These are aggravations arising from the way in which the criminal trespass is committed. But criminal trespass may also be aggravated by the end for which it is committed. It may be committed for a frolic. It may be committed in order to a murder. It may also often happen that a criminal trespass which is venial, as respects the mode, may be of the greatest enormity as respects the end; and that a criminal trespass committed in the most reprehensible mode, may be committed for an end of no great atrocity. Thus A may commit house-breaking by night for the purpose of playing some idle trick on the inmates of a dwelling. B may commit simple criminal trespass by merely entering another's field for the purpose of murder or gang-robbery. Here A commits trespass in the worst way. B commits trespass with the worst object. In our provisions we have endeavoured to combine the aggravating circumstances in such a way that each may have its due effect in settling the punishment."(9)

441. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

Criminal trespass.

(9) Note N, Reprint, p. 168.

or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit "criminal trespass."

Synopsis.

(1) *Analogous Law* (4929-4933).
(2) *Meaning of Words* (4934).
(3) *What is a Criminal Trespass* (4935-4936).
(4) *Civil Trespass* (4937-4939).
(5) *Intention vs. Knowledge* (4940-4945).
(6) *Specific Intention Unnecessary* (4946-4950).
(7) *View that Specific Intention Necessary* (4947).
(8) *Law Defective* (4948-4950).
(9) *Entry or Remaining must be Unlawful* (4951).
(10) *Trespass on Disputed Land* (4952-4955).
(11) *Who may Complain* (4956).
(12) *Possession must be Actual and Exclusive* (4957).
(13) *Illegal Possession Excluded* (4958-4960).
(14) *License and Possession Without Title Excluded* (4958-4960).
(15) *Unlawfully Remaining After Lawful Entry* (4961).
(16) *What is Entered Upon must be Property* (4962-4963).
(17) *Bona Fide Claim* (4964-4967).
(18) *Limits of the Rule* (4967).
(19) *Manifestation of Criminal Intent* (4968-4973).
(20) *Intent only Necessary* (4971-4973).

4929. Analogous Law—This section defines the offence of criminal trespass which is akin to the "forcible entry" of English law, in which that offence is indictable at common law as well by Statutes; but the terms of the common law are stricter and require proof of entry by such force as constitutes a public breach of the peace, or such proceedings as constitute a riot or unlawful assembly.(10) But "forcible entry" under Statute is punishable, if it is forcibly made with a strong hand by a multitude of people.(11) An entry into the land or possession of another unaccompanied by any circumstance constituting a breach of the peace is there called trespass which is not indictable.(12) The conception of criminal trespass in the Code is thus somewhat novel and a departure from the English law inasmuch as the offence lies not so much in the entry *vi et armis*, as in the *intention* which is the sole test of criminal liability.

4930. The definition as now enacted is, however, materially different from that originally drafted which ran thus:—

"418. Whoever exercises any dominion over any property, not having a legal right, independent of the consent of any other party to exercise such dominion, and not having the consent, express or implied, of any party legally entitled to give a consent which would authorize the exercise of such dominion, is said to "trespass."(13)

(10) *Wilson*, 8 T. R. 357; *Bake*, 3 *Burr.* 1731.
(11) 5 Rich. 2, c. 7.
(12) *George*, 3 Salk. 188; *Sharpless*, 4 T. R. 777.
(13) S. 418.

Appended to this section were the following six illustrations:—

"(*a*) *A* walks into a building, not having a right of entry there, and not having the consent of any person entitled to authorize such entry. *A* trespasses.

"(*b*) *A* goes across *Z*'s field, not having a right of way there, and not having the consent of any person entitled to authorise *A* so to do. *A* trespasses.

"(*c*) *A* takes up a book belonging to *Z*, and reads it, not having any right over the book, and not having the consent of any person entitled to authorize *A* so to do. *A* trespasses.

"(*d*) *A* throws rubbish into *Z*'s garden, not having any right over the garden, and not having the consent of any person entitled to authorize *A* so to do. *A* trespasses.

"(*e*) *A* climbs up behind *Z*'s carriage not having a right so to do, and not having the consent of any person entitled to authorize him to do so. *A* trespasses.

"(*f*) *A* goes into *Z*'s field with *Z*'s consent but remains in the field after he has been directed by *Z* to withdraw. *A* trespasses."

4931. Having thus settled the sense of "trespass" the Bill then proceeded to define "criminal trespass," in the following words.

"419. Whoever knowingly trespasses in order to the injuring by any offence, o the intimidating, to the insulting or to the annoying of any possessor of the property which is the subject of the trespass, or of any person who, by the permission express or implied, of such possessor, is exercising any dominion over such property is said to commit criminal trespass."

4932. The definition of "trespass" was, however, considered too wide and even unnecessary for the purpose of a Criminal Code. The two definitions were, consequently, consolidated into the present definition, which takes an intermediate place between the "trespass" and "forcible entry" of English Law.

4933. The word "criminal trespass" as here defined is not to be confused with a mere "trespass" mentioned in section 297. As there pointed out (§ 2968), that word has not the special significance attached to "criminal trespass" which may be regarded as a term of art possessing certain well defined attributes, which are of the essence of the offence punishable as such.

4934. Meaning of Words:—"*Possession of another*," which means actual possession,[14] not necessarily rightful, but sufficiently long to be legal and peaceful[15] (§ 4955). "*With intent to commit, etc.*" Mere unlawful entry may amount to trespass, but in order to make it criminal it must accompany the intention to intimidate, insult, or annoy *not* the owner, but the person in possession of the property. The question whether such intention should be actual or presumed is not free from doubt (§§ 4894-4946).

4935. What is a Criminal Trespass?—Trespass is an encroachment on the property of another. As such, trespass is a wrong, and it may be a civil wrong or a crime. The term "criminal trespass" is therefore

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(14) *Kunji Lal*, 12 A. L. J. 151; *Tok Gyi*, 35 I. C. (Bur.) 810.

(15) *Ram Dyal*, 7 W. R. 28; *Dwarka Singh*, 38 I. C. (Pat.) 962.

not synonymous with trespass, for all trespass is not criminal even though it should conform to all the requirements of this section. As Straight, J., remarked: "The unusually vague and elastic language used in section 441 if not closely scrutinized and strictly interpreted might lead to its application to sets of facts or circumstances for which it was never intended by the legislative authorities who framed it. For, it is easy enough to conceive multitudinous cases, some approaching the verge of absurdity, that would fall within the letter, not the spirit, of the section, and which no one would for a moment consider a fit subject even for civil proceedings, much less for a prosecution in a Criminal Court. To lay down any rule as to the extent to which its operation should be limited is scarcely possible, but it is plain that its scope must be confined within those bounds that common sense and sound reason dictate.

4936. "In this view, let us see what the words of the section practically enact, and how they are to be practically applied. *First*, there must be an unauthorized entry into or upon property—unauthorized, that is to say, either directly against the will of the person in possession, or constructively against his will, in the sense that he who enters has an unlawful intention, which, were it known to such person would make him object, forbid, or prevent the entry that in ignorance of such intention he sanctions and permits; or again, if the entry has been lawfully and legitimately obtained; there must be an unlawful remaining, either directly or constructively, against the will of the person in possession, to be judged by the tests already explained. In either case the unlawful entry or unlawful remaining must be with intent: (*i*) to commit an offence; (*ii*) to intimidate; (*iii*) to insult; (*iv*) to annoy any person in possession of the property. As to these intents the first three are sufficiently explicit by the light of sections 40, 503 and 504 of the Penal Code; but as to the fourth, very grave difficulty arises to ascertain what is or is not meant. Is the word 'annoy' to be taken in its fullest and most general sense, or with what limitations is it to be construed? The varieties and differences of human temperament are so innumerable that it is next to impossible to estimate to what lengths a literal definition might not extend. It is a matter of daily observance that what will annoy one man will not disturb an emotion in another; and in a vast community like the native population of this country, the endless fancies, feelings, and prejudices, religious or caste-born, necessarily are stronger and more sensative with one set of persons than with another. It must, therefore, be that the word 'annoy' in this section (441) must have some plain and intelligible construction placed upon it, and its application must not be left to depend upon each individual case and the peculiarities of character or idiosyncrasies of feeling of the special person who comes forward to complain. It seems to me that the word 'annoy' in section 441 must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual."(16)

(16) *Gobind Prasad*, 2 A. 465.

4937. Civil Trespass.—Entry into or upon property in the possession of another is not necessarily trespass, for it may be a lawful entry, as in the case of the landlord exercising his right of re-entry on expiration of the lease. Such entry may, however, become unlawful, if though peaceful, it is not warranted by law. And it may then be civilly actionable as a civil trespass, but it is not criminally punishable. And since an erroneous but honest belief in one's right is always a ground for exoneration, it follows that no person could be condemned for an act which though illegal was done in the belief that it was legal. Such an act may amount to a civil trespass and may even make the trespasser liable to pay damages, but he could not be convicted of criminal trespass which is a statutory offence requiring the presence of a certain criminal intention which is the gist of the crime.(17) In this sense a lawful entry may become criminal if it is accompanied by the intention which law has declared to be criminal. And so in England while at common law, if a man had a right to the possession of land and a right to enter thereon, he might enter and obtain possession with force of arms, and retain possession by force, but this led to abuse of the right by the strong ejecting the weak under pretence of feigned titles, and so it was enacted in 1381 " that none henceforth make entry into any lands and tenements, but in cases where entry is given by the law; and in that case not with strong hand, nor with multitude of people but only in a peaceable and easy manner."(18)

4938. This was the first enactment against lawful but forcible entry upon land and, it has since remained the law that no person has the right of making a forcible entry upon his own land if in the possession of another, even though the latter have no clear right to possession. So Parke, B., said in a case " where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. It is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant who was the owner, and that the defendant entered upon it accordingly."(19)

In English Law the position of the parties is then this: in order to determine the *civil* responsibility of the person, law looks not to the nature of the entry but to the right. If the entry was legal, it does not care if it was also forcible. But criminal law views the entry in a different light. It looks not to the right but to the manner of the entry. If it was forcible, it holds the person indictable and it does not matter that the entry was legal.(20) The result of viewing this question from two different stand-points has led to this result that a person may be criminally punished for trespass though he could not be held

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(17) *Bakar Halsana* v. *Dinobandhu*, 3 B. L. R. (A. Cr.) 17 *Shistidhur*, 9 B. L. R. (App.) 19; *Budh Singh*, 2 A. 101; *Wazir Jan*, 9 A. 58; *Abdul Latif*, 5 S. L. R. 125; *Ramchandra*, 5 N. L. R. 69; *Meajan* v. *Sharafatullah*, 16 C. W. N. 1007. 17 I. C. 415, 13 Cr. L. J. 873.

(18) 5 Ric. II., c. 7.

(19) *Harvey* v. *Brydges*, 14 N. & W. 442; *Davison* v. *Wilson*, 11 Q. B. 1890; *Meriton* v. *Coombes*, 9 C. B. 787.

(20) *Newton* v. *Harland* 1 M. & G. 644.

civilly liable for the same act.[21] It may be then said quoting the words of the authors that "to tempt men to trespass by means of the Civil Code, and then to punish them for trespassing, is contrary to every sound principle."[22] But such is the law of England, enacted in the Code, but which appears to be abundantly justified, if regard is had to the different objects which the two branches of law have in view—the one being concerned with the protection of title, the other with the preservation of peace.

4939. English Law insures this by preventing forcible entry, while this section seeks to attain the same end by preventing an entry "with intent to commit an offence, or to intimidate, insult, or annoy a person in possession of such property." It has been thought that these words are too wide and would include even a case of innocent entry if it has the effect of causing annoyance to the possessor of land. (§§ 4937-4938). But it is apprehended that this is by no means the effect of the section, which makes criminality depend upon the *intention* of the trespasser and not upon the effect produced by his trespass. Nor does it take account of the knowledge of the likelihood of causing annoyance in the mind of the trespasser as distinct from his intention. In other words, the sole test of criminality in this offence is the intention as distinct from knowledge and effect.

4940. Intention v. Knowledge.—It is conclived that such intention must be actual and primary, and not merely constructive or secondary[23] (§§ 4942-4945). Consequently, where a person makes an entry upon another's land not with the intention of annoying him, but in the assertion of a *bona fide* claim of right, he could not be punished for this offence though his act may have in fact caused annoyance to the possessor, and the trespasser may have been aware of it. This ground for exoneration is based upon the broad principle that no one could be said to have intended to annoy another when his act was prompted by the intention to take possession of property which he believed to be his own. In this case the question does not depend upon an inherent right, but upon the trespasser's belief in his right—in short, upon the state of his mind and not upon the strength of his title.

So, Turner, J., said: "If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, but without any intention to intimidate, insult or annoy the person in possession, or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence. So also, if a person deals injuriously with property in the *bona fide* belief that it is his own, he cannot be convicted of the offence of mischief, because his act was not committed with intent to cause *wrongful* loss or damage to any person. But the mere assertion of a claim of right is not in

(21) *Pollen* v. *Brewer*, 7 C. B. N. S. 373

(22) Note, Reprint, p. 166; cited under s. 415.

(23) *Harendra Nath* v. *Jyotish Chandra*, 52 C. 188 (193), following *Bhagwana* v. *Kedari*, 25 B. 202 (226); *Suleman*, 96 I. C. 871, (1926) L. 600; *Moti Lal*, 47 A. 855.

itself a sufficient answer to such charges. It is the duty of Criminal Court to determine what was the intention of the offender; and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established, which constitute the offence."[24] So it was said in another case: "If the appellant entertained the belief in good faith that he was entitled to the possession of the land, his entry and continuance on it would constitute a trespass on the land for which he would, if he failed to prove his title, be answerable in a civil suit, but would not be liable to a criminal charge. If, on the other hand, the circumstances were such that he could not have entertained such a belief in good faith, it would be a fair inference that he intended the annoyance which his action must have caused to the complainant, and the conviction would be proper."[25]

4941. The question whether the claim was *bona fide* or a mere pretence, is a question of fact which must be decided upon the proved facts of each case. But in order to support a conviction under this section, there must be a clear finding that what the accused did was done with the primary intention of committing one of the acts reprobated in the section. This has been laid down in several cases,[1] but a discordant note was struck in a Full Bench case of the Punjab Chief Court, in which the majority of the Judges approached the question from a different stand-point. For they said: "The question for decision is whether the intent to annoy or intimidate or insult any person in possession of the property entered upon, must, under section 441 of the Penal Code, in order to constitute criminal trespass, be the primary intent, or whether an act intended to assert a *bona fide* right to the property entered upon may constitute criminal trespass by reason of intimidation, insult or annoyance to the person in possession, being a natural consequence of the act. After careful consideration of the judgments and of the authorities cited, the conclusion at which I have arrived is: (*i*) that each case must be decided on its own merits, with special regard to the nature of the claim, the nature of the act alleged to constitute criminal trespass, and the effect which such act would have on a person of ordinary temperament, regard being also had to the sex and position in life of the individual affected by the act; (*ii*) that the fact that the primary intention of the accused was to assert a *bona fide* claim to property, does not necessarily justify an act by him which he knows or must be assumed to know, to be likely to intimidate, insult or annoy the person in possession; (*iii*) that the means at the disposal

(24) *Budh Singh*, 2 A. 101.

(25) Turner, C. J., in *Devarasetti*, (1884) 1 Weir 517.

(1) *Shistidar Parui*, 9 B. L. R. (App.) 19; *Shambunath* v. *Ram Kamal*, 13 C. L. R. 212; *Ram Dyal Mundle*, 7 W. R. 28; *Kali Nath Nag*, 9 W. R. 1: *Chooamoni*, 14 W. R. 25; *Ishar Chandra*, 17 W. R. 47; *Shib Nath Banerjee*, 24 W. R. 58; *Roshun Lal* (*Seith*), 2 N. W. P. H. C. R. 82; *Budh Singh*, 2 A. 101, 5 M. H. C. R. (App.) 17; 5 M. H. C. R. (App.) 19; *Jotharam*, 2 M. 30; *Vartapa*, 5 M. 382; *Rayapadayachi*, 19 M. 240; *Luximan*, 26 B. 558; *Ganpat*, (1888) B. U. C. 390; *Gobind Prasad*, 2 A. 465; *Jangi Shah*, 26 A. 194; *Bazid*, 27 A. 298; *Pika Ram*, (1902) A. W. N. 6; *Nandu*, (1902) A. W. N. 42; *Golap Pandey* v. *Boddam*, 16 C. 715; *Evans*, 28 C. 123; *Hari Bhumali*, 9 C. W. N. 974; *Bura*, (1886) P. R. No. 5; *Muhammad Shah*, (1881), P. R. 42; *Asa Mal*, (1884) P. R. No. 1.

of the accused of asserting his claim, and the necessity for asserting it in the manner adopted, must be considered."[2] Now as against this, and more specially as against point (*ii*) it is submitted that wherever the Code declares the offence to depend upon the "knowledge of likelihood," it says so expressly. It does not say so here. Why should then the offence depend upon a mere knowledge of likelihood as distinct from intention? And moreover what justification is there for the introduction of such a fiction as the secondary intention in the Code?

4942. Indeed, as has been elsewhere pointed out, the Code eschews the fiction of a presumed intention or knowledge but bases the offence on the actual intention of the accused—that is to say, upon evidence which justifies an inference as a fact that the accused possessed the intention to cause the effect upon which depends his criminal liability. It may be, and indeed it cannot but be, that in drawing such inference the Court takes into consideration the nature of the act and the effect produced on the mind of the party in possession, but it is not content to say: "Every man is presumed to intend the natural consequence of his act, and as such consequence was annoyance, the accused must be *presumed* to have intended it, whatever *in fact* be his intention."

4943. This is the English view of crime,[3] but it is not the Indian stand-point[4] though the Courts have in several cases failed to notice this difference. It is possible that the practical result of the two views is the same, but it cannot be forgotten that there is a difference between a presumed and an actual intention: the one is a fiction—the other is a fact. It has been sometimes said that when an act is done with a knowledge amounting to practical certainty that a result will follow, the doer must be held to have *intended* to cause the result,[5] to which the reply submitted is that, it may be so found in a given case upon consideration of all the facts,[6] but that it cannot be laid down as a legal axiom, for there are cases easily conceivable in which the accused may have the fullest knowledge but not the least intention of causing annoyance. For example, suppose the case of the landlord re-entering upon the land of his tenant on sufferance. He knows that the tenant, who has been squatting on his land would feel greatly annoyed by his ejectment, but the landlord does not effect his entry with the intention of causing him annoyance. He could not, therefore, be convicted of trespass whatever annoyance his entry may have caused the wrong-doer, and howmuchsoever it may have been the natural consequence of his act.

4944. This view is consistent with that taken in several cases,[7] though the contrary has been also laid down in other cases of the same Court,[8] but these latter cases are supported by nothing in the Code,

(2) *Per* Reid, J., in *Ram Saran*, (1906) P. R. (Clerk, C. J., concurring; Rattigan, J., *dissentiente*); followed in *Jiwan Singh*, (1908) P. R. No. 17.

(3) *Hicklin*, L. R. 3 Q. B. 360; followed *per* Reid, J., in *Ram Saran*, (1906) P. R. No. 12; *per* Fulton, J., in *Lakshman*, 26 B. 558.

(4) *See* General Introduction, §§ 58-60.

(5) *Lakshman*, 26 B. 558.

(6) *See* the definition of "Proved" in s. 3, Indian Evidence Act (Act I of 1872)

(7) *Moti Lal*, 855; *Ganpat*, (1888) B. U. C. 390; *Fakirgavda*, (1888) B. U. C 393; *Sivaratri* (1895) 1 Weir (3rd Ed.) 329; *Royapadayachi*, 19 M. 240.

(8) *Vedagurukkal*, (1882) Weir (3rd Ed.) 328.

and are on the other hand opposed both to its letter and spirit. The correct view was, therefore, undoubtedly taken by Shephard and Davis, JJ., who dissenting from an earlier case[9] said: "It is one thing to entertain a certain intention, and another to have the knowledge that one's act may possibly lead to a certain result. The section defining criminal trespass is so worded as to show that the act must be done with intent, and does not, as other sections do (*e.g.*, section 425), embrace the case of an act done with knowledge of the likelihood of a given consequence."[10] That there is such a difference will be clear from the facts of this case, in which "the accused had entered the complainant's house for the purpose of having sexual intercourse with the complainant's unmarried sister. The sexual intercourse constituted no offence, but the accused was convicted of trespass on the view that nothing could be more annoying and insulting to the complainant than such an entry." But the High Court held that it was insufficient to prove the intention to annoy.[11]

This was reaffirmed by the Full Bench of the same Court in a case in which the accused's son had stolen some of his jewels, and when questioned, stated that he had given them to his schoolmaster. The accused thereupon went to him and in spite of his remonstrances, searched his house for the stolen jewels, which he did not find. He was prosecuted for house trespass and the Full Bench held that if a person entered into property in possession of another or remains there with an intent other than to intimidate, insult or annoy him or to commit any offence, but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, he is not guilty of this offence.[12] But this view has not been accepted in other cases. So where the accused was found having entered the complainant's female apartment at night pleaded an *alibi*, which was disbelieved, the question then arose as to what intention he could have had in committing the trespass. It was contended for him that the room contained several women of whom two were such as the accused could ravish without committing an offence and upon which the Court said: "The case comes to this, that late at night, when the women were in bed the prisoner, a stranger, though a neighbour, went into the room where they were sleeping; that his position and all the facts preclude any notion of his going there to steal, or for any purpose save his own pleasure. We think, the facts are good evidence of an intent and of an intrusion on privacy within the meaning of section 509 of the Indian Penal Code, and that, therefore, the intent to commit an offence within the meaning of section 441 is made out."[13]

4945. This case follows the view taken in the earlier cases of the same Court.[14] In one the accused, a village doctor, was caught in the room occupied by two widows. His plea was *alibi* which failed, and the

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(9) *Ib.*
(10) *Royapadayachi*, 19 M. 240.
(11) *Ib.*
(12) *Vullappa* v. *Bheema Row*, 41 M. 156 F. B. dissenting from *Lawshman*, 26 B. 558; *Premanundo* v. *Brindabun*, 22 C. 994. To the same effect, *Rehana*, (1923) 5 Lah. 20 *Jag Mohan Das*, 75 I. C. (Oudh) 292, 24 Cr. L. J. 916; *Narayana*, 20 M. L. W. 239.
(13) *Premanando* v. *Brindabun*, 22 C. 994.
(14) *Koilash Chandra*, 16 C. 657; *Balmakand* v. *Ghansamram*, 22 C. 391.

question was as to his intention, and the Court remarked: "What we have to deal with is the case of a man, a stranger, who uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when the attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances we think, a Court ought to presume that the entry was effected with an intent such as is provided for by section 441 of the Penal Code."(15) But these cases are no authority for presuming as a matter of law. The Court no doubt presumes an intention, but it finds it as a fact, in the same way as it finds other facts upon which there is direct evidence. In other words, the question of intention in such cases being a question of evidence, the Court may well apply the rule of evidence and presume the existence of a fact which it thinks likely to have happened, regard being had to the common course of natural events and human conduct in their relation to the facts of the particular case.(16)

4946. Specific Intention Unnecessary.—But in any view, it is not necessary that in order to be criminal, the intention should be found to have been directed to the commission of a specific offence, or to any other specific purpose out of those enumerated in the section. But where under a given set of circumstances it is possible to presume any of the intentions mentioned in the section, the accused is entitled to have it taken that his intention was the least culpable. The accused was found to have entered the sleeping apartment of the complainant at about one at night, while he was asleep with his wife aged 25. He was caught by the complainant and made over to the police. The complainant strove to conceal the true facts and suggested the trespass as one to a desire to commit theft. But he admitted that he had lost nothing. It was moreover proved that the accused was a wealthy man, the landlord of the complainant. The accused was convicted, but on revision it was contended for him that the prosecution should have but had not proved guilty intention, and that what that intention was had not been found. But the Court held that it was not necessary to prove specifically which of the several guilty intentions the accused had; and that it would have been enough if it was shown that the intention must have been one or other of those specified in this section, though it might not have been certain which it was. They then added: "In the present case, though it is not quite certain what the precise intention of the accused in committing the trespass which forms the subject of the charge was, it is clear that it must have been one or other of those specified in section 441. One of them would probably be excluded by the circumstances attending the trespass, that is, the intention to annoy. Considering that the trespass was stealthily committed, it would not be reasonable to suppose that it could have been intended to annoy any of the persons in the room that was trespassed into, though such annoyance must have resulted from it. Nor could the intention of the accused

(15) *Koilash Chandra*, 16 C. 667.

(16) S. 114, Indian Evidence Act (I of 1872); *see* also *ib.*, s. 3, "*Proved*"; *Somaduri* 43 I. C. 405, 19 Cr. L. J. 117, *Pirbax* v. *Raji*, 54 I. C. (N.) 620, 21 Cr. L. J. 140; *Lakhmi Das*, 4 L. L. J. 532.

have been to intimidate any one as his subsequent conduct shows, for, as soon as he was found out, he tried to make his escape quietly. But the intention must have been to commit some offence, or to insult the modesty of the complainant's wife by intruding upon her privacy. Judging from the time, the place and the manner in which the trespass was committed, and the conduct of the accused when he was found out, it is impossible to suppose that the trespass could have been committed either unintentionally or with any innocent intention. It must have been committed with the intention of insulting the modesty of the complainant's wife, or of committing some offence though it is not quite certain what the offence intended was....It was argued that the accused must have been prejudiced, if the intention was so uncertain that the Court was unable to find affirmatively what it was, and that, if any specific intention had been alleged, it could have been disproved, just as the intention at first imputed by the complainant in his complaint to the police, namely, one of theft, has been disproved by the cross-examination of the witnesses tending to show that the ccused is a man of such position that theft would be a most improbable motive. But here we must be guided, not by the undefined possibility of the accused having been prejudiced, but by some suggestion which a reasonable man can accept, that there has been prejudice to the accused. No reasonable suggestion has been made, and none occurs to us as to how the accused, whose defence was an utter denial of the entry, could possibly have been prejudiced by reason of the absence of any specification of the intention with which the trespass was committed."[17]

View that Specific Intention Necessary.

4947. But this reasoning has not been accepted as final by the other Courts. Indeeded, in such cases of trespass, the Courts have naturally felt the justice of conviction, but they have not arrived at that result by the same process of reasoning. Thus while in the Punjab where the accused entered the house of the complainant with the object of holding illicit intercourse with his sister, the Courts supported the conviction on the ground that he knew that if detected he would inevitably annoy the person in possession[18]—a view combated in Calcutta in the case last cited,[19] some cases of the Allahabad,[20] and Madras[21] High Courts would seem to throw a doubt on the legality of a conviction itself holding that in such cases what is required is the finding of a specific intention.

So Edge, C. J., Aikman, J., said: "It is the first principle of criminal law that where a Statute creates a criminal offence, the ingredients of that criminal offence must be strictly proved, and that where the doing of an act without consent or without authority is made a criminal offence, and the Statute does not expressly put upon the accused the proof of such consent or authority, it is necessary part of the case for the prosecution to negative by evidence such consent or authority. In this case, if Brij Basi (the accused) had actually been caught in the act of sexual inter-

(17) *Balmakand Ram* v. *Ghansamram*, 22 C. 391, following *Koilash Chandra*, 16 C. 657; to the same effect, *Kangla*, 23 A. 82.

(18) *Jiwan Singh*, (1908) P. R. No. 17.

(19) *Balmakand Ram* v. *Ghansamram*, 22 C. 391.

(20) *Brijbasi*, 19 A. 74.

(21) *Anon*, 5 M. H. C. R. (App.) 5.

course with the wife of Ram Gopal, assuming that he knew her to be Ram Gopal's wife, the offence of criminal adultery would not have been made out without proof that such sexual intercourse was without the consent and without the connivance of Ram Gopal." Brij Basi was convicted of a house-trespass in order to commit a criminal adultery with the wife of Ram Gopal. It was consequently necessary for the support of the prosecution, to prove that if Brij Basi had sexual intercourse on that occasion with the wife of Ram Gopal, it would have been without Ram Gopal's consent or connivance. The Court cannot make assumptions against the prisoners in the absence of necessary evidence for the prosecution.[22]

The Madras Court carried the accused's case a step further, holding that he could not be convicted of trespass unless the complainant charged him with trespass with intent to commit adultery. If therefore he charged him with trespass for the purpose of committing theft, and the intention to commit theft was disproved, the accused could not then be convicted on the hypothesis that his intention was still criminal though it might have been other than that alleged.[23] The earlier view of the Allahabad Court[24] was, however, distinguished by Aikman, J., another case[25] in which the contrary was laid down, and in which the complainant had also originally alleged theft as the intention of the trespasser, but it was proved that his intention was to have carnal knowledge of the complainant's wife; and upon which his conviction was upheld though the Judge did not give any reason for distinguishing the earlier case.

Law Defective.

4948. The difficulty of the question arises from the fact that criminality under this section depends not on the use of criminal force,[1] or the unlawfulness of the entry (§§ 4929-4932), but upon the intention to commit an offence, or to intimidate, insult or annoy any person in possession. Now there can be no doubt that a midnight intruder upon a man's privacy deserves to be punished. At the same time there can be no doubt that there must be law to punish him, and the only law available is this section. But its language is either inapt or defective, and the Courts have consequently been constrained to justify their finding by reference to reasons which are as varied as they are irreconcilable with one another. For as has been seen in the foregoing discussion, some cases have justified the conviction with reference to a presumed intention, while others with reference to section 509. But neither view is wholly satisfactory or convincing, and the section needs to be amended.

4949. But when it is said that it is not necessary to find a specific criminal intention what is implied is that the finding need not specify the particular purpose for which the entry was made; but that does not dispense with the finding that the intention must in any case be criminal, that is to say, it must be an intention to commit an offence or to intimidate, insult or annoy any person. Where, therefore, the Court found the trespass to be "for theft or for some other intention or idea," the Chief Court quashed the conviction holding that it was insufficient to uphold a

(22) *Brij Basi*, 19 A. 74.
(23) *Anon*, 5 M. H. C. R. (App.) 5.
(24) *Brij Basi*, 19 A. 74.
(25) *Kangla*, 23 A. 82.
(1) *Batakala*, 26 M. 49.

conviction for this offence for which the intention found must be of the nature specified in this section.[2] The same view was taken in Allahabad in the case of the landlord who illegally took possession of his tenant's occupancy land, taking advantage of his temporary absence, and induced the village Patwari to enter it that the tenant had abandoned the holding. By doing so, as the Court observed: "The accused's intention possibly was to obtain possession contrary to law."

But this of itself would not constitute criminal trespass. An unlawful entry is not necessarily an offence,[3] and an intention to commit an unlawful act, not being one of the acts mentioned in this section, does not render the accompanying trespass a criminal trespass.[4] In another case one A was the tenant of the accused and as such had a house in the accused's village. A had for sometime left the village shutting up the house, but which was looked after by some of his relatives. A died of plague and thereupon the accused took possession of his house asserting his right to it as landlord. A's widow prosecuted the accused but the Court threw out her complaint holding that whether the accused's entry was right or wrong he had no intention to commit an offence or to intimidate, insult or annoy any one.[5]

4950. There can be no criminal trespass where a person takes possession of property in the absence of another. The accused, a woman, entered the compound of the complainant, an Assistant Superintendent of Police, while he was absent locking up his house. She was acquitted of this offence as there was no evidence to prove with what intention she had entered his compound.[6] The accused gave a lease of pepper on certain hills which he described as his property. As a matter of fact it included some land which was the property of Government. The lessee assigned over his right to another who entered upon possession on the strength of the lease, and took the pepper belonging to Government, whereupon the accused was prosecuted for the abetment of this offence, but the Court acquitted him holding that "the essential ingredients of criminal trespass and theft are unlawful entry and unlawful taking, but the mere execution of a document cannot be said to aid either the entry or the taking, and is by itself consistent with an intention that the person in whose favour the document is executed, shall assert his claims thereunder in due course of law.....Even assuming that the Courts are right in finding that he knew he was granting the lease of land to which he had not title, the facts proved are still consistent with an absence of intention to abet either criminal trespass or theft."[7] The Court then added: "A penal Statute must be construed strictly, and it was for the prosecution to prove either the instigation of or intention to aid in the commission of this offence."[8]

4951 Entry or Remaining must be Unlawful.—The first clause does not state that the entry therein contemplated should be unlawful. But this is necessarily implied.

Clause 2.

(2) *Wariama*, (1885) P. R. No. 11; *Jiwan*, (1885) P. R. No. 11, *note*, followed in *Bura*, (1886) P. R. No. 5. To the same effect, *Sahz Ali*, (1877) P. R. No. 2.

(3) S. 40.

(4) *Jangi Singh*, 26 A. 194; distinguishing *Nandan*, (1902) A. W. N. 42.

(5) *Bazid*, 27 A. 298.

(6) *Chinna Thovi*, (1895) 1 Weir 518.

(7) *Paratpravan*, (1889) 1 Weir 48.

(8) *Ib.*, p. 49.

For an entry authorized by law is not intended to be punished, merely because it is made with intent to cause an annoyance to the person in possession. So if an execution creditor accompany the bailiff and enter the house of his debtor with a view to seizing his property in execution of a warrant, he could not be convicted of this offence merely because of the annoyance he thereby causes to his debtor. And in such a case even if he effects his entry before sunrise, which he could not do under law, he would not be necessarily guilty of trespass, for his entry being then illegal would only furnish one element out of the many necessary to constitute this offence.

As Muttusami Aiyar, J., said: "The act which was intended to be done after entering the house was to cause certain property to be attached in execution of a decree and as this is an act which the prisoners had a legal right to do, no intention, such as is necessary to constitute criminal trespass, can be inferred from it. The primary intention which it is reasonable to infer from forcing open the door, to attach property is an intention to violate the right of the prosecutor to exclude strangers from his house. The breaking into the house would certainly amount to an infringement of this right, and as such be an actionable wrong, but I do not see how it is criminal. It is said that it would be an illegal annoyance. If it is, every civil trespass would be so, there would be a civil right infringed, and the infringement might be regarded in one sense as causing annoyance. It has been ruled by this Court that every civil trespass is not a criminal trespass; section 441 seems to me to contemplate the entry into property in the possession of another as a means to another act and to regard the intention with which it is made in relation to that act. Here the only act to which the entry can be referred as a means, is the seizure of property in execution, an act perfectly legal in itself. There may be cases in which the ultimate object may be legal while the means employed to attain it may be criminal. But in this case there is no finding that any act was done in addition to breaking into the house to levy execution on certain goods."(9)

So where the wife of a Hindu who had been excommunicated from her caste and was found to have been living separately from her husband, entered his house to demand her maintenance, whereupon she was prosecuted for this offence, it was held that the loss of social status consequent upon excommunication from the caste did not involve the deprivation of her legal right to joint enjoyment of her husband's property, unless she was expelled therefrom by the husband, in the absence of which her entry was legal and did not amount to trespass, civil or criminal.(10) Such was presumably the view taken of the accused who having purchased a house in the occupation of the complainant at a Sheriff's sale in the High Court, was put into possession by the Sheriff's officer, after which he would not allow the complainant to re-enter it.(11) On the expiry of his lease the tenant's possession is unlawful but if he continues in possession without any reason and merely because he likes it, he could not be held to retain possession with the intention mentioned in clause 2. His act no doubt constitutes civil trespass but it may become criminal if in spite of notice to quit he persists in maintaining his possession.

(9) *Jotharam*, 2 M. 30.
(10) *Marimuttu*, 4 M. 243.
(11) *Charoo Chunder*, 4 C. W. N. 47.

4952. Trespass on Disputed Land.—But between these cases and those in which the accused enters upon land in the assertion of a claim of right, there is naturally a material difference.(12) For these are cases in which the entry appears or is shown to have been made with some intention, other than those specified in section 441, and the annoyance that is caused to the person in possession of the property trespassed upon, simply results from the trespass without its having been intended. But even such cases would fall into the category of criminal trespass, if the doctrine of secondary intention is once let in to explain this section (§ 4940). For if A were to enter upon the land of B with no intention of annoying him but in the *bona fide* assertion of his right, it may justifiably be urged that though his primary intention was to assert his own right, still, since he knew of the annoyance his act was likely to cause, he must be deemed to possess the secondary intention of annoying him, and in which case his entry would be criminal the moment it ceases to be legal.

It may then lead to such a case as this. A is warned off the land of B. A shoots a deer, and follows it on to B's land for the purpose of killing it. A trespasses. But it has been held that he does not because his intention was to shoot the game and not to annoy B.(13) Opinions may possibly differ in this case, but there would seem to be no occasion for such difference in the following case. A, an æronaut, finds his balloon taking him to the sea. He decides to drop into B's garden to save his life. He knows that by doing so he would destroy B's cabbages, and thus annoy B. A trespasses. The doctrine of secondary intention is therefore a dangerous innovation and there is no knowing what results it may lead up to. Nor can the English presumption of an intention from the natural consequences of his own acts be legitimately let in to explain this offence (§§ 4942-4945).

4953. The true view appears to be to confine the operation of the section strictly to cases in which the intention of the accused as distinct from the knowledge of likelihood, is to produce any of the results specified in the section. In this view, a trespass made in the assertion of a right, must be obviously excluded from the category of the crime. This is certainly the trend of cases.(14) But here again the question cannot be generalized, for it depends upon the nature of the right asserted, the manner of the entry, and the trespasser's belief in his right; though unfortunately the cases lack unanimity even on this subject. For, while there are cases in which the Courts have laid down that the forcible entry upon the land of another constitutes trespass without reference to the question in whom the title to the land may ultimately be found,(15) there are those in which some inquiry into the title is insisted upon, not for the purpose of legalizing the entry but for the purpose of seeing whether

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(12) *Shib Nath Banerjee*, 24 W. R. 58; *Punjab Singh*, 6 C. 579; *Shambhu Nath Sarkar* v. *Ramkomul*, 13 C. L. R. 212; *Govind Prasad*, 2 A. 465.

(13) *Chander Narain* v. *Farquharson* 4 C. 837.

(14) *Valappa* v. *Bheema Row*, 41 M. 156 F. B., following *Jotharam*, 2 M. 30; *Varthappa* v. *Nayakan* 5 M. 382; *Rayapadayachi*, 19 M. 240, *Manikka*, 8 I. C. (M.) 318, 11 Cr. L. J. 623; *Amavasaya* v. *Marri Polliah*, 15 I. C. (M.) 317, 13 Cr. L. J. 477, (1912) M. W. N. 395; *Chunder Narain* v. *Farquharson*, 4 C. 837; *Chandi Pershad* v. *Evans*, 22 C. 123; *Gobind Prasad* 2 A. 465; *Gaya Bhar* 38 A. 517; overruling *contra* in *Sellamuthu* v. *Pallamuthu*, 35 M. 186; to the same effect, *Rehana*, (1923) 5 Lah. 20.

(15) *Ram Dayal Mundle*, 7 W. R. 28.

it was *bona fide*.[16] For, the mere assertion of a claim of right is not a sufficient defence to a charge of trespass: to be a good defence it must be a claim made in good faith, that is to say, it must be a claim in which the person must have himself believed though it may not be legally tenable.[17] Now no one can believe in a claim once hushed up by a decree binding on the party; but if in such a case the decree does not conclude his right so as to exclude all possibility of a claim, the mere fact that the person ejected in due course of law remains on the land would not expose him to the penalties of this offence.

As Straight, J., remarked: "Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass, unless the intent to commit an offence, or to intimidate, insult or annoy is conclusively proved."[18] In this case the accused held certain houses jointly with two other persons, A and B. The three had executed a mortgage by conditional sale in favour of the creditor C, who, however, obtained possession only against the accused. The latter, though ejected, continued to retain possession of the houses in assertion of the right of his co-owners, A and B, who were his wife and brother and who also refused to vacate them. C filed a complaint against the accused and A for trespass, but Straight, J., threw out the complaint, holding that since the original mortgage was joint and since rightly or wrongly both A and B alleged a joint interest in the property, C could not drive them out of the property by bringing the pressure to bear upon the accused who could still maintain his possession on the strength of the title of A and B. But in this case the result would have been different if the accused had been the sole proprietor or if A and B had not supported his claim. For it was never intended to be laid down as the law that a person could with impunity defy the decree of a competent Court in execution of which he is ejected.[19] The complainant as the assignee of the rights of the mortgagee in possession was like his assignor in peaceful possession of the property. The accused who was a relation of the mortgagor, forcibly ousted the complainant after some years' possession, on the plea that he was under the Hindu Law entitled to a share in the land and the mortgagor had no title to mortgage it with possession. It was held that the plea was a mere pretence for the forcible dispossession and that the accused had been rightly held guilty of this offence.[20]

4954. The same view was taken in another case, where the accused claiming to be the assignee of the mortgagor's right forcibly dispossessed the mortgagee in possession, it being held that though he may have become liable to ejectment, still he could not be ejected from the land save in due course of law.[21] In another case the land of A was brought to sale in execution of a money decree obtained against him by B. C was the auction-purchaser and he was physically put in possession of the land with the

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(16) *Gokul* v. *Seithi Roshun Lal*, 2 N. W., P. H. C. R. 82; *Budh Singh*, 2 A. 101 (103); *Kudukoli Burandni*, (1882) 1 Weir 515.
(17) *Devarasetti*, (1884) 1 Weir 516.
(18) *Gobind Prasad*, 2 A. 465
(19) *Tikaram*, (1902) A. W. N. 6.
(20) *Nandan*, (1902) A. W. N. 42.
(21) *Mya Zan*, (1902) 1 L. B. R. 358. *Dwarka Singh* v. *Ram Kishan*, 38 I. C. (Pat.) 962, 18 Cr. L. J. 402.

usual attendant formalities. He ploughed up and manured the land and exercised other rights of ownership when the accused appeared upon the scene, and forcibly drove him out of the land. They were prosecuted under this section, and they justified their act with reference to an antecedent lease executed by the judgment-debtor many years prior to the auction sale of land, but this plea failed and the accused were convicted.(22)

So while two persons A and B, being members of a joint family and as such in joint possession of a house, could not commit trespass by each exercising his right of co-ownership, still if one of them was in exclusive possession of the joint property, the other would be guilty of this offence if he effected his entry with intent to annoy the other.(23) Such a case might be conceived of a co-sharer landlord forcibly taking possession of land of an undivided village in the exclusive possession of the other co-sharer. A mere entry upon such land would be trespass and it may become criminal if it is accompanied by the intention which the section reprobates. So in a Madras case it was said that though a co-sharer could not maintain a trespass against his co-sharer unless there has been an ouster, still such a proceeding would be justifiable if the co-sharer has committed such destruction or waste of common property as by pulling down a common wall,(24) or by carrying away a portion of the common property as by digging and carrying away turf.(25) So where A, B, C and D were co-owners of a plot of land in which they were accustomed to bury their dead, it was held that in such a case though the plot was originally held in common, it might be perhaps inferred that each of the co-owners had assented to the appropriation by a co-owner of so much as he had actually appropriated to the grave of a relative, so that if a grave were disturbed, a trespass might be established.(1)

4955. Of course, this section, like many others in the Code, is not intended to protect title but only possession as distinct from ownership. Consequently, a person having a right to possession may be guilty of this offence, unless his entry is otherwise justifiable or excusable. Such would be the case where an act is justifiable on the ground of private defence, (§ 988) or on the ground of *bona fide* though mistaken belief, or, indeed, on any other ground which is a sufficient answer to criminal liability. But except where a person is so exempt from liability, the only defence which avails a trespasser is that indicated in the section which is made the basis of criminality.

4956. Who may Complain?—In this connection, it will be observed that the section speaks of "property in the possession of another." This raises the question, what is possession. In a sense and to a certain extent the question may be said to have been solved by section 27 (§§ 274-277), under which "when property is in the possession of a person's wife, clerk or servant, on account of that person it is in that person's possession within the meaning of the Code." But this is the limit

Meaning "of in the Processions of another."

(22) *Kailash Ghose* v. *Jugal Lohar*, 1 C. L. J. 104 (106-110).

(23) *Prankristo* v. *Bissonath*, 15 W. R. 6.

(24) As in *Cubitt* v. *Porter*, 8 B. & C. 257.

(25) *Khaja Mahomed*, 3 M. 178.

(1) *Khaja Mahomed*, 3 M. 178; *Jacobs* v. *Seward*, L. R. 5 H. L. 478.

beyond which the Code does not admit constructive possession as entitled to protection.[2] Strictly speaking, it does not protect the landlord's possession through his tenant, or the physical possession of one which is by a *jus in re aliena*. It would then follow that the person immediately aggrieved is the person in physical possession of the property, whence it further follows that it is he alone who is entitled to complain.[3] But two other views are possible and have received the support of cases: one is that the landlord is as much entitled to complain as the tenant, since he is equally entitled to eject trespassers.[4] The other view is that it is open to anyone to set the criminal law in motion, and that this offence is no exception to the rule.[5] This is perfectly true, but the Court is not bound to entertain a complaint instituted by an officious intermeddler.

The accused was prosecuted for this offence at the instance of A, a municipal commissioner, who had been then sitting with B as a Committee dealing with appeals in assessment cases. The accused entered the room in spite of warning not to enter it without permission. He, however, persisted in entering it, his object being to move the Committee to reconsider their assessment which they had more than once before declined to do. He was ejected from the room, but he took his stand in the verandah and persisted in addressing the crowd assembled that no justice could be had there. He was prosecuted for this offence by A, and Petheram, C. J., and Beverley, J., held that in view of section 345 of the Procedure Code he alone could not complain: " Whether the charge is made under section 441 or 422, the prosecution must prove that the property trespassed upon was at the time in the possession of a complainant who could compound the offence under s. 345 of the Code, and, as this is the case, we think the charge must fail, even if there were no other reason, on the ground that the complainant's own statement, so far from showing that the room was in his possession, shows that it was not, but that he was merely sitting in it with other persons at the invitation and with the consent of the person, whoever he may be, as to which we know nothing, who is in possession of the room in the well-understood sense that he is the person to whom the right to immediate possession belongs."[6]

But this view has been controverted in Bombay, where it has been laid down that this section is no exception to the general rule which allows any person to complain of a criminal act.[7] Consequently, Jardine, J., held it to be no objection to a complainant prosecuting for trespass in respect of a field in the possession of his tenant. " The destruction of the crop," he held, " must have been damaging or annoying to the owner or tenant, or both, as

(2) *Isur Chunder* v. *Seetul Das Mitter*, 17 W. R. 47.

(3) *Kunji Lal*, 12 A. L. J. 151; *Nga Po Tok*, 49 I. C. (R.) 99, 20 Cr. L. J. 115; *Udayappa*, (1923) M. W. N. 451, 74 I. C. 856, (1924) A. I. R. (M.) 40; *Nga Ton Kyi*, 10 Bur. L. T. 77, 35 I. C. 810, 17 Cr. L. J. 378; *Toy Gyi*, 8 L. B. R. 425, 35 I. C. 810, 17 Cr. L. J. 378; *contra* in *Prayag Singh* v. *Morgan*, 25 C. W. N. 425, 52 I. C. 190, 22 Cr. L. J. 494 (anyone can complain).

(4) *Fakir Chaand* v. *Fakir*, 69 I. C. (L.) 370, 23 Cr. L. J. 699.

(5) *Prayag Singh* v. *Morgan*, 25 C. W. N. 425, 52 I. C. 190, 22 Cr. L. J. 499; *Dhauntud Lodhi*, 47 I. C. (N.) 77, 19 Cr. L. J. 881.

(6) *Chandi Pershad* v. *Evans*, 22 C. 123; *Kali Nath* v. *Nag Chowdhury*, 9 W. R. 1; *Iswar Chandra Karmarkar* v. *Sital Das Mitter*, 17 W. R. 47. in *Keshav Lal*, 21 B. 536.

(7) *Ganesh Sathe*, 13 B. 600, followed

in the present case."[8] It is submitted that the person annoyed must be the person in possession, and such possession must be actual and not merely constructive, as held by Jardine, J., in the case last referred to. Any other view would make it possible for the landlord to prosecute a person let into possession by the tenant, which would be a material curtailment of the right of possession.

4957. Possession must be Actual[9] and Exclusive.—So it has been held that where the possession is not actual and exclusive, the possessor could not complain of trespass, though it may be an encroachment on the right of joint possession. Such was held to be the case of the accused who were prosecuted for this offence for having fished in a certain river, in which the complainant was shown to possess an exclusive right of fishery. But it was held that though the complainant possessed the exclusive right of fishery, it did not put the river upon which the accused entered in the exclusive possession of the complainant, and without such possession the accused could not be convicted of this offence.[10]

License and possessions without title excluded.

4958. Illegal Possession Excluded.—Again, such possession must be at least juridical and of right and not a mere license, in which the possession of the licensee is no possession at all, though he may be in actual occupancy of the land. So where the accused who was prosecuted for trespass claimed to be in possession of the land, contending that he had permitted the complainant to use it for stacking his paddy, the Court directed that "if it be found that the occupation of the land on which the paddy was stored was permissive, and that possession lay with the company (on whose behalf the accused had made the entry), there could be no trespass committed on this land by the company's servants."[11] And then the Court went on to add: "If it be found that in fact the complainant had gone beyond the boundary and commenced to build a corner of his shed on land in the possession of the company, and that the officers of the company at once intervened to prevent him, their action in removing from the land of the company the materials the complainant had placed there would not amount to mischief, nor would their entry be a trespass."[12] Of course, in order to entitle a person to complain of trespass, his possession must not be a barren one without right or title and merely permissive without possessing the characteristic of such possession as law recognizes and protects. Such possession may, however, be acquired by lapse of time, as where a person's possession though adverse or wrongful in the inception, is suffered to continue for a considerable time, though not for the statutary period so as to confer an indefeasible title on the possessor, in which case he could not be ejected by force even by a person having a better title to the property.[13] For this purpose the Court gives effect to a *bona fide* claim of right as much on the part of the trespasser as on the part of the person dispossessed.

(8) *Keshav Lal*, 21 B. 536; *contra* in *Chandi Pershad* v. *Evans*, 22 C. 123.

(9) *Kunji Lal*, 12 A. L. J. 151, 21 I. C. 681, 14 Cr. L. J. 633; *Tok Gyi*, 8 L. B. R. 425; 35 I. C. 810, 17 Cr. L. J. 378; *Nga Tok Kyi*, 10 Bur. L. T. 77, 35 I. C. 810, 17 Cr. L. J. 378.

(10) *Charu Nayiab*, 2 C. 354.

(11) *Groves*, (1882) 1 Weir 521 (522).

(12) *Ib.* p. 522.

(13) *Ponnusami Pillai*, (1898) 1 Weir 522.

So Collin, C. J., and Benson, J., said: "If she (the prosecutrix) was in possession under a *bona fide* claim of right, she was entitled to remain until ejected by due course of law. The accused could not eject her by force, even if he had a better legal title. If, however, *possession* had already been given to the accused, and the complainant was a mere trespasser, then the accused would have been justified in using such force as might be necessary to remove her. Superior title, however, in the accused would not by itself convert the complainant into a mere trespasser so as to justify him in ejecting her if she was in possession otherwise than as a mere trespasser.[14] Possession without title could be held to be entitled to legal protection only when it has been sufficiently long to raise an inference of acquiescence by the owner. Otherwise, as Lord Denman, C. J., put it: "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person, whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession. Here by the acquiescence of the plaintiff the defendants had become peaceably and lawfully possessed as against him. He had re-entered by a trespass; if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession. What he could not have done on the 1st of July,[15] he could as little have done on the 11th, for his tortiously being on the spot was never acquiesced in for a moment and there was no delay in disputing it."[16]

The three questions relevant in such cases are then the strength of title and the length and peaceful nature of the possession. The question what length of possession is sufficient to invest a person with the right to hold it even by main force, if necessary, against the owner has not been and cannot be the subject of any rigid rule, but there are cases in which[17] the Courts have protected a man who held peaceful possession for about a year. This case was referred to by Cockburn, C. J., who said that "a person being peacefully in possession of a house, a person going in and taking possession without his leave commits a trespass, and all trespass implies force in the eye of the law."[18] These cases were referred to by Melvill, J., who said that they apply only to cases in which the person who is ousted has been for some time previously in peaceful and undisturbed possession. Such possession, being acquiesced in creates a presumption of title, and is what the Roman jurists designate "juridical possession," as distinguished from mere detention.[19] A mere trespasser, unless his occupation be acquiesced in, acquires no such possession, and may be expelled by main force.[20]

4959. So where the trustees of a school who were entitled to eject the plaintiff, a schoolmaster under them, after service of notice to quit ejected him without such notice, and he peacefully left, but returned the next day (1st July) and established himself in the room he had vacated on

(14) *Ponnusami Pillai*, (1898) 1 Weir 522.

(15) When the person elected re-entered into possession.

(16) *Browne* v. *Dawson*, 12 A. & E. 624.

(17) *Doe* v. *Dyeball*, Mood & M. 346.

(18) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

(19) Von Savigny on Possession, s. 1; Domat's Civil Law, s. 2134.

(20) *Dadabhai* v. *Sub-Collector of Broach*, 7 B. H. C. R. (A. C.) 82 (84, 85).

the previous day, upon which the trustees gave him a legal notice and ejected him on the 11th July, whereupon he sued them in trespass founded on his last possession, but Lord Denman, C. J., threw out his case, holding that having acquiesced in the restoration of his possession to the defendants, his subsequent re-entry was a trespass and for which he and not the defendants were liable.(21) Here then only a day's possession entitled the trustees to defend it against a trespasser. But the case would not have been different if the schoolmaster had been a lessee instead of being merely a licensee. Such was the case of the accused who were lessees of land which was subsequently sold in execution of a money-decree passed against the lessor to the prosecutor who peacefully entered into possession and was permitted to plough it up and manure it and exercise other acts of ownership for a couple of months after which the accused turned out in force and ejected him. It was held "that they were not entitled to take the law into their own hands after possession had been delivered peaceably and without any objection on their part," and that their act consequently amounted to this offence.(22) Length of possession is thus immaterial if it goes with title. It is only material as showing acquiescence on the part of the person interested in disturbing it. It may thus negative the plea of an act done in the *bona fide* exercise of an claim of right (§§ 4779, 4958-4960).

4960. The fact that the offence relates to an entry made upon property in the possession of another, excludes cases in which the accused being himself in possession of the property refused to vacate it. The accused was a lessee from the Forest Department and during his lease constructed a house, which he was called upon to vacate under a legal notice to quit. He refused to relinquish the land until he was paid compensation for improvements, whereupon he was proceeded against under this section, but the Court held that in order to sustain a conviction under this section it must be shown that the property was in the possession of some person other than the alleged trespasser.(23)

4961. Unlawfully Remaining After Lawful Entry.—The second paragraph deals with the case of unlawfully remaining on property after effecting a lawful entry. Here again criminality depends not upon the unlawfulness of remaining on another's property, but upon that act done with the same intent as constitutes the offence under the first paragraph. Apart from such intent there is nothing criminal in unlawfully remaining upon another's land. Such is the case of a tenant on sufferance, who comes in by right but remains on by wrong. So if a person invite another into his house and the two should fall out, there is nothing criminal in the other remaining on to quarrel, nor would the fact of his having caused the other annoyance make his act a criminal trespass. But it would be so if he remained on purpose to annoy the other.

Paragraph 2.

4962. What is Entered Upon must be Property.—But in either case the thing entered upon must be "property." This term has been

(21) *Browne* v. *Dawson*, 12 A. & E. 624; followed in *Dadabhai* v. *Sub-Collector of Broach*, 7 B. H. C. R. (A. C.) 82; *Kailas Ghose*, v. *Jugal Lohar*, 1 C. L. J. 104 (107).

(22) *Kailash Ghose* v. *Jugal Lohar*, 1 C. L. J. 104 (107, 108).

(23) *Foujdar*, (1878) P. R. No. 2?

the subject of some reference before (§ 4791), but here it has been obviously used in a different sense as connoting immoveable property as distinct from moveable property. In other respects the leading features of the two terms are the same. For instance, the term is not intended to include an easement or an incorporeal right such as the exclusive right of fishery in a public river[24], the infringement of which would justify a suit for damage,[25] but for which the tortfeasor cannot be criminally prosecuted whether for theft or trespass.[1]

4963. It is of the essence of all criminal acts punishable as such under the Code that all the ingredients mentioned in the definition as constituting the offence should be present, and that the Court should find them to be present. If it has any doubt upon a single ingredient it cannot punish the accused, for criminality depends not upon the presence of some of the ingredients but upon the presence of all of them.

Over and above these elements there are others which the Court regards as equally sufficient to negative criminality (§§ 4964-4967).

4964. Bona Fide Claim.—It is settled law that an entry upon the land of another under a *bona fide* claim of right does not constitute trespass. But in such a case the entry is exempt from puinshment not because of there being a special rule overriding the general law as regards criminal liability but because of the absence of the necessary intent which makes the act criminal.[2] Now, as it is the duty of the prosecution to prove, and of the accused to find the necessary criminal intent, it follows that the question of a *bona fide* claim is intimately associated with the question of criminality, and it need not, therefore, be raised by the defence, for in establishing the accused's guilt it must be necessarily negatived by the prosecution. So Turner, J., said: "It is the duty of the Criminal Court to determine what was the intention of the alleged offenders, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming, of course, that the other facts are established which constitute the offence."[3]

4965. The question of *bona fides* arises as soon as the entry is shown to be unlawful. It is then a question of intention, whether it was made in the assertion of a claim of right or on purpose to intimidate, insult or annoy the party in possession. This is a question of fact [4] and its determination depends upon the proved circumstances of each case. If, for example, a person is dispossessed in execution of a Civil Court's decree whether passed after a summary inquiry under section 9 of the Specific Relief Act[5] or otherwise, he could not force open the lock put upon his property by the decree-holder and

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(24) *Charu Nayiab*, 2 C. 354.
(25) *Bhusan Parui* v. *Denonath Benerjee*, 20 W. R. 15.
(1) *Kayaram Surma* v. *Nichala Katani*, 15 C. 402; *Bhagiram Dome* v. *Ahar Dome*, 15 C. 388, (1878) 1 Weir. 384; *Rovu Pothadu*, 5 M. 390; *Golla Subba Reddi*, 24 M. 81, (1879) 1 Weir. 520; In *Muthra* v. *Jawahir*, 1 A. 527, a person plying a boat for hire at a distance of three miles from a public ferry was held not to be liable under this section.
(2) *Budh Singh*, 2 A. 101 (108).
(3) *Budh Singh*, 2 A. 101 (108).
(4) *Devarasetti*, (1884) 1 Weir 516.
(5) Act I of 1877.

insult the modesty of such woman.[19] If so, an intrusion, in consequence of an assignation, would go wholly unpunished. The Court have seen the obvious abuse of justice that this course would lead to. Consequently, they have extended the meaning of the word "intention" so as to include therein the "knowledge of the likelihood" of causing annoyance, which certainly meets the requirements of the cases in point, but it at the same time leads to anomalies wholly inconsistent with the tenor of the Code (§§ 4942-4951).

4969. But in either view such a case as the following should present no difficulty. The accused was the landlord of a house in the occupation of the complainant as his tenant. He wanted to turn him out and with that object in view he caused its roof to be removed while the complainant's wife—a *pardanashin* woman was inside, and whom he gave no intimation to leave before she was exposed to public view. The accused was convicted under section 509, but the Chief Court held it to be this offence as it was clear that the accused intended to annoy the complainant.[20] Such was also held to be the case where the accused entered upon the property of the complainant and cut down trees standing thereon, in which case the intent was either to commit mischief or to annoy the complainant.[21]

It has been held that where the accused devoted to his own use by cultivating the ground devoted to common and sacred uses, such as a burial ground, he could be convicted of trespass "for the intent of the defendant must be inferred from the nature of his acts, and it is scarcely possible to conceive any act more calculated to cause annoyance especially to superstitious people attaching sanctity to the relics of mortality, than the act of ploughing up a burial ground."[22] In a subsequent case this was explained to be a case in which the accused had no common right over the burial ground, which would have made a material difference. So where the accused enclosed and cultivated a footpath, the Court held it to be no case of a trespass, as the defendant, along with the rest of the public, was entitled to the use of the footpath, so that his entry could not be held to be an illegal entry on property in the possession of another with intent to annoy the person in possession.[23] But this was probably the case of a path of which the ownership vested in the public jointly. But in Bombay under the Land Revenue Code[24] all public roads are the property of Government, so that an encroachment of such a road by the accused may be trespass if it is accompanied by the requisite intention to make the trespass criminal.[25]

4970. The offence here contemplated must be something different from the trespass itself. As was remarked in a case trespass is a means to another act, and the intention must be regarded in relation to the act.[1] Such act may, however, be a continuous transaction, as

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(19) *Hopper*, (1892) P. R. No. 2; *Lajee Ram*, (1898) P. R. 12; *Phiaz Mahamad* 5 Bom. L. R. 502.
(20) *Dheramal*, (1901) 1 U. B. R. 350.
(21) *Jeenut Bebee*, 1 W. R. 46.
(22) 6 H. M. C. R. (App.) 25.
(23) 6 M. H. C. R. (App.) 26: *cf*, *Khaja Mahomed*, 3 M. 178.
(24) Bom. Act V of 1879, s. 37.
(25) *Fakirya Vecla* (1888), B. U. C. 393.
(1) *Jonathan Davay*, 11 M. 30.

where a person enters upon the property of another to commit an assault which he commits; and in which case he would be liable to a conviction under this section.(2) So a police officer is not justified by the mere fact that a person is of a suspicious character in entering his house at midnight to see whether he is in the house. His act in so entering the house is a house-trespass for which he may be convicted, as the act is calculated to annoy the members of the family of the suspected person and also to insult the suspect.(3) So while a person may not be liable to a prosecution for adultery except on the prosecution of the husband, still adultery is an offence punishable under section 497 of the Code, so that a person entering the premises of another for that purpose may be convicted of this offence though he could not be convicted of adultery for want of a proper complainant.(4)

But on this point the views of the Madras Court are conflicting, for in another case the Court held that in such a case if the husband refuses to charge the trespasser with intent to commit adultery, the latter could not be convicted of trespass.(5) But the facts of this case were somewhat peculiar. The accused was discovered having trespassed into the prosecutor's house and he admitted the fact but stated that he had entered to keep an assignation with the prosecutor's wife. The husband adhered to the statement that the accused's entry was to commit theft. The Deputy Magistrate who tried the case was presumably of opinion that the entry was for the purpose stated by the accused, and he dismissed the complaint because the husband "refused to lay a complaint of house trespass with intent to commit adultery." The High Court held that though the Magistrate might have legally convicted the accused of this offence on his own confession, he was not bound to do so. It further added that the discretion had been wisely exercised in refusing to convict when the complainant absolutely refused to charge the accused with entry with intent to commit adultery. But how did the complainant know that the accused had that intention? All he could say was that he had not consented to nor connived at his entry for that purpose. For the rest, the intent of the accused was a matter of inference, upon which the complainant and the Court may well have differed.

Intent Only Necessary.

4971. It is not, of course, necessary that the trespasser should have actually committed an offence following upon his trespass—for, all that the section requires is that he should have entered "with intent to commit an offence." All that is then necessary to prove is the entry and the intention which need not be even accompanied by an overt act, for it will then amount to an attempt as distinct from a mere intention. But the proof of such intent may be given by the proof of some act as manifesting that intention. And this may even be more essential where the intent is not to commit an offence, but merely to "intimidate, insult or annoy" the person in possession. The inference must, however, be drawn from facts which warrant a conclusion that the act was inconsistent with

(2) *Bashikachari*, (1883) 1 Weir 528.
(3) *Doraisami Pillai*, 27 M. 52.
(4) (1868) 1 Weir 531.
(5) (1869) 5 M. H. C. R. (App.) 5.

any reasonable hypothesis. For instance, such inference could not be drawn in the case of the accused who secretly entered an exhibition building without a ticket. As the Court remarked, his act was undoubtedly of a fraudulent character, and his entry was civil trespass, but it was not criminal because his entry was made with intent to evade payment and not to annoy any one in possession of the exhibition.(6)

This case is not unlike that of the accused who entered a local market through a bamboo fence, instead of the regular gate to evade payment of a toll leviable upon the yarn he had smuggled in for sale, in which case the entry was held to be wrongful, but it failed to amount to this offence for want of the requisite intention.(7) So the entry of a woman into the house of a cavalry sepoy for the purpose of committing adultery is not trespass, because she had failed to obtain permission of the commanding officer, and annoyed him by her unwarranted intrusion.(8) So a person could not be convicted of this offence for driving across an open green in violation of an order issued by a Municipality.(9) So public bodies and private owners sometimes exhibit a public notice threatening to prosecute trespassers, and in such a case the question may arise whether all trespassers render themselves liable to a prosecution by the mere fact of their trespass. But even in such a case the solution of the question depends not upon the presence of the notice, but upon the presence of the intention. The notice is no doubt some evidence of the feelings of a person against trespassers and of which they might well be aware, but it would not make all entry punishable as trespass.

4972. The Courts have repeatedly insisted upon a clear finding as to the intent of the accused, without which, there can be no conviction for this offence.(10) Of course, the fact that an act is unlawful or such as the civil law will restrain, or for which it will compensate the injured party in damages is not necessarily criminal. So the fact that an act is calculated to annoy the complainant is no reason for holding it to be criminal unless it is further found to have been so intended (§ 4951). The accused obtained a redemption decree in respect of land in the possession of the complainant as a mortgagee in possession, and of which he took possession otherwise than by process of law, which fact was found by the Magistrate to calculate to annoy the complainant. But the Chief Court held it to be insufficient to sustain the conviction.(11) The same view was maintained in another case in which the accused took possession of the property claiming to have inherited it."(12)

4973. A person's entry upon the property of another taking advantage of his absence could not be held to have intended to annoy him. He could not therefore be convicted of this offence, unless there is

(6) *Mehervanji Bejanji*, 6 B. H. C. R. 6.
(7) *Varthappal Nayallan*, 5 M. 382.
(8) *Kushee (Mt.)*, (1887) B. U. C. 328.
(9) 5 M. H. C. R. (App.) 38.
(10) *Aladitta*, (1882) P. R. No. 29; *Asa Mal*, (1884) P. R. 1 *Mulchand*, (1884) P. R. No. 1, *note*; *Wariama* (1885) P. R. No. 11; *Jiwa*, (1885) P. R. No. 11, note.
(11) *Aladitta*, (1882) P. R. No. 29.
(12) *Asa Mal*, (1884) P. R. No. 1.

evidence to show that his entry was made with intent to commit an offence.[13]

House-trespass.

442. Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit "house trespass."

Explanation.—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

[*Vessel*—s. 48. *Criminal trespass*—s. 441.]

Synopsis.

(1) *Analogous Law* (4974).
(2) *What is House-trespass* (4975-4978).
(3) *Building* (4976-4977).
(4) *Tent* (4978).
(5) *What is Sufficient Entry* (4979-4980).
(6) *Criminal Intent Necessary* (4981-4982).

4974. Analogous Law.—House-trespass is as much an aggravated form of trespass as theft in a building is an aggravated form of theft. Indeed, the language of this section is closely comparable to that of section 380, reference to which may be usefully made in this connection. Referring to this section the draftsmen wrote: "There is no sort of property which it is so desirable to guard against unlawful intrusion as the habitations in which men reside and the buildings in which they keep their goods. The offence of trespassing on these places we designate as house-trespass, and we treat it as an aggravated form of criminal trespass. House-trespass, again, may be aggravated by being committed in a surreptitious or in a violent manner. The former aggravated form of house-trespass we designate as lurking house-trespass; the latter we designate as house-breaking. Again, house-trespass, in every form, may be aggravated by the time at which it is committed. Trespass of this sort has, for obvious reason, always been considered as a more serious offence when committed by night than when committed by day. Thus we have four aggravated forms of that sort of criminal trespass which we designate as house-trespass, lurking house-trespass (s. 443), lurking house-trespass by night (s. 444) and house-breaking by night (s. 446)." [14]

These sections, however, only define the terms which are constituted offences by others (ss. 448-456).

4975. What is House-trespass?—This section defines house-trespass by reference to the definition of simple trespass the existence of all the constituting elements of which are presupposed in addition to

(13) *Chunia Thoyi*, (1895) 1 Weir 518; *Jangi Singh*, 26 A. 194; *Basid*, 27 A. 298.
(14) Note N., Reprint, p. 168.

which the only essential element possessed by this offence is that the property entered into or entered upon is a "building, tent or vessel used as a human dwelling, or any building used as a place for worship or as a place for the custody of property."

Building.

4976. The question what is a building has been considered in another connection (s. 380) and reference must be made to that discussion for the meaning of the term as there used. (§ 4153). It is not intended to comprise a railway carriage[15] or the open or walled compound attached to a house,[16] though they are popularly comprised in that term. But it is clear that whatever may be the popular notion of a building a person merely entering the open compound of a house cannot be held to have committed house-trespass, for in doing so he could not be said to enter *into any building used as a human dwelling*—words which could only mean the actual structure as distinct from its open purlieus. On this point the Courts are agreed and so it was held by Scott and Jardine, JJ., that there was no authority for including compounds within the words "house" or "building" used as a human "dwelling."[17] And the same view was taken by Mahmud, J., in a case in which the accused had been convicted for performing an offence of nature in his neighbour's compound.[18] So in a Burmah case, Irwin, J., said: "Entering an ordinary compound, such as both Europeans and Burmans commonly use, is not house-trespass,"[19] though the *panachut* or outer verandah of a Burmese dwelling is a part of his house, and a trespass therein would, it is said, be a trespass into a dwelling house within the meaning of this section.[20]

But, of course, there may be a building in the courtyard and in that case it may answer the description of a building though it may not be the main building. Such a case arose in the Punjab where the majority of the Court held a courtyard surrounded by a high brick wall and with rooms built against the wall on the inside with an outer door or gate leading into a side street as a building used for the custody of property for which it was proved to have been used.[21] This was presumably a substantial structure used as the family warehouse. But a cattle-fold or pen with a thorn-hedge round it could scarcely be designated a building, and it was so held in the case of the accused who had stolen cattle at night from such a fold and whose conviction was accordingly altered from under s. 457 to one under s. 379.[22] And this view was re-affirmed in a subsequent case in which

(15) 1 Weir 436; *Sheik Saheb*, (1886) B. U. C. 298.

(16) *Rama*, (1889) B. U. C. 484; *Po Thet*, 4 L. B. R. 24, 6 Cr. L. J. 134.

(17) *Rama*, (1889) B. U. C. 484; *Sunder*, (1919) P. L. R. 56, 49 I. C. 864, 20 Cr. L. J. 240; *Dhanun*, 86 I. C. 156, (1925) L. 459.

(18) *Surja*, (1882) A. W. N. 224.

(19) *Po Thet*, (1907) 4 L. B. R. 24.

(20) *Sit Hou*, 9 Bur. L. T. 204; *contra* in *Nga Pan Hlaing*, 8 Bur. L. T. 17, 26 I. C. 306.

(21) *Shera*, (1879) P. R. No. 35, *But see Buta*, 77 I. C. (L.) 809, 25 Cr. L. J. 457 *an enclosed compound with no door anywhere is not a building.*

(22) *Sucha Singh*, (1887) P. R. No. 57; followed in *Gokul Chand*, (1901) P. R. No. 14; *Ramjan*, (1905) P. R. No. 285; *Kohmi*, (1914) P. R. No. 24, 26 I. C. 305, 16 Cr. L. J. 1; *contra in Pullabhotla*, 39 I. C. (M.) 309, 18 Cr. L. J. 469.

the accused had entered the complainant's cattlepen to prosecute his intimacy with a young unmarried woman of over sixteen years of age.(23)

4977. But the view of the Court would have been probably different if the pen had been walled on four sides, though a wall may have fallen and the gap stopped with thorn. This was the inclination of the Court in which the accused was convicted of removing a bullock from such a shed though the Court declined to commit itself definitely to that view.(24) The Madras High Court had to consider a similar question in the case of the accused who had stolen a sheep from an open pen enclosed by hurdles, and it was held that such a pen even if it was walled on all sides could not be called a building.(25) The porch or portico of a building if enclosed by walls is a part of the building to which it is attached, so that an entry thereinto would be punishable as house-trespass.(1) So is a *dalan* or an entrance hall surrounded by a wall in which there were two door-ways without doors, and which was used for the custody of property.(2)

The question whether what was described as a building was a building within the meaning of this section must always be a question of degree and circumstance, but its ordinary and usual meaning is a block of brick or stone work covered in by a roof.(3) But as observed by Davies, J.: "The mere surrounding of an open space of ground by a wall or fence of any kind, could not by any stretch of imagination, be deemed to convert the open space itself into a building."(4) The question of house-trespass, however, depends not only upon the question whether the thing entered into is a building, but upon the further question whether it was used as a human dwelling or as a place for the custody of property. This is a question of fact and in solving it regard must be had to the normal adaptability of the thing to the purpose for which it was put no less than to its actual use. For if a modern Diogenes were to live in a tub, his place of abode could not for that alone be called a building.

4978. Of course, a thing may fail to be a "building" but may still be a "tent" which is a portable house made of some flexible covering such as skins, matting or canvas stretched and sustained by poles (§ 4156). The term "vessel" has been defined before.(5)

Tent.

4979. What is a Sufficient Entry?—House-trespass consists in "entering into or remaining" in any building, tent or vessel. Now the term "entering into" is susceptible of some ambiguity, and consequently, it is provided in the explanation that "the introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass." If, therefore, the trespasser puts in his head or

(23) *Ramjan*, (1905) P. R. No. 28.
(24) *Dullee*, 6 N. W. P. H C R. 307.
(25) *Palani Goundon*, (1896); 1 Weir 523, *Kohmi*, (1914) P. R. No. 24, 26 I. C. 305.
(1) *Gulam Jelani*, (1889) P. R. No. 16.
(2) *Dad*, (1879) P. R. No. 10.
(3) *Per*, Esher, M. R., in *Movi* v. *Williams*, (1892) 1 Q. B. 264.
(4) *Palani Goundan*, (1896) 1 Weir 523.
(5) S. 48.

hands or legs or any part of his trunk inside a building, his entry is complete whatever offence he may then be guilty of. But if no part of his body enters the building the entry is not complete, though the act may amount to an attempt. The accused, a thief, made a hole into a wall of the complainant's house, but on his putting his hand into it he found a cross beam on the other side barring his way. It was held that as his hand could not go through the hole there was no entry and the prisoner was convicted of only an attempted house-breaking.(6) Such was also the case of the accused who occupied the upper story of the house the ground floor of which was in the occupation of the complainant, and in the ceiling of which there was a trap-door which was kept closed by him. The accused forced open and removed this trap-door with intent to get into the complainant's premises. His act was held to constitute an attempt for which he was convicted.(7) Again, since house-trespass requires an entry *into* or remaining *in* a building, it follows that an entry upon the terrace or roof of a house is not a house-trespass, though it would be criminal trespass if it is made with the requisite criminal intent.(8)

4980. The entry if sufficient must be necessarily illegal (§§ 4951, 4958-4961). For no one can be convicted of this offence if he enters into the house of another by leave or license. So where A solicited B, a public servant, to receive a bribe, and B intending to entrap him sent him word to bring it to him at night which A did, the latter could not be convicted of house-trespass because he had made his entry with B's permission, whatever mental reservation B may have made, in according it to A.(9) And in such a case it could not be said that A's entry though legal became illegal as soon as he utilized it for the purpose of offering a bribe, because the purpose of his entry was known to B when he permitted it. But the case would have been otherwise if A had obtained permission merely to see B and then offered him a bribe. So where the accused legally entered the house of the complainant and then unlawfully remained there to commit an assault, the Court held it to be a case falling under this section.(10) But this case is no authority for supporting a view that a person should be necessarily guilty of house-trespass, if after legally entering the house he commits an assault. For under clause 2 of section 441, it is an essential ingredient of the offence that the accused should have *unlawfully remained* on the property, which implies his staying on after the withdrawal of the occupier's consent which made his entry legal. Such withdrawal could not be presumed from the mere fact that the entry was followed up by an assault, or the pilfering of some of the house-holder's things.

4981. Criminal Intent Necessary.—Indeed, it would even appear from the language used in the last section that the formation of criminal intent should have preceded the entry, or the unlawful stay. If the intention was subsequently formed, the accused might be convicted of the offence his act discloses, but it could not be aggravated by reason of

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(6) *Ghulam*, 4 L. 399.
(7) *Narshi*, (1883) B. U. C. 188.
(8) *Alla Baksh*, (1887) P. R. No. 9; *Fazla*, (1890) P. R. No. 9; *Mullua*, (1900) A. W. N. 15.
(9) *Kamarajee*, (1887) 1 Weir 534.
(10) *Rashikachari*, (1883) 1 Weir 528.

the entry which facilitated its commission. The intent which makes the entry criminal is an intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. Obviously then, the house trespassed into must be in the possession of some one other than the accused (§ 4956). And the entry therein must have been made with the purpose of committing an act which is punishable under the Code,[11] or which is intended to, and has the effect of, annoying the possessor. As regards these words, it will be observed that while the offence may be committed against any one not necessaily the possessor, the intimidation, insult or annoyance must be directed against and caused only to him. For example, a person entering into a hotel for the purpose of stealing lodgers' goods would be guilty of house-trespass though the offence did not affect the person in possession of the hotel. But a person entering a hotel to insult or annoy a guest staying there, would not be guilty of the same offence, unless he entered his private apartment for that purpose.[12]

4982. Again, while intimidation, insult or annoyance implies the presence of the party in possession, the commission of an offence does not. Consequently, no person could be convicted of criminal trespass for having entered upon property in the possession of another during his absence, if his intent was not to commit an offence. So where the accused entered the compound of the house of the complainant during his absence in order to carry on an intrigue, the Court quashed her conviction for trespass, holding that since her entry was not made to commit an offence, she could not be convicted of this offence for she could not have intended to annoy the complainant who was then absent.[13] This was the *ratio decidendi* of the case disposed of by Mahmud, J., in which the accused had been convicted of this offence for having got into his neighbour's vacant house for the purpose of answering the call of nature. The Court quashed his conviction for house-trespass because the compound he had entered was not a building, and for trespass because his entry was not to annoy the absent owner.[14] So where the accused was caught having entered the premises of a police lock-up to supply food to an under-trial prisoner, it was held that his act amounted to no offence, because the supplying of food to under-trial prisoners was no offence under the Code or under section 45, cl. iii of the Prisons Act.[15] The same view was taken of the accused, who had previously made over a child he had obtained in a famine to be brought up by the complainant, which the latter refused to part with and upon which the accused entered his house and recovered the child.[16]

The case of a trespasser effecting his entry into a house in order to have sexual intercourse with a female inmate, has been already considered (§ 4948).

For a further commentary, *see* s. 441.

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(11) S. 40.

(12) *Cf.* 2 East., P. C., 492; *Turner*, 12 Leach 305; *Rogers*, 1 Leach 89; *Carrol*, 1 Leach 287—which were all, however, cases of burglaries.

(13) *Chinna Thoyi*, (1895) 1 Weir 518.

(14) *Surja* (1882) A. W. N. 224.

(15) Act XXVI of 1870; *Lalai*, 2 A. 301.

(16) *Nawab Ali*, (1885) A. W. N. 50

443. Whoever commits house-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass."

Lurking house-trespass.

[*Criminal trespass*—s 441. *House-trespass*—s. 442.]

[For punishments, *see* sections 453, 454.]

Synopsis.

(1) *Analogous Law* (4983).
(2) *What is Lurking House-trespass* (4984-4989).
(3) *Precautions to Conceal* (4987).

4983. Analogous Law.—This section deals with a further circumstance of aggravation attending a house-trespass, namely, its lurking character. Lurking house-trespass is in itself a serious offence, and as such punishable with imprisonment which may extend up to two years,[17] but when such trespass is committed at night, its gravity is heightened and the offence is then punishable with imprisonment up to three years.[18] But the offence assumes a far more serious form, if in addition to these circumstances it has for its object the commission of an offence punishable with imprisonment, and *a fortiori* if that offence is theft.[19] But this is by no means the height of criminality, for the trespasser may further aggravate his offence by entering, prepared to cause hurt,[20] or grievous hurt[21] or even death.[22] In all such offences the two offences of lurking house-trespass or house-breaking underlie. The question what constitutes this offence is thus of far greater importance than it would seem at first sight.

4984. What is Lurking House-trespass?—The three essential ingredients of this offence are (*i*) trespass, (*ii*) the trespass being of the special kind designated house-trespass, and (*iii*) that trespass being made in a surreptitious manner, called "lurking." The first two questions have been already considered (ss. 441, 442). The last question depends upon what is house-trespass after "having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser." The section does not specify who such persons are, for the question of right is not a question within the cognizance of the Criminal Code. It is essentially a question of civil law, and criminality in this and other cognate offences depends upon the right determination of that question in the light of civil law. Now this being the case, it is clear that the person primarily entitled to eject the trespasser is the owner in physical possession of his house. But he is not the only person so entitled.

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(17) S. 453.
(18) S. 456.
(19) S. 457.
(20) S. 458.
(21) S. 459.
(22) S. 460.

For as against a trespasser all persons in joint possession of it are equally so entitled, and so are his agents, and servants. Indeed, in an ordinary case of such trespass any person is entitled to eject the trespasser.[23]

But the case is different where of the family members one invites the trespasser to commit an offence, which the other members of the family resent. For instance, take the simple case of the wife inviting her paramour over to her house during the absence of her husband. And suppose that there is no question of consent or connivance on the part of the husband. Is the secret entry of the husband "lurking house-trespass?" It is apprehended not; because the precaution taken is to prevent the knowledge of the paramour's visit being known to the husband. There was no secrecy as against the person actually in possession of the house and having then the sole right to eject a trespasser. For the right to eject here spoken of is not a potential right possessed by an absent owner, but by one in physical possession of the property. For example, take the case of an owner leaving his house in charge of a care-taker, who invites thieves to come and rob it. The thieves enter and rob the owner during his absence, but in the presence of the care-taker. Could they be held to have committed lurking house-trespass? If it were so, every theft in an uninhabited house would be accompanied by the commission of this offence. But such, view does not appear to have commended itself to the Courts. On the other hand, the Courts have invariably punished trespassers secretly entering into other people's houses for the purpose of committing adultery, as offences of simple house-trespass. Nor could such a trespasser be punished for lurking, even if his object was theft, unless there was evidence to show that he had adopted some active means not merely to disguise his identity but to conceal his presence[24] (§§ 4987-4988).

4985. The collocation of the words "exclude or eject" is intended to convey a sense more or less similar, but one word is intended to supplement any defect discovered in the sense conveyed by the other. Primarily, however, the word "exclude" would suggest unlawfulness of the initial entry, while the word "eject" should apply to the expulsion of a person whose previous possession was not unlawful, as in the case contemplated in section 441, second clause. A person having no right to exclude may acquire the right to eject, as in the case of a lessee ejected on breach of condition. So while the husband has, ordinarily, no right of excluding his wife from joint possession of his house,[25] he acquires the right to eject her if she is guilty of unchastity.

4986. So the husband surprising the paramour of his wife invited into the house has the right of ejectment; but if on hearing of the arrival of the husband, the paramour hides himself from view, he does not commit this offence for he does not then intend to commit an offence, but to make good his escape unobserved by the husband. His

(23) S. 105.
(24) *Budha*, (1916) P. R. No. 21, 35 I. C. 513, 19 Cr. L. J. 609.
(25) *Marimuthu*, 4 M. 243.
I. C. 176; *Bhagwana*, 16 A. L. J. 383, 45

remaining on in the house is not then even trespass for it is not accompanied by the intention which makes that act criminal.

Precautions to Conceal.

4987. The lurking trespasser must conceal his house-trespass on purpose. If he enters an occupied house, and the owner fails to see him, he cannot be convicted of lurking for which the taking of a precaution is necessary. Such precautions must be to conceal his house-trespass, that is, both his entry and the criminal design to commit an offence. If he conceals his design but not his entry, as if he should secure welcome by assuming the garb of a *Fakir* he could not be convicted of this offence if after having gained admission he commits an offence, unless he does some act which amounts to lurking, as if ostensibly taking leave of the owner he hides himself in a cellar box or loft from which he crawls out when the house-hold is asleep. In such a case his offence is completed with his concealment. Nor is it necessary that the concealment should be perfect, for his criminality depends upon his attempt at concealment and not upon the success attending his effort.

4988. Since in all lurking house-trespass (or for that matter in house-breaking) there must be house-trespass, which requires entry *into* or remaining *in* a building, it follows that if the entry was upon the terrace or roof of a house the accused could not be convicted of house trespass, and *a fortiori* of lurking house-trespass, though he might be of criminal trespass punishable under section 447.(1)

4989. This and the following sections dealing with the aggravated forms of house-trespass must as such necessarily possess all the underlying elements of criminal trespass. But there is one aspect of that offence which is necessarily excluded by the nature of this trespass, namely, that in which the entry is made to intimidate, insult or annoy the person in possession of the property. This species of trespass is from its very nature of a comparatively less formidable character than that in which the entry is made surreptitiously, and in which the only object of the offender must be the commission of an offence (s. 441).

Lurking House trespass by night.

444. Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night."

[*Criminal-trespass*—s. 441. *House-trespass*—s. 442. *Lurking house-trespass*—s. 443.]

For punishment, *see* section 456.]

Synopsis.

(1) *Analogous Law* (4990). (2) *Lurking House-trespass by Night* (4991-4992).

4990. Analogous Law.—This section adds another aggravating circumstance to the offence of "lurking house-trespass" defined in the last section—that circumstance being the time of entry. So the break-

(1) *Allash Baksh*, (1887) P. R. No. 9.

ing and entering of the dwelling house of another in the night time with intent to commit a felony therein is burglary at common law.(2) But this section eschews the ambiguous term "night time" which is said to include the portion of the day between sunset and sunrise if there was not sufficient twilight apart from moonlight to discern a man's face.(3) This naturally created even a greater uncertainty till it was set at rest by a provision of the Larceny Act,(4) which defines "the night to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day."

4991. Lurking House-trespass by Night.—All lurking house-trespass by night must, to begin with, be a criminal trespass, which is an entry into or upon or remaining on the property of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. Now since the trespass is "lurking" there can be no question of intimidation, insult or annoyance caused to the person in possession. All such trespass must then have for its purpose, the sole intention of committing an offence. And since the offence is such a trespass committed at night, it follows that the first entry of the accused must be made after sunset and before sunrise. If therefore, the accused effected his entry into the building before sunset, and after sunset he entered the apartment he intended to rob, he could not be convicted of this offence, though he would be guilty of the offence described in the last section.

4992. A person who lawfully enters a house may be guilty of this offence, if he unlawfully remains therein after sunset. So if the owner should invite two men to a feast and one of them should conceal himself in the house at night, and the other being questioned about his companion should falsely assure the owner that he had taken leave, both may be convicted—the former of this offence and the latter of abetment.

445. A person is said to commmit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say—

House-breaking.

First.—If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

(2) 3 Co. Inst. 63; 4 Black. 224; 2 Stephen Hist. Cr. L., 56; 3 *ib.*, 150; *Polly*, 1 C. & K. 77.

(3) 3 Co. Inst. 63; 1 Hale 550; 1 Hawk c. 31, s. 2; 4 Black 224.

(4) 24 & 25 Vict., c. 99, s. 1, re-enacting 7 Will. IV & 1 Vict., c. 86, s. 4.

Secondly.—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor of the house-tresspass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass or in order to the quitting of the house after house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force or committing an assault or by threatening any person with assault.

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation—Any out-house, or building occupied with a house and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations.

(*a*) *A* commits house-trespass by making a hole through the wall of *Z*'s house and putting his hand through the aperture. This is house breaking.

(*b*) *A* commits house-trespass by creeping into a ship at a port hole between decks. This is house-breaking.

(*c*) *A* commits house-trespass by entering *Z*'s house through a window. This is house-breaking.

(*d*) *A* commits house-trespass by entering *Z*'s house through the door, having opened a door which was fastened. This is house-breaking.

(*e*) *A* commits house-trespass by entering *Z*'s house through the door, having lifted a latch by putting a wire through a hole in the door. This is house breaking.

(*f*) *A* finds the key of *Z*'s house door, which *Z* had lost, and commits house-trespass by entering *Z*'s house, having opened the door with that key. This is house-breaking.

(*g*) *Z* is standing in his doorway. *A* forces a passage by knocking *Z* down and commits house-trespass by entering the house. This is house-breaking.

(*h*) *Z*, the door-keeper of *Y*, is standing in *Y*'s doorway. *A* commits house-trespass by entering the house, having deterred *Z* from opposing him by threatening to beat him. This is house-breaking.

Synopsis.

(1) *Analogous Law* (4993).
(2) *What is House-breaking* (4994-5002).
(3) *Opening by Servant* (5002).
(4) *What Entry is Essential* (5003).
(5) *What is Included in the term "House"* (5004-5005).

4993. Analogous Law.—The term "house-breaking" is a term of English law, the offence being now punishable by Statute.(5) But in English law the term has not been defined at all, though it is used there in the same sense as here.

The explanation is taken from the English Statute,(6) which enacts as follows:—

"No building although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other."

4994. What is House-breaking?—The laws of all civilized countries, in their especial regard for the safety and security of the habitation of man, have adopted means to prescribe deterrent punishments for the forcible invasion of the dwelling houses of another for the purpose of crime; and in doing so they pay no regard to the time of the day, considering an attack upon the security and privacy of one's home sufficiently flagrant to merit drastic measures irrespective of the hour of darkness which, however, the Code classes as a distinct aggravation, and which is reflected in the higher penalty prescribed in section 456.

4995. The term "house-breaking" implies a forcible entry into a house "to break a house" being a legal phrase used to mean the removal or setting aside with violence and a felonious intent any part of a house or of the fastenings provided to secure it.(7) The section enumerates six ways of breaking, but if they are examined they will be found to reduce themselves into two main sub-heads: (*i*) clauses 1—3 being those in which the entry is effected by means of a passage which is not the ordinary means of access to it, and (*ii*) the remaining clauses being those in which the entry is effected by use of force. So illustrations (*a*), (*b*) and (*c*) refer to the former while the remaining five illustrations are intended to show the working of the remaining clauses. All these clauses, however, only relate to the mode of ingress, and egress, which alone converts house-trespass into house-breaking. But the act must, to begin with, amount to house-trespass—that is to say, it must be an entry made into any building, tent or vessel with intent to commit an offence or to intimidate, insult or annoy the person in possession, or if the entry was lawful, then the trespasser must illegally stay in the building with that intent. While on the subject of lurking

(5) Larceny Act, 1861 (24 & 25 Vict., c. 96, s. 56).
(6) 24 & 25 Vict., c. 96, s. 53, re-enacting, 7 & 8 Geo. IV, c. 29, s. 8.
(7) Sw. *braka*, to crack, or break to cause a breach, etc.

house-trespass, it was remarked that since the lurker commits his trespass by taking care to conceal his presence from the owner, he could not intend to intimidate, insult or annoy him from whom he remains in studied concealment. His only object should then be to commit an offence. Such, however, need not necessarily be the object of the house-breaker, whose entry though forcible may not be clandestine, and who may have forced his way into the house merely to overawe and annoy the possessor.

4996. The lurker and house-breaker are classed together in the ensuing sections as being alike, but though they are so in a sense it is not necessary that they should share common purpose and intention. Again, a person may be both a lurker as well as a house-breaker, as when he steals into a house through the usual passage and being detected committing an offence, escapes by one of the six means of house-breaking. It is not necessary that either the lurker or the house-breaker should commit an offence. But if he had entered for the purpose of committing an offence, then even his egress by one of the six ways would amount to house-breaking, but which would not be the case if his entry was not to commit an offence, but merely to annoy an inmate. So it is said that "*if, being* in the house or any part of it for the purpose of committing an offence" he breaks the house even if he quits by any of the six ways enumerated in the section.

But as remarked before, this is not the only object for which he may be there. For if his entry was made for that purpose, it is not necessary that he should have actually committed the offence for which he had effected the entry. All that is necessary is that his ingress must amount to house-trespass, and his ingress, or if he had entered to commit an offence, then, his egress should be made in the unusual manner described in the six ensuing clauses. It is not necessary that the means so adopted should enable him to make good his escape. All that is required is that he should "quit the house or any part of it" in any of those ways. If, therefore, he quits a room of the house and then avails himself of the ordinary means of exit he is guilty of house-breaking. So if a thief enter the inner room of a house to steal and the owner waking up stand at the door to bar his way, and the thief should thereupon push him aside and attempt to escape, he would be guilty of this offence, though he may have used the ordinary passages to clear out of it.[8]

4997. Adverting now to the six ensuing clauses, it will be observed that the first clause deals with a case of the kind presented in illustration (*a*) which is the case of actual breaking, other instances of which may be found in the breaking of a door or window, picking the lock of a door or opening it with a false key, or even by lifting a latch, or unloosening any other fastening to doors or windows, which the owner has provided.[9] So is an entry effected by the removal of a glass of a door[10] or a window,[11] or

Clauses 1 and 2.

(8) *See* Fifthly, s. 445.
(9) 3 Co. Inst. 64; 1 Hale P. C. 552; *Pugh* v. *Griffith*, 7 A. & E. 827 (836).
(10) *Smith*, R. & R. 417.
(11) *Perker*, C. & P. 300; *Tucker*, 1 Cox. 73.

removing even a broken pane of glass.[12] The first three clauses refer to a passage made[13] or opened,[14] and one not intended for human entrance.[15] The making of a passage would apply to an act by which a new passage is made, as by making a hole in the wall, by undermining the house, cutting a hole in the roof, or the like. The *opening* of the passage by adopting means by which it was not intended to be opened would cover those cases in which the door or window or any other opening is unfastened by removal of the glass, hasp, bolt or chain by which it was secured. Such would be the case where the intruder pulled down the sash of a window which had no fastening, and only kept in its place by the pulley-weight,[16] or where he raised a sash-window which was shut down close, but not fastened, though it had a hasp which might have been fastened,[17] or where he pushed open a window which was fastened with wedges, but so that it could be opened by pushing against it,[18] or where he got in by lifting up the heavy flap of a caller which was not bolted,[19] or by removing the bolt of a window by inserting the hand through a broken pane which broke some more of the pane.[20]

Clause 2.

4998. Lastly, an entry effected through a passage not intended for human ingress or egress also constitutes house-breaking. Such would be the case if the entry is effected by scaling a wall,[21] or by getting down the chimney,[22] or through a gutter main or other opening such as an air-hole, the skylight or the like. Illustration (*b*) is an example of what is here intended.

Clauses 4 and 6.

4999. In all these three modes of effecting a passage, the offender devises means which, though desperate, have nothing to do with the use of criminal force. Clauses *fourthly* and *sixthly* also refer to an ingress or egress similarly effected. Indeed, the picking of a lock or opening it with a false key is an instance of actual breaking and so treated in English Law (§ 4997), and so is also the making of a passage by unfastening any passage, referred to in the last clause. This clause has been sometimes extended to cover the case of the removal of a *tatti* placed against the door of the hut of the poor villagers in this country, and there is no reason why it should not be, if the *tatti* was somehow fastened, it may be, with a bar or string, so long as it is fastened to prevent the entry of offenders. The fact that it was wholly insecure is nothing, for such was the window in the English cases before cited,[23] but which did not prevent the Courts from holding the offence to be house-breaking.

(12) *Bird* 9 C. & P. 44, *Robinson*, 1 Wood C. C. 327.
(13) *First.*
(14) *Thirdly.*
(15) *Secondly.*
(16) *Haines*, R. & R. 451.
(17) *Hyams*, 7 C. & P. 441.
(18) *Hall*, R. & R. 355.
(19) *Russell*, 1 Moo. C. C. 377.
(20) *Robinson*, 1 Mood C. C. 327.
(21) *Emldad Ally*, 2 W. R. 65.
(22) Hawk, c. 38, s. 6; 1 Hale 552; *Brice* R. & R. 450. But in *Lewis* 2 C. & P. 628, and *Spriggs*, 1 W. & Rob 357, it was held that entry through an aperture in the cellar window to admit light was not burglary.
(23) *Haines*, R. & R. 451; *Hyams* 7 C. & P. 441.

5000. All these four clauses are thus instances of actual breaking in English Law. Clause 5, however, deals with the case of constructive breaking, in which the ingress or egress is made, by the use of, or threat of using, criminal force. So Blackstone, referring to this rule says: "So also to knock at the door, and upon opening it to rush in with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and to rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the clock of legal process."(24)

Clause 5.

5001. The last clause refers to entry effected by unchaining a door, or causing it to be opened by an accomplice from within. If the door was neither chained nor locked but was merely shut, the opening of it by a push would not amount to house-breaking.(25)

Clause 6.

5002. Under English Law, if a servant conspire with a robber, and let him into the house by night, it is burglary in both.(1) But if the servant pretend to agree to let in a robber intending to entrap him, it is no burglary, for the door is then lawfully opened.(2) So it is no burglary if a person leave his doors and windows open and another to enter therein with intent to commit a felony.(3) The last case would be similarly regarded in this country, and as for the first two cases they would be both treated as cases of lurking house-trespass which in point of criminality is the same as this offence.

Opening by Servant.

5003. What Entry is Essential?—In all cases of house-breaking there must be an entry or egress. The subject of entry has been before alluded to.(4) It will, therefore, suffice here to state that the entry of any part of the human body is sufficient. In England, not only the intrusion of a hand or a finger,(5) but even the insertion of any instrument held in the hand has been held to be sufficient.(6) So the insertion of a hook or other instrument into a window to draw out goods, or the pointing of a pistol to demand one's money have been held to be burglarious entries.(7) So it was held to be a sufficient entry where the accused put in his hand through a pane of glass broken by him for the purpose of undoing the window-latch.(8) In view of the explanation appended to s. 442, it may, however, be doubted if the insertion of an instrument such as a bill-hook or the like without the introduction of the felon's body would be sufficient entry for the purpose of this Code.

(24) 4 Black, pp. 226, 227.
(25) *Ledga*, 66 I. C. (N.) 422, 23 Cr. L. J. 278; *a fortiori*, if the entrance is open or has no door; *Budha* (1916) P. R. No. 21, 35 I. C. 176; 17 Cr. L. J. 304.
(1) *Cornwall*, 2 Str. 881; 1 Hale, 553; 1 Hawk., c. 38, s. 14.
(2) *Johnson*, C. & Mar. 218.
(3) 3 Co., Inst. 64; 1 Hale 551.
(4) *Davis*, R. & R. 499.
(5) *Ib.*; but in *Hughes*, 1 Leach 406; *Roberts*, 2 East. P. C. 487; *O'Brien*, 4 Cox. 400, this must be done with felonious intent, *e.g.*, to draw out goods.
(6) 1 Hale 555; Fost 108; 1 Hawk, c. 38, ss. 11, 12; 3 Co. Inst. 64.
(7) *Bailey*, R. & R. 341.
(8) 1 Hawk., c. 38, s. 35; 1 Hale 557.

5004. What is Included in the Term "House"?—As remarked before the explanation extends the meaning of the term "house" as mentioned in the first paragraph, by including therein any outhouse or building if it is connected therewith by an immediate internal communication (§ 4993). Under English law, from which the explanation is taken, such communication may either be immediate or by means of a covered and inclosed passage. The term "house" in this section has been used in the same sense as a "building used as a human dwelling or any building used as a place for worship or as a place for the custody of property," within the meaning of s. 442. This reference to the house in the first clause would seem to confine the operation of this section only to a building as such, excluding therefrom a "tent or vessel" similarly used. But illustration (*b*) shows that a "vessel" was at any rate not intended to be excluded. There then remains the tent, and a question may arise whether it was also intended to be similarly included. In England it is laid down that theft in a tent or booth in a market, or fair is not burglary because it is a temporary and not a permanent edifice,[8] but a tent may of course be the subject of "house-trespass," and as house-trespass is the foundation of this offence, "the house" in the first paragraph was probably intended to be used in its generic sense as including the building, tent or vessel in respect of which the "house-trespass" was committed.

Explanation.

5005. The term "house" is not then synonymous with building, but comprises something more. And when it is used in the sense of a building it includes all outhouses connected with it by means of "an immediate internal communication." The "communication" here means a passage, and the passage must be both immediate and internal. Now the question whether the two houses possess an immediate common passage depends upon their construction. For example, suppose there are three or more rooms in a row, in the manner of a barrack or the railway porters' quarters, and suppose each room communicates with the others by means of a doorway in the party wall; here the three rooms though belonging to and occupied by three different households amount really to one house within the meaning of this section, so that a person robbing all the three occupants at the same time, would be guilty of only one house-breaking.[9] But if the three rooms did not intercommunicate by a common passage, as is ordinarily the case, then the fact that they were mutually accessible by each opening on to the road, would not make them parts of the same house though they may be parts of the same block. So it has been held, that if the owner of the house reside in a part of it, and let the rest out in lodgings, then if the part occupied by the lodger be severed from that occupied by the owner, that is, if there be no external communication between them, and the lodger and the owner enter the house by different outer doors, a burglary in the part occupied by each respectively must be held to have been committed in the dwelling house of the person so occupying it; but if they be not severed, and the lodger and owner enter by the

(8) 1 Hawk., c 38, s. 35; 1 Hale 557.

(9) From Ger. *burg*, a house, and *larron*, a thief; or O. Fr., *burg*.

outer door, then the burglary must be held to have been committed in the dwelling-house of the owner(10)

There may be an immediate internal communication between two houses, and yet the right of passage may depend upon mutual consent, as where two adjoining lodgers use a common doorway by possessing duplicate keys.

House-breaking by night.

446. Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night."

[*Criminal trespass*—s. 441. *House-trespass*—s. 442. *House-breaking*—s. 445.]

[For punishment, *see* ss. 457, 458.]

Synopsis.

Analogous Law (5006).

5006. Analogous Law.—The last section defines "house-breaking" which may be at any hour of the day or night. This section describes the offence of "house-breaking by night" which is burglary(11) of English law, which is defined in the books as "breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not."(12) Originally, time was immaterial for the purpose of the offence,(13) but it is now of the very essence of the offence. And so now it is provided by Statute as follows(14):—

"S. 51. Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night shall be deemed guilty of burglary."

This section merely supplements the common law definition of burglary.

The question when the sun sets and rises may not sometimes be the subject of ocular demonstration. In that case the fact will have to be proved by reference to the astronomical calculation fixing the time at which the sun rises and sets in a given locality.

For a further commentary on the offence defined in this section, reference should be made to s. 456.

Bailable. Summons. Cognizable. Any Mag. Comp. Summary.

Punishment for criminal trespass.

447. Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

[*Criminal trespass*—s. 441.]

(10) 1 Leach, *n*; 2 East. P. C. 503; *Gibbons*, R. & R. 442.

(11) 3 Inst. 63; 1 Hale 549; 1 Hawk, P. C., c. 38, s. 1; 4 Black 224.

(12) 1 Bac. Abr., tit. "Burglary" (1807 Ed.), 539.

(13) Larceny Act, 1861 (24 & 25 Vict., c. 96), s. 51.

(14) This section re-enacts, 7 & 8 Geo. IV, c. 29, s. 11.

Synopsis.

(1) *Analogous Law* (5007).
(2) *Procedure and Practice* (5013).
(3) *Proof* (5013).
(4) *Form of Charge* (5014-5015).
(5) *Evidence of Criminal Trespass* (5016-5020).
(6) *Defence* (5018).
(7) *No Criminal Trespass.* (5021-A).

5007. Analogous Law.—Section 441 defines a "criminal trespass" and this section prescribes a punishment for it—when it is an offence of the simplest kind and not otherwise provided for.

5008. Procedure and Practice.—This offence is cognizable but summons should, ordinarily, issue in the first instance. It is bailable and compoundable, and is triable by any Magistrate, and summarily.

5009. Since the entry or illegal stay on the land is one act, the accused could be only once convicted for it, and if after his conviction he persists in remaining on the land and does not give up his possession, he could not be convicted again and again for the same act so long as he does not give up possession.[15] Where the accused entered a forest and cut down reserved trees he could not be convicted both of this offence as well as under s. 52 of the forest Act.[16]

5010. The question who could be the complainant in this case is one upon which the Courts are not agreed, the Calcutta High Court being divided on the question, it being held in one case that the only person competent to complain is the person in actual possession of the property and who is competent to compromise the case.[17] But this view has not been concurred in in another case of the same Court,[18] and in Bombay[19] this offence has been held to be no exception to the general rule that any person is competent to set the criminal law in motion. But this view may at times lead to awkward results. One thing however, seems certain, that not only the person in possession of land but also its owner has the right to complain of trespassers as he has equally with the occupier and right to turn out trespassers whose possession is adverse to his ownership.[20] The person who complains is entitled to compromise the case. The fact that he had complained for his master does not confer on the latter the power to control the compromise.[21]

5011. The question whether a trespasser committing an offence is liable to the cumulative punishments for trespass as well as the offence committed, must be answered in the light of s. 441 and s. 71, where the subject will be found more fully discussed. It will, however, suffice here to state that since the actual commission of an offence is no part of the offence of trespass, there is nothing against the accused being

(15) *Ma Heaya*, (1908) 4 L. B. R. 276.
(16) *Rup Deb*, 11 A. L. J. 340, 20 I. C. 408, 14 Cr. L. J. 424.
(17) *Chandi* v. *Evans*, 22 C. 123; to the same effect, *Nga Po Tok*, 49 I. C. (R.) 99, 20 Cr. L. J. 115; *Avudayappa*, (1923) M. W. N. 451, 74 I. C. 856, 24 Cr. L. J. 824, (1924) A. I. R. (M.) 40; and *see* § 4956.
(18) *Prayag Singh* v. *Morgan*, 25 C. W. N. 425, 62 I. C. 190, 22 Cr. L. J. 494.
(19) *Kesavlal*, 21 B. 536.
(20) *Fakir Chand* v. *Fakir*, 69 I. C. 379, 23 Cr. L. J. 699.
(21) *Harbons*, 22 A. L. J. 820.

convicted for both, though[22] in such a case it may be a question whether the trespass was not a part of the major offence committed.

5012. The High Court has no jurisdiction to permit, on revision, the compromise of an accused convicted under this section.[23] A person convicted of this offence cannot be bound over under section 106 of the Criminal Procedure Code since the offence is not one involving a breach of peace,[24] but it is permissible to doubt the soundness of this view.[25]

5013. Proof.—The points requiring proof are:—

(1) That the complainant had possession of the property in question.

(2) That the accused entered into or upon the property, or that he unlawfully remained there after having lawfully entered therein or thereon.

(3) That he so entered or remained there with the intention[1]—

(*a*) to commit an offence;

(*b*) to intimidate, insult or annoy the person in possession.

5014. Charge.—The charge when necessary should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed criminal trespass by entering into (*or* upon) (*or* by illegally remaining on) the land (*describe it*) then in the possession of A B, and thereby committed an offence punishable under section 447 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5015. A person cannot be convicted of this offence on a charge under section 147 where the common object is not specified to be criminal trespass.[2] For a conviction under this section it is necessary, and certainly desirable to specify the offence the accused intended to commit,[3] or at any rate, that he intended to commit an offence of some kind,[4] though the rulings on the subject of specifying the offence are not unanimous.[5]

5016. Evidence of Criminal Trespass—This section prescribes punishment for an offence which is generally defined in section 441.

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(22) S. 235, ill. (*b*), Cr. P. C.

(23) *Akshoy* v. *Rameswar*, 43 C. 1143.

(24) *Muthiah Chetty*, 29 M. 190; *Pantanbi*, 19 M. L. J. 66.

(25) *Jareni* v. *Gourikant*, 7 C. W. N. 25.

(1) Which must be stated in the charge and proved *Bhagwant Rao* (1925) N. 50.

(2) *Salamut Ali*, 23 W. R. 59; *Ariff Munshi*, 18 C. W. N. 992, 22 I. C. 764.

(3) *Rayapadayachi*, 19 M. 240; *Venkataramanuja*, 6 M. L. T. 262; 3 I. C. 828.

(4) *Kurnam Seshayya*, 21 M. L. T. 781; 11 I. C. 797; 12 Cr. L. J. 453.

(5) *Kurnam Seshayya*, 21 M. L. T. 781; 11 I. C. 797; *Samban*, 1 Weir 533.

It has been there pointed out that this is an offence in which care should be taken that an entry which may amount to a bare civil trespass is not made the subject of a criminal prosecution. Unfortunately it is one of those sections in which the trial of the accused is often entrusted to inexperienced hands, though it requires a grasp of the principles and knowledge of civil law without which it is easy to confound civil with criminal trespass. The essential ingredients of this offence are of course (*i*) an unlawful entry, (*ii*) into or upon immoveable property, (*iii*) in the possession of another, (*iv*) with intent to commit offence or to intimidate insult or annoy the person in possession of such property.

5017. As has been pointed out before, of all these elements the last is the most important, inasmuch as it distinguishes a criminal act from what may be a purely civil trespass. Reasons have been already given for confining the word "intent" to mean actual as distinct from constructive intention (§§ 4940-4947) The fact that a trespass causes or was likely to cause annoyance to the person in possession is only of evidentiary value in determining the intention of the accused. It is of itself insufficient to justify a conviction on the assumption that every man is presumed to intend the natural consequence of his act.(6) As a maxim of English Law this presumption may be justifiable in highly penal acts where the act and effect are so closely akin as to have been necessarily indissolubly present in the accused's mind, but it is obviously inapplicable to an unlawful entry upon the land of another.

The question of intention is, however, a question of fact, but whether it has been legally inferred from a set of facts is a question of law. The fact that the trespasser knows that his act, if discovered, will be likely to cause annoyance to the person in possession does not make the entry criminal.(7) Such knowledge may be presumed on the part of any one disturbing another's possession, but he is not on that account criminally punishable. Nor does the fact that the entry was unlawful and made with an intention to obtain improper gain necessarily imply an intention to cause annoyance, which must be further proved.(8) How it must be proved must depend upon the circumstances of each case.(9) Where the intent charged is the commission of an offence the best proof of intention is no doubt the commission of the offence, itself.(10) If does not appear that criminal intent can be proved by evidence of other acts of a similar character. But a similar attempt or entry made on a previous occasion confronted by resistance from the person in possession would be evidence that it was intentional and not merely accidental. But it is quite another thing to say that because the accused had trespassed into the field of A on a previous occasion, therefore, his trespass into B's field must be criminal.

(6) *Jiwan Singh*, (1908) P. R. No. 17; *Lakshman Raghunath*, 26 B. 558.
(7) *Rayapadayachi*, 19 M. 240; *Gaya Bhat*, 38 A. 517; *Tharu*, 5 S. L. R. 29, 9 I. C. 895.
(8) *Ganpat Ramshet*, (1888) B. U. C. 390.
(9) *Balmakund Ram* v. *Ghansamram*, 22 C. 391 (406).
(10) *Locost*, Kel (J.) 30.

Defences.

5018. The defences open to the accused to rebut the charge may be (*i*) lawfulness of the entry; (*ii*) *bona fide* belief in the right of entry; and of course (*iii*) denial of the entry itself. He is further entitled to show that (*iv*) the complaint had not been laid by the person in possession; (*v*) that the complainant was not in possession at all; or that (*vi*) if in possession he had consented to the entry.[11] Again, since the offence may be legally compounded, a previous composition of the case is a bar to a prosecution for this offence.

5019. Apart from intent, the prosecution have to establish an entry on the part of the accused on land in the possession of the complainant. The latter must then establish his own actual possession on the date of the entry, which cannot be presumed from the mere fact that a decree for possession stood in his name.[12] What he has to establish is that the decree was put into execution and that he was given possession which he retained up to the moment of the trespass. It sometimes happenes that the complainant with a doubtful claim to possession, shifts his ground by charging the accused with theft. But in this case the question of possession still remains material, for if a person trespasses on land in the possession of another and sows a crop, he does not become entitled to the crops, and he who has possession of the land commits no offence whether of theft or criminal trespass if he removes the crop and appropriates it to his own use.[13] For in such a case, the maxim *Quicquid plantatur solo solo cedit*[14] applies.

So Adamson, C. J., of Lower Burmah, said: "if a person trespasses on land in the possession of another and sows paddy on it, that does not entitle him to property in the paddy that results from the sowing, and if a person in possession of land reaps and removes paddy that has been sown on it by a trespasser, he does not therefore commit theft.[15] A *fortiori* where the accused cannot be convicted of theft, he cannot be convicted of this offence. So where the accused was charged with theft of rice plants, but acquitted on the ground that the prosecution had failed to prove that the accused had not sown the crop, but the Magistrate convicted him of criminal trespass; and it was held that the conviction was inconsistent with the acquittal for theft "inasmuch as the rice plants had been sown by, and were the property of the accused, he would have been entitled to remove them, and could not properly have been treated as a criminal trespasser for so doing."[16]

5020. The question of actual possession—possession which must be at least juridical (§ 4952) if not coupled with title is then one which may sometimes raise wider issues. But the Court is not bound to go into them, but must confine its inquiry to the fact of possession

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(11) *Nand Singh*, 26 P. L. R. 247.
(12) *In Tok* v. *In Sham Ma*, (1894) 1 U. B. R. 262.
(13) *Nga Hmyin*, 3 L. B. R. 199; 4 Cr. L. J. 465.
(14) "Whatever is fixed to the soil becomes a part of the soil and goes with it."
(15) *Nga Hmyin*, (1906) 3 L. B. R. (199).
(16) *Oomerkhan*, (1865) B. U. C. 4.

and only such facts as make it worthy of protection[17] (§§ 4956-4960). So while a co-sharer would be guilty of trespass if he constructed a building despite the protests of his other co-sharer, he counld not be convicted of criminal trespass on that account inasmuch as his intention would then be traced to the assertion of his right to the property rather than to an intention to annoy his co-sharer.[18] So the mere fact of re-entry into or remaining upon the land from which a person has been ejected by civil process, or of which possession has been given to another for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass, unless his act can be traced to the intention which makes it criminal.[19] The fact that the person claiming to retain possession has no title, is immaterial. It is equally immaterial that he would be ejected by the Civil Court. What is material is whether he has a sufficient claim to be called *bona fide* or a sufficiently long possession to be called juridical. And when there is neither, there may be yet some other intention beyond the mere intention to annoy. So where the accused entered upon the *bund* of the prosecutor to save his own house from flood he could not be held guilty of either mischief or trespass.[20]

5021. No Criminal Trespass.—In the following cases the Court have refused to convict the person charged of this offence Where a co-sharer erected a building upon common after his co-sharers had refused him permission to build on it,[21] where the complainant had ejected the accused, but the latter entered upon the land to prevent the complainant from harvesting the crops he had raised.[22] The fact that a person is liable to ejectment does not render his possession as that of a criminal trespasser.[23] The accused was ejected from the land and formal possession given to the landlord. He appealed against the decree and during its pendency resumed possession. He was convicted but later on the appellate Court reversed the decree for ejectment and the High Court quashed his conviction holding that his resumption of possession was without the intention mentioned in s. 441.[24] A school was built by public subscription and placed in charge of a teacher who had to lock up the school building, as his pupils all left and joined a rival school. The accused who were some of the managers of this school broke open the lock and began to hold it in that building. The Court held that as they had no intention to annoy the complainant they could not be punished for this offence.[25] Of two brothers who owned a house, one mortgaged it with possession, and the other leased it to the complainant who was given physical possession. In the absence of the complainant the mortgagee locked up the house. It was held to constitute no offence.[1]

(17) *Ramdayal Mundle*, 7 W. R. 28. *Surwan Singh*, 11 W. R. 11.

(18) *Ram Sarup*, 36 A. 474; *Akshoy* v. *Rameswar*, 43 C. 1143; *contra Lakshman*, 26 B. 558.

(19) *Gobind Prasad*, 2 A. 465; *Appanda*, (1915) M. W. N. 275, 28 I. C. 159.

(20) *Modan Mondal*, 41 C. 662.

(21) *Ram Sarup*, 36 A. 474.

(22) *Appanda Natha*, (1915) M. W. N. 275, 28 I. C. 159, 16 Cr. L. J. 271.

(23) *Wir Singh*, (1915) P. L. R. 170; 30 I. C. 455, 16 Cr. L. J. 631; *Jagan Dubey*, 45 I. C. (Pat.) 677, 19 Cr. L. J. 629.

(24) *Bhagwan Din*, 16 A. L. J. 501, 46 I. C. 160, 19 Cr. L. J. 704.

(25) *Narain Das*, 17 A. L. J. 334, 51 I. C. 351, 20 Cr. L. J. 463.

(1) *Shadi Ram*, 50 I. C. (L.) 834, 20 Cr. L. J. 354; *Jambulinga*, 47 M. L. J. 437.

Any Mag. Cognizable. Summons. Bailable. Comp. Summary.

448. Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Punishment for house-trespass.

[*House-trespass*—s. 442.]

Synopsis.

(1) *Analogous Law* (5022).
(2) *Procedure and Practice* (5023).
(3) *Proof* (5024).
(4) *Form of Charge* (5025).
(5) *Evidence of House-trespass* (5026).

5022. Analogous Law.—This offence is defined in section 442, and this section provides punishment for it when it is not otherwise provided for. If the house-trespass was of any of the aggravated forms specially provided for in the ensuing sections, it must be dealt with as such and cannot be punished under this section.

House-trespass as such, is a simple entry into or remaining in the "building, tent or vessel" used as a human dwelling or as a place of worship or for the custody of property. under English law the mere entry into the house of another if made with intent to intimidate, insult or annoy him is not indictable, but if the entry is made with intent to commit felony then the felon is deemed guilty of burglary and is liable to punishment as such;[2] and which under the Statute is penal servitude for life.[3] The distinction between entry into a place of divine worship and a mansion-house is, again, one which the English law regards as of some moment. the former being treated as sacrilege and for which the offender if he *breaks and enters* any church or other place of divine worship and commits any felony therein, and being in such place commits a felony and breaks out of the same, is held liable to penal servitude for life.[4] There are, however, other provisions against brawling in such places[5] which provide against disturbances. Such cases would have to be dealt with either under this section, or as a public nuisance under section 296 of the Code.

5023. Procedure and Practice.—This offence is cognizable but summons should ordinarily issue in the first instance. It is both bailable and compoundable, and is triable by any Magistrate, and summarily.[6] The husband being in possession of the house an entry permitted by the wife does not justify the trespass.[7] But where the accused had entered the complainant's house at the invitation of his mistress with whom the accused was carrying on an intrigue and on the appearance of the complainant he concealed himself, it was held

(2) Larceny Act, 1861 (24 & 25 Vict., c. 96), s. 51, re-enacting 7 & 8 Geo. IV, c. 29, s. 11.
(3) *Ib.*, s. 52.
(4) *Ib.*, s. 50.
(5) 1 Mar., St. 2, c. 3; 1 Eliz., c. 2; 1 Will. & Mary, c. 18, s. 15; 52 Geo. III, c. 155; 2 & 3 Will. IV, c. 115; 9 & 10 Vict., c. 59.
(6) S. 260 (*i*), Cr. P. C.
(7) *Bishan Singh*, 74 I. C. (L.) 534, 24 Cr. L. J. 790; *Chatter Singh*, (1919) U. B. R. 194.

to amount to no trespass as his concealment rebutted the intention to annoy and his entry could not be held to be for the purpose of committing adultery with the complainant's mistress.(8)

For other points of practice, *see* (§§ 5008-5012.)

5024. Proof. The points requiring proof are:—

(1) That the complainant had possession of the property in question.

(2) That such property was a building, tent or vessel used as a human dwelling or any dwelling used as a place of worship or as a place for the custody of property.

(3) That the accused entered into such building or having lawfully entered, unlawfully remained there.

(4) That he did so with intent to commit an offence or to intimidate, insult or annoy the person in possession.

5025. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed house trespass by entering into (*or* unlawfully remaining on) the house in the possession of A B, with intent to commit the offence of (*or* to intimidate, insult *or* annoy the said A B) and thereby committed an offence punishable under section 448 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5026. Evidence of House-trespass.—House-trespass is an aggravated form of criminal trespass, the aggravating circumstance being that the property trespassed upon is a human habitation, the privacy and security of which is insured by law, by providing against its invasion by trespassers who violate its sanctity by intruding therein for the purpose of carrying out their criminal purpose. Such purpose may be either to annoy any of the inmates or to commit an offence. In the former case, the trespasser must necessarily get into a house where there is some one in possession, and whom he wishes to "intimidate, insult or annoy." If therefore, the accused enters a house to annoy, but not the person in possession, he could not be convicted of this offence, though he may, by his annoyance, render himself liable to a suit for damages. This shows that the mere unauthorized entry of one into the house of another is not punishable as a trespass, unless it was accompanied by a criminal intent of the kind specified in section 441. But such intent may probably be inferred from entry made in spite of protest.(9) Where, however, the entry is made with intent

(8) Rupa, 22 O. C. 121, 52 I. C. 275, 20 Cr. L. J. 610.

(9) *Lakshman Raghunath*, 26 B. 568. The rest of this judgment in which Fulton, J., held that intent cannot be treated as identical with "wish" or "desire" is not in accordance with the accepted connotation of that concept. The subject will be found discussed before §§ 4942-4945 *contra* in *Ram Sarup*, 36 A. 474.

to commit an offence the question does not present the same difficulty, for it is then an offence independently of the presence of the person in possession. And in such a case the actual commission of the offence is not necessary, for all that the section requires is that the entry should have been effected with that intent. If the intent is accomplished, the accused may render himself liable to a further prosecution for offence. The thing trespassed into must, however, be a building, tent or vessel used as a human dwelling, or any building used as a place for worship or as a place for the custody of property. Tents and vessels not used as human dwelling but only used for the custody of property are thus excluded, so that an entry thereinto would be only punishable as a simple trespass. So if a tent is used as a meeting place or for divine worship, trespass thereinto has not the same effect as a trespass into a building. The term "human dwelling" implies a place used for human residence. A refreshment tent put up for a temporary purpose is not such a place, though the cook may sleep therein to guard its contents. So again, although a place may have been intended for and at one time used as a human dwelling, still it does not continue to remain as a human dwelling if it was discarded or abandoned at the time of the trespass.(10) For the same reason a building no longer used as a place for worship or for the custody of property would fall out of the category of a building, the protection of which is enjoined by section 442.

For a further commentary, *see* s. 442 (§§ 4974-4982).

Session. Cognizable. Warrant. Not bail. Not comp.

House-trespass in order to commit offence punishable with death.

449. Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with transportation for life or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

[*House-trespass*—s. 442.]

Synopsis.

(1) *Analogous Law* (5027).
(2) *Procedure and Practice* (5028).
(3) *Proof* (5029).
(4) *Form of Charge* (5030).
(5) *House-trespass to Commit capital Offence* (5031).

5027. Analogous Law.—The phraseology of this section differs from other analogous sections in which the language used is "having made preparation for causing death"(11) or the like. But the meaning is in each case the same. For a person who trespassed in order to the committing of any offence punishable with death, must have made at least some preparation for causing death, for otherwise he could not

(10) S. 382.

(11) S. 382.

be convicted for a mere intention not manifested in any overt act. The design to commit such offence must have been already made, and the trespass must have been committed in prosecution of that design. In short, in order to justify a conviction for this offence, there must be evidence of an intention formed to commit such offence, and that in furtherence of it the accused committed trespass. Evidence of preparation is not necessary, but it is admissible as shewing intent.

5028. Procudure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

5029. Proof.—The points requiring proof are:—

(1) That the accused committed house-trespass.

(2) That he did so in order to commit an offence punishable with death.

5030. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed house trespass by entering into (*or* unlawfully remaining in) the building (*or* tent *or* vessel) of A B, used as a human dwelling (*or* for the custody of property) in order to the committing of the offence of——which is punishable with death, and that you thereby committed an offence punishable under section 449 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court.)

"And I hereby direct that you be tried by said Court on the said charge."

5031. House-trespass to Commit Capital Offence.—All the offences punishable with death have been set out under section 53 (§ 397). This section punishes a person who commits house-trespass with intent to commit such offence. Evidently, it is not intended to punish one who in the course of an altercation gets into the house of another and threatens to kill and bury him on the spot after the fashion of Falstaff. The section is not intended to punish such a braggadocio, but to punish one who effects his entry with that purpose. But how is such purpose to be proved? It is apprehended in the same way as any other intention. The fact that the accused had previously threatened the complainant with death, the fact of the former's intimacy with the latter's wife, and in fact any other motives which prompt men to crime would be relevant for this purpose. It will then have to be proved that the accused had formed a design to commit such crime and that his entry was made to carry it into execution. The section only deals with an entry in which the intention to commit a capital crime falls short of an attempt. For if an attempt is made, the accused would be additionally liable for that offence.

Session. Cognizable. Warrant. Not bail. Not comp.

House-trespass in order to commit offence punishable with transportation for life.

450. Whoever commits house-trespass in order to the committing of any offence punishable with transportation for life, shall be punished with imprisonment of either description for a term not exceeding ten years and shall also be liable to fine.

[*House-trespass*—s. 442.]

Synopsis.

(1) *Analogous Law* (5032).
(2) *Procedure and Practice* (5033).
(3) *Proof* (5034).

5032. Analogous Law.—This section is supplementary to the last and deals with house-trespass in which the offence intended to be committed is punishable with transportation for life. In other respects the requirements of the two sections are the same.

5033. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

For a list of offences punishable with transportation for life, *see* §§ 402, 403.

5034. Proof.—The points requiring proof are:—

(1) That the accused committed house-trespass.

(2) That he did so in order to commit an offence punishable with transportation for life.

5035. Charge.—*see* the last section (§ 5030).

Any Mag. Cognizable. Warrant. Bailable. Comp. with Court's sanction.

House-trespass in order to commit offence punishable with imprisonment.

451. Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Session. Pres. Mag. or Mag. of 1st or 2nd Class. Cognizable. Warrant. Not bail.

And, if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

[*Offence*.—s. 40 *Theft*—s. 378. *House-trespass*—s. 442.]

Synopsis.

(1) *Analogous Law* (5036).
(2) *Procedure and Practice* (5037).
(3) *Proof* (5038).
(4) *Form of Charge* (5039).
(5) *Principle* (5040).

5036. Analogous Law.—This section also refers to the same offence, but in which the offence intended is neither capital, nor punish-

able with transportation for life, but only with imprisonment as a substantive sentence. Such are most of the offences in the Code, except only a few which are punishable with only fine.

5037. Procedure and Practice.—This section provides for two cases in both of which the offence intended is punishable with imprisonment but the sentence varies according to whether the offence was theft or otherwise, and so does also the procedure. In the one case, that is to say, when the offence intended is not theft, the offence is cognizable and warrant should issue in the first instance. It is bailable and compoundable, with the permission of the Court, and is triable by any Magistrate, but if the offence is theft it is both non-bailable and non-compoundable and triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class, and in either case summarily.

5038. Proof.—The points requiring proof are:—

(1) That the accused committed house-trespass.

(2) That he did so in order to commit an offence punishable with imprisonment.[12]

To which may be added the following aggravating circumstances:—

(3) That the offence in question was theft.

5039. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the—day of—at—you committed house-trespass by entering into (*or* remaining in) the building of A B used as a human dwelling (*or* for the custody of property in order to commit the offence)[13] (*or* theft), and that you thereby committed an offence punishable under section 451 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5040. Principle.—This section is the last of the three commencing with section 449, in which the fact of house-trespass is aggravated by the accused's intention to commit an offence of the varying degrees of gravity. In each of them the special criminality of the accused depends not so much on account of the house-trespass, as upon that offence being committed to achieve a still greater criminal purpose; and which is upon the prosecution to establish. How it is to be established must depend upon the circumstances of each case. But in the absence of such circumstances it cannot be presumed that the accused's entry had been made with one intention rather than with another, but a person found passing into another's house at an unusual hour, or disguise, may well be presumed to have entered there for the purpose of committing an offence, which the

(12) *Manhur Husain*, 41 A. 587.

(13) According to Ainslie, J., in *Mehar Dowalia*, 16 W. R. 63, the offence must be specified in the charge.

Court would be well justified in presuming in the absence of any satisfactory explanation. But this alone would not justify a conviction under this section, for it would not justify an inference that the offence in question was punishable with imprisonment. And this has to be proved, though the prosecution are not bound to prove the specific offence the accused intended to commit.(14) But there must be a clear finding that the entry was criminal and made with such intent. It must not be left in doubt and to uncertain inference.(15) For instance, if the entry was made to have sexual intercourse with some one of the females of the house, the prosecution must adduce evidence that the accused had in view a woman, sexual intercourse with whom is an offence. If, for instance, the entry was made in order to carry on an intrigue with an unmarried relation of the complainant the accused could not be convicted of this offence, because to have such an intercourse is not criminal. But it would be otherwise if the intercourse was intended to be had with the woman who was the complainant's wife.(16) In this case the complainant must show that there has been no consent or connivance on his part to condone the offence.(17) But in Bombay it has been held that the omission of the husband to prosecute does not absolve the prisoner from criminal liability under this section or section 457,(18) and in the Punjab it has been pointed out that the Court would presume absence of collusion, connivance or consent where the adulterer entered his house during his absence to have connection with his wife.(19) Where however such evidence is considered necessary and is wanting the only section under which the accused might be convicted is section 448.(20)

Session Pres. Mag or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp.

House-trespass after preparation for hurt assault or wrongful restraint.

452. Whoever commits house-trespass, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Hurt*—s. 319. *Wrongful restraint*—s. 339. *Assault*—s. 351. *House-trespass*—s. 442.]

(14) *Samban*, (1881) 1 Weir 533. But Ainslie, J., held in *Mehar Dowalia*, 16 W. R. 63, that the prosecution were bound to specify such offence in the charge.

(15) *Durgaiya*, (1882) 1 Weir 524.

(16) (1875) 8 M. H. C. R. (App.) 6.

(17) *Brij Basi*, 19 A. 74; *Jagannath*, 1 O. L. J. 48, 23 I. C. 703; but the cases on this point are, by no means, unanimous, and, indeed, the views of the same Court are conflicting, for while in 5 M. H. C. R. (App.) 5, the Court held it to be right that the Magistrate refused to convict in the absence of complaint on the part of the husband, the same Court justified the trespasser's conviction for trespass in another case, (1868) 1 Weir 531. This conflict will be found noticed under s. 448.

(18) *Bandhu*, (1894) B. U. C. 689.

(19) *Khanoon Ram*, 60 I. C. (L.) 666, 22 Cr. L. J. 226; *Anant Ram*, (1921) P. W. R. 8, 59 I. C. 550, 22 Cr. L. J. 118.

(20) *Veda Gurukkal*, (1882) 1 Weir 533.

Synopsis.

(1) *Analogous Law* (5041).
(2) *Procedure and Practice* (5042).
(3) *Proof* (5043).
(4) *Form of Charge* (5044).
(5) *Principle* (5045).
(6) *House Trespass After Preparation to Cause Hurt* (5046-5048).
(7) *Evidence of Preparation* (5047).
(8) *Where Preparation Not for Causing Hurt* (5048).

5041. Analogous Law.—This trespasser whose entry is made after preparation for causing hurt, is also one whose trespass is committed in order to the committing of any offence punishable with imprisonment—only the former commits a special offence described in this section. Such person must then be convicted only under this section which is applicable to him. It is, however, clear that if his entry is further aggravated as when it constitutes house-breaking or lurking house trespass, he would be liable to be dealt with under section 455, which bears the same relation to this section as section 454 does to the last section. The offence may be further aggravated if such trespass is made at night (s. 458) or if the hurt caused is grievous hurt (s. 459). It will be thus apparent that sections 451, 454 and 457 are related to one another in the same way as this section and sections 455 and 458.

5042. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session. Presidency Magistrate or a Magistrate of the first or second class.

This offence may differ in its gravity from the simplest trespass committed in the course of an altercation by which neighbours amuse themselves in this country, or it may assume its maximum gravity where a person intrudes into the zenana of another after arming himself with a formidable weapon. This section is not intended to punish the causing of hurt on such trespass for which the offender may be separately convicted (§ 525). The offence is as a rule non-bailable, but the practice of the Courts has been to admit the accused to bail if the offence is more or less of a technical character, and is not attended by any circumstance of aggravation.

5043. Proof.—The points requiring proof are:—

(1) That the accused committed house-trespass.

(2) That it was committed after making preparation for—

(*a*) causing hurt,

(*b*) assaulting, or

(*c*) wrongfully restraining any person; or

(3) That it was committed for putting any person in fear of—

(*d*) hurt, or

(*e*) assault, or

(*f*) wrongful restraint.

5044. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the———day of——at———you committed house-trespass by entering into (*or* unlawfully remaining in) the building of A B, used as a human dwelling, having made preparation for causing hurt to the said A B [or for assaulting (*or* wrongfully restraining) the said A B (*or* for putting the said A B in fear of hurt, *or* assault, *or* wrongful restraint)] and that you thereby committed an offence punishable under section 452 of the Indian Penal Code, and within my cognizance *or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5045. Principle.—Between an offence in which house-trespass is committed in order to commit an offence punishable with imprisonment and this offence there is this difference, that while the one may be an act of trespass committed with intent to cause hurt, it is not accompanied by any overt act of preparation to cause hurt, and which is alone sufficient to strike terror in the mind of the person upon whose property the trespass is committed. Such preparation may consist of entering armed with a cudgel, sword or a loaded gun intended to be used against any inmate of the house. For, the mere entry of a person armed but without such intention is not sufficient. The offence owes its aggravation to the threat implied by show of force. And if this is otherwise manifest, it is not necessary that the accused should be armed at all, for he may enter into another man's house with his clenched fist ready to strike him, and it will then be a sufficient entry after preparation made for assaulting him.

The section does not require that the preparation should culminate in the causing of actual hurt. But if hurt is actually caused, it may be some evidence of the preparation, though it is by no means conclusive, for the hurt may have been caused on a sudden impulse in consequence of a grave and sudden provocation, and in which case the accused could not be convicted of this offence though he might be of simple hurt and house-trespass. Again, though the section is generally worded, it is evident that some distinction should be drawn between an entry made after preparation to cause hurt and unlawfully remaining in the house after such preparation (§ 5041).

5046. House-trespass After Preparation to Cause Hurt.—The high penalty prescribed for this offence requires that the exact scope of this section should be properly understood. The section requires that there should in the first place be a trespass, but the house-trespass committed must be with intent to commit an offence, that offence being to cause hurt or commit assault or wrongful restraint, and that intent must be manifested in some overt act evidencing preparation to commit any of those offences *in praesenti*. This eliminates those cases of trespass in which the entry is made with intent to intimidate, insult or annoy another. But it does not exclude the possibility of this offence being committed by one whose trespass consists in unlawfully remaining on another's property after a lawful entry.

Such, for example, may be the case of a son-in-law entering the house of his father-in-law in order to take away his wife. He enters lawfully,

but his father-in-law may refuse to deliver him his minor wife in the lawful custody of her parents and the son may then threaten to assault him and persist in remaining in the house in spite of the other's warning to leave it. His subsequent stay being unlawful he commits trespass, and his threat of assault heightens the degree of his crime to this offence. So where the husband entered the house of the complainant in which his wife had taken refuge, in order to beat her and did in fact beat her, it was held that the entry without the complainant's permission was unlawful, and constituted house-trespass and that his beating her there for which he had made the entry, aggravated his offence to one under this section.(21) A person who was always welcome to another may assume leave to enter his house, but he has no right to enter it for the purpose of committing an offence, even though that offence may be an assault on his own life who may have entered there; *a fortiori* he cannot assume that such permission confers on him the right to make an entry for the purpose of assaulting any of the inmates.

Evidence of Preparation.

5047. But since the criminality under this section depends upon preparation, there must be clear evidence of it. The fact that a person entered another man's house and committed an assault does not necessarily presuppose such preparation, for it may be a case of *post hoc ergo propter hoc*.

Nor is such preparation to be readily assumed from an empty threat which the trespasser uttered as he effected his entry. For the Court must make some allowance for the exaggeration of language which people use in a moment of excitement. It is, indeed, a common spectacle of two rustics meeting and on the slightest provocation one threatening to make a corpse of the other. But such corpses are seldom made and both parties are equally aware of it. So again, a preparation to cause hurt must not be necessarily inferred from the mere fact of an entry made by a person who is armed, for it may be his habit and he may have never thought of his arm while making the entry. The question really depends upon his intention.

Indeed, if there is the intention to commit an assault, the fact that the accused entered unarmed would be immaterial, for all that the section requires is that there should be a preparation and not that it should be adequate. So, a person entering the house of another with, say a clenched fist, ready to strike him commits this offence though his preparation is scanty, and he may be overpowered before he has the chance of even making use of it. But there must be some preparation at all events. The fact that the accused entered the house of the complainant in a moment of excitement and as they both stood abusing each other, the accused assaulted him, would not make his act punishable under this section, merely because there was an entry and an assault, and probably an intention to commit it. At the same time, the preparation need not necessarily be to cause hurt to any person at all events. For a person may achieve his illegal purpose by the mere show of force, without being required to use it. So the fact that the accused entered the house of another prepared and determined to use force should he be resisted in the commission of some other offence or in order to facilitate his escape, would not reduce his offence though it may reduce his criminality.

(21) *Katakam Narasigadu*, (1882) 1 Weir (3rd Ed.) 329.

Where Preparation Not for Causing Hurt.

5048. Indeed, between the two clauses of the section itself there is a noticeable difference. For other things being equal, a person who enters prepared to cause hurt cannot be treated as an offender of the same dye as one who enters prepared merely to frighten him with the causing of hurt. But this is only the simplest case and the degree of the accused's crime may be affected by a number of other circumstances—for instance, the nature of the preparation, its effect upon the inmates, the mischief threatened and the mischief done. The accused conspired with another man, Brij Mohan, to abduct a young prostitute living in the house of another prostitute, in consequence of which Brij Mohan personated a constable and entered the house in which the young woman, by name Indro resided. He told her that he had a warrant for her arrest for absconding from her natural guardian. She thereupon went off with Brij Mohan who conveyed her to the house of another prostitute in a different place, where she was found living under the protection of the accused. The warrant was a forgery, and thereupon both Brij Mohan and the accused were convicted at the same trial—the former of this offence, and the latter of abetment. Only the accused appealed; but in reviewing his case the Court found that Brij Mohan's entry under a forged warrant was unlawful entry and constituted criminal trespass. He put Indro in fear of arrest, which being unauthorized constituted wrongful restraint. He was, therefore, guilty of this offence. And as regards the accused the Court found that Brij Mohan had all along acted at the instigation of the accused, whose conviction for abetment was maintained, but the Court reduced his sentence from seven years' transportation and a fine of Rs. 100 to three years' rigorous imprisonment with a fine of Rs. 25.(22)

Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp.

Punishment for lurking house-trespass or house-breaking.

453. Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

[*House-trespass*—s. 442. *Lurking house-trespass*—s. 443.]

Synopsis.

(1) *Analogous Law* (5049).
(2) *Procedure and Practice* (5050).
(3) *Proof* (5051).
(4) *Form of Charge* (5052).
(5) *Proof of Lurking House-trespass* (5053-5055).
(6) *House Breaking* (5055).

5049. Analogous Law.—This section prescribes a penalty for the offence of lurking house-trespass and house-breaking, not otherwise provided for. In short, it provides only for a case in which the act amounts to the offences defined in sections 443 and 444 without any of the attendant aggravating circumstances presented in the ensuing sections.

5050. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Presidency Magistrate or

(22) *Nund Mohan Sirkar*, 12 W. R. 33.

a Magistrate of the first or second class. A person may be guilty both of lurking house-trespass and the commission of an offence (*e.g.*, theft) in which case the appropriate section to convict him under is section 457 and not sections 456 and 380.[23] The splitting up of a graver offence into its primary ingredients is of course nowhere permitted in law.

5051. Proof.—The points requiring proof are:—

I. *In lurking house-trespass*—

(1) That the accused committed house-trespass.

(2) That he did so after taking precautions to conceal his trespass from another person who had a right to exclude or eject him.

II. *In house-breaking*—

(1) That the accused committed house-trespass.

(2) That he effected his entrance into any part of the house described in section 445, or if he had entered with intent to commit an offence, then he quitted in any of those six ways.

5052. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed lurking house-trespass (*or* house-breaking) by entering into a building belonging to A B, and used as a human dwelling, and that you thereby committed an offence punishable under section 453 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5053. Proof of Lurking House-trespass.—The essential ingredients of this offence are (*i*) house-trespass, and (*ii*) lurking. The former has been the subject of discussion under section 442 which defines the term, while the latter is defined in section 443 as taking precautions to conceal the house-trespass from some person who has a right to exclude or eject the trespasser. There can be, of course, no lurking house-trespass where a person has a right to enter the house. So if a person should steal into a club of which he is a member to watch things he is interested in, he could not be guilty of this offence. So if the husband secretly enters his own house to detect a suspected offence, or indeed for any other purpose, he cannot be said to lurk, because he conceals his presence from those who have a right to exclude a trespasser, which he is not. But a person may be a trespasser in his own house, if he has parted with his right of possession to another (§§ 4952-4954), in which case his entry being a trespass may amount to this offence if it otherwise answers the requirements of section 443 or section 444.

5054. The precautions taken may not be sufficient, but they must have been taken all the same, and their object must be not concealment generally from detection, but concealment from detection by the person in possession. So if a person trusts to force for effecting his entry, but

(23) *Ramchurn Kairee*, 6 W. R. 39 F. B.

effects a disguise as by wearing a mask or the like, he takes precautions to conceal himself, but not his trespass. He would not then be guilty of this offence. But a person who enters by the back-door does so to conceal himself from those having the right of ejecting him, he would then be guilty of lurking. A person who takes precaution to alter his appearance so as to pass for another person who is as such permitted to enter, may perhaps be equally guilty of this offence, for there is nothing to prevent such a disguise from being regarded as a precaution taken to conceal the house-trespass.

5055. House-breaking.—The case of house-breaking is simpler. Now as observed elsewhere (§§ 4994-5002), such a person may commit house-trespass either for the purpose of committing an offence, or with intent to intimidate, insult or annoy the person in possession. In either case it is house-breaking if his entry is made in any of the six ways enumerated (§§ 4997-5003). But if his entry was made to commit an offence, then he is guilty of this offence whether his entry or exit was so made. The specification of intention is so far material. But otherwise, it need not be specified,[24] though if the offence suggested be adultery some evidence would have to be given to show that it was not consented to nor connived at by the husband.[25] But a formal proof of this may be dispensed with if the husband was called as a witness for the prosecution, and he complained of the accused's trespass, though he was neither asked nor stated that the trespasser had not entered into his house with his consent or connivance and especially where the accused's defence was *alibi* and inconsistent with his subsequent plea, on appeal of consent.[1] At any rate it is by no means necessary that the husband complaining of trespass, should also complain of adultery.[2]

For further commentary, *see* s. 445 (§§ 4994-5005).

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp.

Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment.

454. Whoever commits lurking house-trespass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

[*Offence*—s. 40. *Theft*—s. 378. *Lurking house-trespass*—s. 443. *House-breaking*—s. 445.]

Synopsis.

(1) *Analogous Law* (5056).
(2) *Procedure and Practice* (5057).
(3) *Proof* (5058).
(4) *Form of Charge* (5059).
(5) *Lurking or House-breaking to Commit an Offence* (5060-5062).
(6) *Evidence of Specific Intent* (5063).
(7) *Evidence of Lurking or Breaking* (5064).

(24) *Balmakand Ram* v. *Ghansam*, 22 C. 391.
(25) *Brij Basi*, 19 A. 74.
(1) *Ishri*, 3 A. L. J. R. 652.
(2) *Kangla*, 23 A. 82.

5056. Analogous Law.—This section carries the offence described in the last section, a step higher, inasmuch as the trespass here committed had for its object the commission of any offence punishable with imprisonment. As, however, such trespass may have for its object not only the commission of an offence punishable under the Penal Code, but also other offences punishable under the special and local laws, and as moreover, such act may have been committed in order to intimidate, insult or annoy the person in possession, it follows that in all such cases the act would be punishable under the last section, this section being only applicable to a trespass in which the sole intent or any of the intents was to commit an offence punishable under the Code. There is again, no difference between this section and section 457 except that the former is committed by day, and the latter by night.

5057. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class. As this is another compoundable offence, the Magistrates should be careful in not splitting up one single aggravated offence into separate offences.(3) But such a course though improper is not illegal. A person convicted of this offence may be sentenced to whipping in lieu of the sentence here prescribed.(4)

5058. Proof.—The points requiring proof are:—

(1) That the accused committed lurking house-trespass (s. 443) or house-breaking (s. 445).

(2) That he did so in order to commit an offence punishable with imprisonment.

5059. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed lurking house-trespass by entering into (*or* remaining in) a building in the possession of A B, and used as a human dwelling, in order to the commission of the offence of——and that you thereby committed an offence punishable under section 454 of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session *or* of the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5060. Lurking or House-breaking to Commit an Offence.—As remarked before, this offence is an aggravated form of the offence made punishable under the last section—the aggravation consisting in the trespass being committed "in order to the committing of any offence punishable with imprisonment." Such offence need not be committed by the trespasser

(3) *Ramcharan Kairi*, 6 W. R. 39; *Ajudhia*, 2 A. 644; *Zar Singh*, 10 A. 146. (4) S. 3. (d) Whipping Act (IV of 1909).

himself for it may be committed by his accomplice, but in effecting his entry the offender must have that object in view, which may be proved by the attendant circumstances. The last evidence of such intention is, of course, the commission of the actual offence. But the actual commission of the offence is not necessary to constitute an offence under this section. But in the view of Brodhurst and Straight, JJ., the actual commission of the offence of theft is under the latter part of both this section and section 457 necessary. As Brodhurst, J., observed: "The latter part of each section enacts that, if the offence intended to be committed is theft, the term of imprisonment may be extended from three and five years to ten and fourteen years, respectively. An intent to commit theft would not be punishable until after lurking house-trespass, or house breaking had been committed. It is evident that the Legislature never meant that a house-trespasser or house-breaker should be liable to seven and nine years' additional imprisonment, merely because he intended to commit theft. The latter portion of each of these sections was obviously framed to include the cases of house-trespassers and house-breakers who had not only intended to commit theft, but had actually committed that offence. To sentence a house-trespasser or house-breaker to the enhanced punishment of ten years' imprisonment under the latter part of section 554, because he intends to commit theft, and to sentence him also under section 380 to four years' imprisonment or any other punishment for theft in a building, would virtually be to punish him twice for the same offence, and would be grossly unjust."(5)

It may be so: but it is submitted that the actual commission of the offence of theft does not appear to be the natural outcome of the words used in defining this section. And at any rate if the latter clause implies the actual commission of offence, why should not the earlier clause have the same effect? And as regards hardship, it is sufficient to state that if a person commits the offence of lurking house-trespass or house-breaking with intent to commit an offence, he is not likely to take all the risk without being determined to commit the offence. As a rule, the commission of trespass would be followed up by the commission of the offence for which the trespass was made, but it may not be completed and in that case, as the section is worded, "its non-completion would be no ground for his exculpation under this section."

Evidence of Specific Intent.

5061. Though the section does not require proof of specific intent, still if the prosecution have facts to prove that the intention of the accused was to commit theft, it is for them to adduce such evidence. For this purpose evidence of the poverty of the accused and of the fact that his entry was made in a house containing valuable property, is relevant, as are also the other facts which make the fact of his having had that intention highly probable.(6) Such would be the fact of his previous conviction for theft or that he was a wandering vagabond having no ostensible means of livelihood.(7)

(5) *Zor Singh*, 10 A. 146.
(6) S. 11, Indian Evidence Act (I of 1872).
(7) Oudh Cr. Cir. No. 82 of 1885.

Evidence of Lurking or Breaking

5062. As an offence under this section must have been committed at day-time, few cases of house-breaking are likely to arise under this section. But lurking is more possible, though it is also comparatively difficult. In any case it may be established by evidence which establishes not only the entry but also the "taking of precautions to conceal it from some person who has a right to exclude or eject him. Where, therefore, all that was proved was that the accused was seen leaving the house of the complainant, and was seized one afternoon before sunset on an outcry being made by a female inmate of the house, and he was found carrying the complainant's jewels ordinarily kept in an earthen receptacle in the house, it was held that there was no evidence to support the accused's conviction for lurking house-trespass or for house-breaking, but that the accused could only be convicted of theft in a building, and his conviction was altered to one under section 380.[8]

For a further commentary under this section, *see* s. 457.

Session. Pres. Mag. or Mag. of 1st class. Cognizable Warrant. Not bail. Not comp.

Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.

455. Whoever commits lurking house-trespass, or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Assault*—s. 35. *Hurt*—s. 319. *Wrongful restraint*—s. 339. *Lurking house-trespass*—s. 443. *House-breaking*—s. 446.]

Synopsis.

(1) *Analogous Law* (5063).
(2) *Procedure and Practice* (5064).
(3) *Proof* (5065).
(4) *Form of charge* (5066).

5063. Analogous Law.—This section bears the same relation to section 453 as section 452 bears to section 450. The intention of the lurker or house-breaker in such a case need not be to commit an offence punishable with imprisonment, but it must have been made after preparation for causing hurt, etc, as stated in the section. The section is precisely the same as section 458 with the exception that the trespass is here committed by day, while the trespass under that section is committed at night.

5064. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of

(8) *Khuda Buksh*, (1886) P. R. No. 19.

Session, Presidency Magistrate, or a Magistrate of the first class. A person convicted of this offence may be setenced to whipping in lieu of the sentence here provided.(9)

5065. Proof.—The points requiring proof are:—

(1) That the accused committed lurking house-trespass (s. 443) or house-breaking (s. 445).

(2) That he did so after making preparation for causing hurt, or assaulting or wrongfully restraining some person, or for putting some person in fear of hurt assault or wrongful restraint.

5066. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed lurking house-trespass (*or* house-breaking) by entering into (*or* unlawfully remaining in) the building in the possession of A B and used as a human dwelling (*or* for the custody of property), having made preparation for causing hurt to the said A B (*or* for assaulting any person *or* for wrongfully restraining any person, *or* for putting any person in fear of hurt or assault or of wrongful restraint) and that you thereby committed the offence punishable under section 455 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

For a general commentary on this section *see* s. 458.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp.

456. Whoever commits lurking house-trespass by night or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Punishment for lurking house-trespass or house-breaking by night.

[*Lurking house trespass*—s. 443; *by night*—s. 444. *House-breaking*—s. 445; *by night*—s. 446.]

Synopsis.

(1) *Analogous Law* (5067).
(2) *Procedure and Practice* (5068-5069).
(3) *Proof* (5070).
(4) *Form of charge* (5071).
(5) *Lurking House-trespass or House-breaking by Night* (5072-5074).

5067. Analogous Law.—Lurking house-trespass and house-breaking as such is punishable under section 453 of the Indian Penal Code; when aggravated by the offence being committed at night, it is punishable under this section. It may be further aggravated by the presence

(9) S. 3 (*d*), Whipping Act (IV of 1909).

of an intention to commit an offence punishable with imprisonment (s. 457) or where it is a preliminary to the commission of theft; or where the entry is made after preparation for assaulting or wrongfully restraining any person (s. 458).

5068. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class.

5069. A person charged under s. 457 for trespass in order to commit theft may be convicted under this section, if the object of the trespass is proved to be the making of an immoral proposal to an inmate of the house.[10] The question is one of prejudice to the accused (§ 5081). A person convicted of this offence may be sentenced to whipping in lieu of the punishment here prescribed.[11]

For other points *see* s. 454, §§ 5057-5062.

5070. Proof.—The points requiring proof are:—

(1) *For lurking house-trespass at night*—

(1) That the accused committed lurking house-trespass (s. 443).

(2) That it was committed after sunset and before sunrise.

(2) *For house-breaking at night*—

(1) That the accused committed house-breaking (s. 445).

(2) That it was committed after sunset and before sunrise.

5071. Charge.—It is not necessary to specify the criminal intention in the charge. It is sufficient if a criminal intention supecified in s. 441, is proved.[12] The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed lurking house-trespass by night (*or* house-breaking by night) by entering into the building (*or* unlawfully remaining in the building) in the possession of A B, and used as a human dwelling, after the hour of sunset and before the hour of sunrise, and that you thereby committed an offence punishable under section 456 of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

(10) *Karali Prasad*, 20 C. W. N. 1075; *Contra* in *Jharu Sheik*, 61 C. W. N. 696; *Contra* in *Raghu Singh*, 1 Pat. L. T. 221, 56 I. C. 592, 21 Cr. L. J. 496.

(11) S. 3 (*d*), Whipping Act (IV of 1909).

(12) *Koilash*, 16 C. 657; *Balmakand* v. *Ghansamram*, 22 C. 391; *Premanundo* v. *Brindaban*, 22 C. 994; *Karali Prasad*, 20 C. W. N. 1075 (1078); *Ishri*, 29 A. 46; *Sher Singh*, (1883) P. R. No. 14; *Lalji Ram*, (1898) P. R. No. 12; *Ramrang*, (1902) P. R. No. 13.

5072. Lurking House-Trespass or House-breaking by Night.— This section prescribes punishment for the offence of lurking by house-trespass or house-breaking committed at night. As such it is the aggravated form of the offence punishable under s. 453 and prescribes a punishment for the offence defined in section 444 and 446. For general observations on this offence reference should be made to the commentary under those sections. As has been there observed, the offence is susceptible of being committed under circumstances of varying degrees of aggravation, but these when of a special and definite kind give rise to distinct offences provided in the ensuing sections. The offence punishable here must not, of course, fall under any of those sections, but even as an offence under this section it may vary in its gravity in accordance with the intention of the intruder. For without possessing the intent specified in section 441 there can be no trespass, and without trespass there can be no offence punishable under this section. So where the accused who were execution-creditors accompanied an authorized bailiff, and broke open the complainant's door before sunrise with intent to distrain his property, for which they were convicted under this section, it was held that since the only finding of the Magistrate was that there was a breaking and that it was unwarranted, it failed to support the finding of the intent so as to make the entry punishable as a criminal trespass, and as that intent is the foundation of this offence, it follows that the accused could not be legally convicted of it.(13)

But though the intention disclosed by the facts must be necessarily criminal, it is not necessary that it should be specifically proved, but in that case the evidence adduced must be sufficient to establish an intention which is in any case criminal, and it is then the right of the accused to claim that it was one least culpable to himself.(14) And it would then suffice if he refutes it. Such was the case of the accused who stole into the complainant's house at dead of night and entered her bedroom. She woke up as soon as her body was touched, woke up her mother who was asleep on the same bed. He was accused of having removed the complainant's earrings. The defence was an intrigue with the complainant, who was a young widow. Both the stories were found to be false, the truth being that the accused, a well to do man, had effected his entry with a view to ravish the complainant. He was convicted of this offence, and his conviction was held good on the ground that the facts proved that his presence would and did annoy the complainant, and there was nothing to rebut them.(15)

5073. Now, of the four intentions described as criminal in section 421, the intention to commit an offence is naturally more serious than an intention merely to intimidate, insult or annoy a person in possession of property. But in the former case the criminality of an act may depend upon the volition of a third party. Of this the offence

(13) *Jotharam Dvay*, 2 M. 30.

(14) *Balmakand Ram* v. *Ghansam Ram*, 22 C. 391; *Karali Prasad*, 20 C. W. N. 1075 (1078, 1079); *Mulla*, 37 A. 395; explained in *Ganga Bhat*, 38 A. 517; *Sambari*, 1 Weir 533.

(15) Karali Prasad, 20 C. W. N. 1075 (1077); *Md. Nasiruddin*, 4 Pat. 459. *Contra* in *Jaharu Sheikh*, 16 C. W. N. 696; *Milkhi Ram*, (1919) P. L. R. 50.

of adultery furnishes an apt example. For the criminality of that act is declared by law to depend upon the absence of consent or connivance of the husband as it is obviously a violation of his marital right. If, therefore, a person is shown to have effected his entry at a time and in the manner so as to make it a lurking house-trespass by night or house-breaking by night and his intention is proved to have been the holding of sexual intercourse with a married woman, his act is criminal, or otherwise according as the husband did not or did consent to the act. Now ordinarily, one should presume non-consent, for there is always a presumption against immorality, and in this view the Court should be justified in condemning the accused of this offence if there is nothing to show that the husband had consented to or connived at the act. But the Courts do not appear to have considered the effect of this presumption on the criminality of such an act. For they have insisted on a formal proof of non-consent(16) holding the Magistrate well justified in refusing to convict the accused if the husband declines to admit that the intention of the accused was adultery.(17)

5074. But this was undoubtedly an extreme case, and one at variance with an earlier judgment of the same Court,(18) and that view is in consonance with that taken in Bombay.(19) Indeed the question of consent becomes only material in a case where consent is pleaded in justification of the act. If, therefore, the defence of the accused was an *alibi* he could not be heard in appeal to say that the failure on the part of the prosecution to prove non-consent was fatal to the charge under this section, especially if the husband had been examined as a witness for the prosecution, and the accused never ventured to raise the question of consent.(20) So where the accused was discovered in the bed-chamber of the complainant where he was sleeping with his wife, on the latter having raised an outcry that a thief was carrying away her neck ornament, and the plea of the accused was an *alibi* which failed, it was held that he was properly convicted under this section, and that his presence at midnight in the house of another was sufficient to raise a presumption that his visit was not innocent and that, at any rate, it raised a presumption of guilt sufficient to shift on him the burden of proving that his intention was under the circumstances innocent.(21) So in another case the Court remarked: "What we have to deal with is the case of a man, a stranger, who uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who when the attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances, we think, a Court ought to presume that the entry was effected with an intent such as is provided for by section 441."(22)

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(16) *Brij Basi*, 19A. 74; *Jagannath*, 1 O. L. J. 48, 23 I. C. 703.
(17) 5 M. H. C. R. (App.) 5.
(18) (1868) Weir 531.
(19) *Bandhu*, (1895) B. U. C. 689.
(20) *Ishri*, 3 A. L. J. 652.
(21) *Ishri*, 3 A. L. J. 652; following *Balmakand Ram* v. *Ghansam Ram*, 22 C. 391; *Premanundo* v. *Brindabun*, 22 C. 994; *Mulla*, 37 A. 395; explained in *Gaya Bhat*, 38 A. 517; *Chote Lal*, 40 A. 221.
(22) *Koilash Chandra*, 16 B. 657.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Not bail. Not comp.

Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.

457. Whoever commits lurking house-trespass by night, or house-breaking by night in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft the term of the imprisonment may be extended to fourteen years.

[*Offence*—s. 40. *Lurking house-trespass*—s. 443.]

Synopsis.

(1) *Analogous Law* (5075-5076).
(2) *Procedure and Practice* (5077-5079).
(3) *Proof* (5080).
(4) *Charge* (5081-5082).
(5) *Proof of the offence* (5083-5088).
(6) *Adultery* (5086).
(7) *To establish title* (5088).
(8) *Not Guilty* (5089).

5075. Analogous Law.—This offence carries the offences described in the last section a step still further, in consequence of the offence being committed by night, and the trespass being used as a means for the commission of an offence punishable with imprisonment, or for theft. As these two additional elements greatly aggravate the offence, it is incumbent on the prosecution to establish them to the satisfaction of the Court.

5076. In England a person entering any dwelling-house in the night with intent to commit any felony therein, is held guilty of felony for which he is liable to penal servitude up to seven years,[23] but should a person break into any dwelling-house for the same purpose, he is liable to penal servitude for any term not exceeding fourteen years.[24] There is thus no single provision in the English Statute law corresponding to this section, but the common law definition of burglary is closely akin to it.

5077. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class, and summarily.

5078. The elementary ingredients of this offence are lurking house-trespass by night and the commission of or an intent to commit an offence punishable with imprisonment or theft. The combination of the two offences gives rise to this offence which is heinous and punishable with the maximum term of imprisonment for fourteen years. It is not, therefore, competent to the Magistrate to split it up into the two comparatively minor offences of lurking house-trespass and

(23) 24 & 25 Vict., c. 96, s. 54. (24) *Ib.*, s. 56.

theft under section 456 and 380, and punish the offender as such.(25) But since the intention required to be proved under this section is an intention to commit an offence punishable with imprisonment, it follows that the prosecution must establish it by evidence which is reasonably consistent with no other intention. The actual commission of the offence is, of course, the best evidence of it,(1) but such evidence is not invariably necessary or available, and intention must then be inferred from such other facts and circumstances as justify a legal inference that the accused had only such intention, and no other.(2) Since, no actual commission of an offence other than that of lurking house-trespass or house-breaking is required to complete this offence, the accused would be additionally liable for the actual commission of such offence. Where, therefore, the accused had committed this offence in order to commit mischief and assault, his conviction for both was held to be legal.(3)

As however, house-breaking implies house-trespass a person cannot be legally convicted of the two offences in respect of the same act.(4)

5079. The Indian Whipping Act authorizes the substitution of the sentence of whipping on a conviction for this offence if the intention was to commit theft or other offences punishable with whipping.(5) But that act does not legalize the sentence of whipping when the act only amounted to an attempt as distinct from the completed offence here punishable.(6)

5080. Proof.—Several cases have been decided under this section in which the value of footprints(7) and of circumstantial evidence is considered.(8) The points requiring proof are:—

(1) That the accused committed either lurking house-trespass (s. 443) by night (s. 444) or house-breaking (s. 445) by night (s. 446).

(2) That he did so in order to commit an offence punishable with imprisonment.

To which may be added the following aggravating circumstance:—

(3) That the offence in question was theft.

5081. Charge.—Under English law the specification of intent is a material part of the indictment which is there drawn up with greater precision than in this country, so that any variance between the intention alleged and that proved is fatal to the trial.(9) Where, therefore, the intent as alleged was to kill a horse, and the intent proved was merely to lame him in order to disable him from running a race, the variance was held fatal.(10) So if the indictment allege murder, and

(25) *Ramchurn Koiree*, 6 W. R. 39.
(1) *Locost*, Kel. (J.) 30.
(2) *Sher Singh*, (1883) P. R. No. 14.
(3) *Nirichan*, 12 M. 36.
(4) *Khandu*, (1886) B. U. C. 302.
(5) S. 3 E. Act IV of 1909.
(6) *Yella*, 3 B. H. C. R. 37.
(7) *Mewa Singh*, (1917) P. W. R. 27, 40 I. C. 305, 18 Cr. L. J. 657.
(8) *Khalas*, (1915) P. L. R. 79; *Mechhia*, (1915) P. W. R. 28, 31 I. C. 337, 16 Cr. L. J. 737.
(9) 2 *East*, P. C. 515; *Thompson*, 2 Leach 1105 *n*.
(10) *Ib.*, p. 513.

the intent proved be to beat the party merely, the variance is fatal.[11] But a charge under this section need not be so precise, though it must allege that the entry was made for the purpose which makes it punishable under this section. But if the charge specifies the offence, *e g.*, theft, and there is no evidence to prove it, it may be a question whether the accused could then be convicted under the last section, which requires no proof of a specific intention. There is no legal impediment to such a conviction though the Court would have to consider the question of prejudice to the accused in such a case,[12] regard being had to the line adopted by the prosecution and that taken by the defence.[13]

5082. The accused who were making a hole in the complainant's house ran away leaving it unfinished finding themselves interrupted. The Sessions Judge held it to be a mere preparation, but the High Court naturally held it to amount to an attempt to commit this offence.[14]

The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you committed lurking house-trespass by night (*or* house-breaking by night) by entering into the building belonging to A B, and used as a human dwelling (*or* for the custody of property) after sunset and before sunrise, in order to commit the commission of the offence of——(*mention it*) and that you thereby committed an offence punishable under section 457 of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

Circumstances Proving Intention.

5083. Proof of the Offence.—The terms employed in defining this offence have been defined in the preceding sections—house-trespass in s. 422; lurking house-trespass in s. 443; lurking house-trespass by night in s. 444; house-breaking in s. 445 and house-breaking by night in s. 446. Such act is here declared punishable if it is done "in order to the committing of any offence punishable with imprisonment." This phrase does not convey the same sense as "in order to commit an offence" which identifies the trespasser with such offender. The phrase used, however, only presupposes the commission of the trespass for the purpose of comitting such an offence, but which need not be committed by the trespasser himself so long as his trespass is made for that purpose. So A and B may agree that A shall make a hole through C's wall and then keep a look-out while B should enter and rob the house, in which case both A and B would be guilty of this offence though A never in fact committed the theft.

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(11) 1 Hale 561.
(12) *Karali Prasad*, 20 C. W. N. 1075; dissenting from *contra* in *Jharu Sheikh*, 16 C. W. N. 696.
(13) *Govindas*, 6 B. H. C. R. (Cr.) 76.
(14) *Chandkha*, 37 B. 553.

5084. The question with what intention the accused entered the house must be inferred from circumstances. The fact that the entry was made late at night would be such a circumstance and if unaccounted for, it would warrant an inference that it was for some illegal purpose. And what that purpose must be would then have to be discovered by a process of elimination. For instance, if the accused was a well-to-do man, and the complainant comparatively poor, it may be presumed that his object was something other than theft. Now, if he entered a room containing young women, the intruder might be presumed to have entered to gratify his carnal appetite. This would bring his case up to section 456.[15] And it may stop short there if the evidence fails to show that the accused had singled out some one out of the inmates, cohabitation with whom would be adultery. On the other hand, where the accused who was an ex-convict, and a notorious offender was caught in the dead of night in company with two other persons making a hole into the wall of the complainant's house, the Court felt justified in holding that the intention of the accused was to commit theft.[16] Such would be the natural inference in the case of one breaking into a shop at night,[17] or one found forcing his way into any other building used for the custody of property.

5085. A very different inference was, however, drawn where the trespasser was caught in the complainant's house where he was found in the company of the complainant's widowed daughter-in-law, a woman of loose character, and in which case he could not be convicted even under section 456 for he could hardly be said to have had the intention of committing the offence described in section 509, as his entry was held to be probably with the leave and license of the widow and in which view he was acquitted.[18]

Adultery.

5086. Where, however, the entry points to an intrigue with the complainant's wife, the complainant may charge him for this offence, but he must then allege the true intent of the accused. If, therefore, out of a feeling of shame, he alleges the accused's motive to be theft, the Court would be chary of convicting him of this section on a finding that his intent was adultery especially if the accused had had no chance of meeting that charge.[19] But the complainant is not bound in such a case of laying a complaint of adultery against the accused.[20] All that he is required to do is to convince the Court that if the intention of the accused was adultery the complainant had done nothing to connive at it,[21] and this he may establish as much by a clear averment as by making a statement inconsistent with such consent or connivance, as where he prosecutes the accused and the latter is content to rely upon an *alibi* as his sole defence.[22] But a case may arise where the complainant steadfastly maintains the impossibility of the entry having been to commit adultery with his wife, in which case the Court would be

(15) *Muhammad Shah*, (1881) P. R. No. 14.
(16) *Sher Singh*, (1883) P. R. No. 14.
(17) *Kenaram Bousee*, 4 W. R. 19.
(18) *Lajje Ram*, (1898) P. R. No. 12.
(19) *Mangal Singh*, (1901) P. R. No 31; *Sarwan*, (1882) P. R. No. 41.
(20) *Kangla*, 23 A. 82.
(21) *Brij Basi*, 19 A. 74.
(22) *Ishri*, 3 A. L. J. R. 652.

justified in proceeding on the assumption that the accused's entry had not been made with that intention.[23] But the cases on this point are conflicting (§§ 5073-5074) and while some urge the necessity of a prosecution by the husband, there are others in which such necessity is denied and it has been even held that a person may be convicted under this section even though the husband of the woman does not come forward to prosecute the accused.[24] But these were probably exceptional cases.

5087. It is not necessary for this offence that the prosecution must be able to establish a case of specific intention, for it is sufficient if they prove criminal intent, though it is not further clear whether it is adultery or theft so long as it is one or the other. But in such a case the Court is bound to punish him on an assumption that his intention was the least culpable.[25]

To Establish Title.

5088. Though this section ordinarily deals with heinous offences of a different type, it was held to apply equally to one who on the strength of a sale deed, which presumably gave him no title to the house, took advantage of the absence of the complainant, assaulted his servant and broke open the doors to effect his entry. It was argued for him that he had no intention to annoy, but the Court citing English cases held that the intention could be presumed from the act. It appears, however, to have been conceded that if the accused had effected his entry without using force then he could not have been convicted.[1] The real question in the case was the nature and strength of the claim the accused had to the house on which there is no discussion. It is stated to be a "fraudulent claim." If so the conviction was right.

5089. Not Guilty.—A person should not be convicted of this offence upon a mere confession of a co-accused.[2] The accused was convicted of this offence on the ground that some of the complainant's property was found in possession of the accused who also bore some scratches. But the accused was shown to be an enemy of the complainant and some of the property identified as the complainant's was not in the list given by him. The Court thereupon acquitted him in revision holding the evidence inconclusive.[3] In another case all that was shown is that two thefts had been committed in a village, that tracks of four men were followed from a place near the village, but later on they changed into the tracks of a pony and two men, later on the pony's tracks went off in one direction and the men's tracks were traced to another village in which the accused along with several others were arrested in possession of certain bundles containing the stolen property. It was held that the mere fact that the accused was with the party in the second village did not prove that he was one of the house-breakers, and that the case against him being doubtful, he

(23) 5 M. H. C. R. (App.) 5.
(24) *Bandhu*, (1894) B. U. C. 689; *Subz Ali*, (1877) P. R. No. 2.
(25) *Balmakand Ram* v. *Ghansam Ram*, 22 C. 391; *Sarwan*, (1882) P. R. No. 41; *Mangal Singh*, (1901) P. R. No. 31.

(1) *Sellamuthu* v. *Pallamuthu*, 35 M. 186.
(2) *Nga Po Tok*, (1912) 1 U. B. R. 158, 20 I. C. 136.
(3) *Khalas*, (1915) P. L. R. 79.

was acquitted of this offence(4); and he could not be tried for an offence under s. 411 as the bundle was not found in his exclusive possession.

Session. Pres. Mag. or Mag. of 1st class. Cognizable. Warrant. Not bail. Not comp.

458. Whoever commits lurking house-trespass by night, or house-breaking by night, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint.

[*Hurt*—s. 319. *Assault*—s. 351. *Wrongful restraint*—s. 339. *Lurking house-trespass*—s. 443. *Lurking house-trespass by night*—s. 444. *House-breaking*—s. 445. *House-breaking by night*—s. 446.]

Synopsis.

(1) *Analogous Law* (5090).
(2) *Procedure and Practice* (5091).
(3) *Proof* (5092).
(4) *Proof of the Offence* (5093-5094).

5090. Analogous Law.—This section and the next go together, this being a case in which the same offence is committed after preparation made for causing hurt or assault or committing wrongful restraint, while the next section presents the same offence when it is accompanied by the causing of grievous hurt or an attempt to cause such hurt or an attempt to cause death. The language of this section is closely analogous to that of sections 452 and 455 which deal with the same aggravation attending a house-trespass and a lurking house-trespass or a house-breaking by day. In each of them, however, the act may only amount to house-trespass, or lurking house-trespass by night or house-breaking by night, and the offence which the offender went prepared to commit may in fact have never been committed (§ 5047).

5091. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. As this offence includes many minor offences such as those punishable under sections 447, 448, 452, 454 and 456, it is competent to the Court to convict the accused of any of those offences, if it finds this offence not proved.

5092. Proof.—The points requiring proof are:—

(1) That the accused committed lurking house-trespass by night (s. 444) or house-breaking by night (s. 446).

(4) *Mewa Singh*, 40 I. C. 305.

(2) That he did so after having made preparation for—

(*a*) causing hurt to any person, or
(*b*) assaulting any person, or
(*c*) wrongfully restraining any person, or
(*d*) putting any person in fear of hurt, or
(*e*) putting any person in fear of assault, or
(*f*) putting any person in fear of wrongful restraint.

5093. Proof of the Offence.—This offence is one in which criminal trespass is aggravated by its being a lurking house-trespass by night, or house-breaking by night, and these aggravations are further aggravated by the nature of the preparation made to cause hurt or the like. It is not necessary, however, that such preparation should be directed against any specific individual previously fixed upon, for so long as there is preparation made to assault or confine "any person," it is immaterial who that person is and whether he was known or unknown to the offender.

5094. The question whether the accused had made preparation to commit assault or wrongful restraint must depend upon circumstances. Ordinarily, such preparation must be more or less adapted for the purpose for which it is made, but it is not necessary. Nor need the preparation be known to any inmate of the house. So if a person enter with a loaded revolver concealed in his hip pocket he commits this offence though he may not have intended to use it except when attacked or opposed. The section punishes only the offender actually armed and not those who were merely his companions in the crime. If therefore of three house-breakers two were armed with sticks, they alone would be convicted of this offence, the third being convicted under s. 456(5)

For further commentary, *see* s. 452.

Session. Cognizable. Warrant. Not bail. Not comp.

Grievous hurt caused whilst committing lurking house-trespass or house-breaking.

459. Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Grievous hurt*—s. 320. *Lurking house-trespass*—s. 443. *House-breaking*—s. 445.]

Synopsis.

(1) *Analogous Law* (5095).
(2) *Procedure and Practice* (5096-5098).
(3) *Proof* (5099).
(4) *Form of Charge* (5100).
(5) *Proof of the Offence* (5101-5102).

(5) *Ghulam* 4, L. 399.

5095. Analogous Law.—This section is in one respect an aggravated form of the offence punishable under the last section; but the lurking house-trespass or house-breaking here need not be committed by night. This offence is, thus supplementary to those described in sections 455 and 458, and an offender may be punished under this section as well as under either of those sections.

5096. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

5097. This is a highly penal section exposing the offender to the risk of a life-long transportation. The Courts have, consequently, emphasised the necessity of construing its provisions strictly, and it has been held to be inapplicable where the act is proved not to amount to the completed offence of lurking house-trespass or house-breaking, but amounts only to an attempt.(6) So Straight, J., observed: "Sections 459 and 460 provide for a compound offence, the governing incident of which is that either a lurking house-trespass or house-breaking must have been committed in order to make a person who accompanies that offence either by causing grievous hurt, or attempt to cause death or grievous hurt responsible under those sections. In other words, the causing of the grievous hurt or the attempt to cause death or grievous hurt, must be done in the course of the commission of the offence of lurking house-trespass or house-breaking is being committed. The provisions of these sections being of a highly penal nature, and inflicting very severe punishment on conviction, it is necessary that they should be construed strictly; and, in my opinion, it was not contemplated that, where the principal act done by the accused person amounts to no more than a mere attempt to commit the offences of lurking house-trespass or house-breaking, the section should be applicable."(7) This view accords with that taken in the Punjab where section 460 which follows the principle of this section had been previously held to be inapplicable to an attempt.(8)

5098. It has also been held there that the section only applies to grievous hurt caused or attempted during the time the house-breaking is committed, and not after it is completed.(9)

5099. Proof.—The points requiring proof are:—

(1) That the accused committed lurking house-trespass, or house-breaking.

(2) That he caused grievous hurt, or attempted to cause death or grievous hurt to some person.

(3) That he did so whilst engaged in committing lurking house-trespass or house-breaking.(10)

(6) *Ismail Khan*, 8 A. 649.
(7) *Ib.*
(8) *Saifuddin*, (1874) P. R. 16.
(9) *Imamuddin*, (1876) P. R. 17; *Jaffir*, (1882) P. R. 2.
(10) And not after the trespass was effected; *Said Ahmad*, 25 A. L. J. 515, (1927) A. 536.

5100. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you while committing lurking house-trespass or house-breaking caused grievous hurt to A B (*or* attempted to cause death of A B or grievous hurt to A B) and that you thereby committed an offence punishable under section 459 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5101. Proof of the Offence.—As noted before (§§ 5096-5098) this section provides a penalty comparable only to that reserved for the most heinous crime. There is scarcely much to choose between such a desparado and a homicide. Indeed, the one may have many retrieving features which this offender has not. To begin with, he commits the highly penal offence of lurking house-trespass or house-breaking, and in doing so he attempts to take a man's life or mutilates or attempts to mutilate him. The penalty of lifelong transportation or imprisonment for ten years is thus a punishment which the section prescribes out of regard to the heinousness of the offence. But at the same time the section must be commensurately strictly construed (§§ 5096-5098). It is not, however, necessary that the accused should have made preparation for causing such injury as is necessary under sections 455 and 458. He may, indeed, have caused it on a sudden impulse and without pre-meditation. But it must be caused *while committing* lurking house-trespass or house-breaking. Now, it has been held that neither this section nor the next applies to an attempt which falls short of the completed offence.[11] Consequently, it follows that the injury must have been inflicted after an act ceases to be an attempt and developes into a complete offence. It has also been held that the section has no application to an injury caused after the offence is committed.[12]

It then follows that this offence could only be committed at that stage which is subsequent to an attempt and anterior to retirement with the plunder. In short, it applies only to the stage when the accused has effected his entry into the house and while he is there in concealment or committing the offence to commit which his entry is made, and the moment he leaves it, he ceases to be liable to this penalty.[13] So where the accused were surprised by a Chowkidar while engaged in making a hole in a wall of the house of the complainant, and on seeing whom they attempted to make good their escape, and to effect which they used their sticks and one of them even discharged a pistol, it was held that since the injuries were inflicted by them while their act was merely an attempt at house-breaking, they

(11) *Saifuddin.* (1874) P. R. 16 *Ismail Khan,* 8 A. 649.
(12) *Imamuddin.* (1876) P. R. No. 17; *Jaffir,* (1882) P. R. No. 2.
(13) *Ib.*

could not be convicted either under this or the next section, but only under sections 452 and 511 of the Code, and under which the accused who had let off the pistol was transported for seven years, the rest who had merely used their *lathis* but inflicted no serious hurt to any one, being sentenced to rigorous imprisonment for five years.(14) The same view was taken of the accused who inflicted grievous hurt upon their pursuers after they had left the premises they had broken into and plundered.(15)

5102. There is, of course, no right of private defence of person or property available to such a felon. But if he is treated with wanton cruelty provoking him to retaliation, it may be taken into consideration in mitigation of his crime. On the other hand, the use of a fire-arm, sword or other equally formidable weapon would be regarded as an additional aggravation meriting exemplary punishment.

460. If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Session. Cognizable. Warrant. Not bail. Non-comp

All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or greivous hurt caused by one of them.

[*Voluntarily*—s. 39. *Death*—s. 46. *Grievous hurt*—s 320. *Lurking house-trespass* (s. 443); *by night*—s. 444. *House-breaking* (s. 445); *by night*—s. 446.]

Synopsis.

(1) *Analogous Law* (5103).
(2) *Procedure and Practice* (5104).
(3) *Proof* (5105).
(4) *Form of Charge* (5106).
(5) *Conditions of Constructive Criminal Liability* (5107-5111).
(6) *Actual Offender must be Guilty* (5108).
(7) *Injury must be Caused "at the time"* (5109).
(8) *All Persons Jointly Concerned are liable* (5110).
(9) *Liability of Actual Offender* (5111).

5103. Analogous Law.—This section defines the constructive liability of the actual offender's associates in a case which is, otherwise, little distinguishable from the last section. The section does not introduce any novel principle, for it is the principle underlying other sections of the Code.

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(14) *Ismail Khan*, 8 A. 649. (15) *Imamuddin*, (1876) P. R. No. 17.

5104. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and exclusively triable by the Court of Session.

5105. Proof.—The points requiring proof are:—

(1) That two or more persons were jointly concerned in committing lurking house-trespass by night, or house-breaking by night.

(2) That they or some of them committed such offence.

(3) That one of them caused or attempted to cause death or grievous hurt.

(4) That he did so whilst engaged in committing such lurking house-trespass by night or house-breaking by night.

5106. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you were jointly concerned with P Q, in committing lurking house-trespass by night (*or* house-breaking by night) by entering into the building in the possession of A B, and used as a human dwelling, and that at the time of the committing of such lurking house-trespass by night (*or* house-breaking by night) the said P Q, who is guilty of such offence voluntarily caused death (*or* attempted to cause death, *or* grievous hurt to A B) and that you thereby committed an offence punishable under section 460 of the Indian Penal Code, and within the cognizance of the Court of Session or the High Court.

"And I hereby direct that you be tried the said Court on the said charge."

5107. Conditions of Constructive Criminal Liability.—This section defines the constructive criminal liability of lurkers and house-breakers for the collateral offences of grievous hurt or homicide committed by a confederate. Such liability arises out of the highly illegal character of the adventure, in which the commission of such offences is not unnatural. At any rate those who sow such wind must be prepared to reap the whirlwind of this liability for an act committed while committing the two offences. The section, however, provides the necessary safeguards against improper extension of criminal liability. For example, it provides that in order to make a man liable for the act of another, (*i*) the latter must be himself guilty of lurking house trespass by night or house-breaking by night, (*ii*) the injury must have been caused by him at the time of committing such offence, and (*iii*) the person to be held liable must be jointly concerned in committing the offence of lurking house-trespass by night or house-breaking by night.

5108. The first condition is intended to ensure that the injury was caused in committing an offence upon which all the offenders were agreed, and by which every one of them made himself liable for the acts of the others, done in the course of committing the offence which was their joint adventure. Persons who were merely aiders or abettors, or who are guilty merely of an attempt, are thus excluded from imparting their criminal liability to others between whom and them there is not the full community of interests. On the other hand, since the complete offenders possess such interest with aiders and abettors and those guilty of attempt, the latter become constructively liable for the offences of homicide and grievous hurt committed by the former.

1. Actual Offender must be Guilty.

5109. But in any case, the homicide or grievous hurt or attempt to cause death or grievous hurt, must be committed "at the time of the committing of lurking house-trespass by night, or house-breaking by night." There is a slight verbal variation in this clause as compared to the opening words of section 459, but it was necessary and does not signify any change in the sense. It has, however, been held to be an expression "to some extent vague"(16) as being susceptible of a construction not limiting the time during which the criminal trespass continues, and extending it even to a prior or subsequent time, but it was held that this was not the true meaning of the expression which was intended to apply only to the time during which the criminal trespass continues; so that where the appellants and another person attempted to break into a house by night for the purpose of committing theft, and were interrupted by the inmates, one of whom was killed by one of the accused, and there was no evidence to show which of the accused caused the death, it was held that the appellants could not be punished with transportation for life under this section, as the offence of house-breaking had been only attempted and not committed.(17) The same view was taken in another case in which death was caused by the offenders when they were seized while making good their escape with the booty(18) (§ 671).

2. Injury must be Caused "at the time".

5110. Where, however, the offence is committed neither before the house-trespass under the circumstances has commenced, nor after it has ceased, but during its continuance, then the section prescribes for the liability of all those who were jointly concerned in committing such lurking house-trespass by night or house-breaking by night. Now the phrase "jointly concerned" is wide enough to include not only all such as actually took part in the commission of the offence as principals, but also those who were their aiders and abettors and committed an attempt to commit it. But such persons may be either present or absent at the fact; but is the section intended to apply

3. All persons Jointly Concerned are Liable.

(16) *Per* Plowden, J., in *Jaffir*, (1881) P. R. No. 2.

(17) *Saifuddin*, (1874) P. R. No. 16; followed in *Jaffir*, (1881) P. R. No. 2. To the same effect, *Ismail Khan*, 8 A. 649.

(18) *Muhammad* 2 L. 342; *Sed Rasul*, (1916) P. R. No. 27, 38 I. C. 734, 18 Cr. L. J. 350.

equally to both? It would seem not; because such persons are spoken of as "jointly concerned *in committing* such lurking house-trespass," which evidently refers to the act of trespass as distinct from a previous conspiracy or preparation.

4. Liability of Actual Offender.

5111. But though this phrase is wide, it is not wide enough to include the actual offender, assuming that he is known. In one case this appears to have been taken for granted,[19] but it is by no means the necessary deduction from the section, which is enacted solely with the object of defining the constructive liability of persons other than the actual offender, whose liability is left to be defined by the general law.[20] For instance, a person who voluntarily causes death may be guilty of murder, and in that case the penalty prescribed here would be wholly inadequate to his case. But in such a case it may be that the actual offender cannot be ascertained, or that the evidence against him is insufficient to justify his conviction for murder; this section would then be applicable, and enable the Court to deal with him, whereas but for this section he might have been acquitted.[21]

Pres. Mag. or Mag. of 1st or 2nd Class. Cognizable. Warrant. Bailable. Not comp.

Dishonestly breaking open Receptacle Containing Property.

461. Whoever dishonestly, or with intent to commit mischief, breaks open or unfastens any closed receptacle which contains or which he believes to contain property, shall be punished with imprisonment of either descripton for a term which may extend to two years, or with fine, or with both.

[*Dishonestly*—s. 24. *Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (5112).
(2) *Procedure and Practice* (5113).
(3) *Proof* (5114).
(4) *Form of Charge* (5115).
(5) *Dishonestly or Mischievously Opening Receptacles* (5116-5118).
(6) *Meaning of "Closed receptacle"* (5117).

5112. Analogous Law.—This section and the next go together, inasmuch as they both apply to the offence of dishonestly or mischievously opening a closed receptacle, but the next section refers to a case in which such receptacle was entrusted to his custody, and in opening which the offender not only commits this offence, but also abuses his trust and for which the next section provides higher punishment. In any case, this offence is complete the moment the receptacle is broken open or unfastened: if he moreover steals the property it contains, he would be guilty of theft for which he may be convicted in addition to this offence.

(19) *Lukhun Das*, 2 W. R. 52.
(20) *Chatur*, 8 A. L. J. 574, 11 I. C. 579, 12 Cr. L. J. 395.
(21) *Jowala Singh*, (1880) P. R. No 12; *Umar Din*, (1891) P. R. No. 1.

5113. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class.

5114. Proof.—The points requiring proof are:—

(1) That there was a receptacle closed or fastened.

(2) That it contained property, or that the accused believed that it contained property.

(3) That the accused broke it open or unfastened it.

(4) That he did so dishonestly, or with intent to commit mischief.

5115. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of—— at——you dishonestly (*or* with intent to commit mischief) broke open (*or* unfastened) a certain closed receptacle (Exhibit) belonging to A B, which contained (*or* which you believed to contain) certain property, to wit——and that you thereby committed an offence punishable under section 461 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5116. Dishonestly or Mischievously Opening Receptacles.—This section provides for a very general offence inasmuch as it not only applies to an act which is an attempted theft or mischief, but also one in which it falls short of it, as in the case of unfastening a closed receptacle erroneously believed to contain property, in which case criminality lies not in the wrongful gain or wrongful loss, but in the criminal intention manifested in an overt act. In either case, however, the act is an invasion on the right of property: consequently, if the contents of a receptacle are known not to contain property, a person unfastening it could not be convicted of this offence. A human corpse is, for instance, not property,[22] and a person breaking open a coffin to steal the corpse it contains, could not therefore be convicted either of this offence or of theft, or mischief. But if the corpse wore some ornaments and the offender opened it to rifle them, he would then be guilty both of this offence as well as theft.

Meaning of Closed Receptacle.

5117. The word "receptacle"[23] is used here to signify any place or vessel which is a repository for anything. As such, it includes not only any chest, safe or closed box or closed package, but also a room, or a part of a room, such as a warehouse or godown. Such receptacle must be "closed," but need not be locked, so that it may be closed by means

(22) *Ramadhin*, 25 A. 129.

(23) From Lat *recipio*, to receive.

of a bolt or chain, but it would seem not merely shut without being fastened as by putting down the lid of a box, the opening of which could not be termed the unfastening of a closed receptacle.

5118. The offence here consists in the breaking open or unfastening of any closed receptacle "dishonestly" or "with intent to commit mischief." An act done dishonestly must have been done to steal the contents of the receptacle. So where the accused who lived with his uncle, forced open a chest containing his uncle's money and clothes, and stole therefrom some money, whereupon he was convicted under section 457, Pearson, J., altered his conviction to one under this section and section 379.(24)

The intent to commit mischief must be judged by the presence of circumstances which constitute mischief under section 425 (§§ 4775-4793).

Session. Pres. Mag. or Mag. of 1st or 2nd class. Cognizable. Warrant. Bailable. Not comp.

Punishment for same offence when committed by person entrusted with custody.

462. Whoever being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[*Dishonestly*—s. 24. *Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (5119).
(2) *Procedure and Practice* (5120).
(3) *Proof* (5121).
(4) *Form of Charge* (5122).
(5) *Trustee Breaking Open Closed Receptacle* (5123).

5119. Analogous Law.—This section is exactly the same as the last with the exception that the closed receptacle was in this case entrusted to the accused, who had no authority to open it. In other respects the offence possesses the same ingredients as the last section.

5120. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class.

5121. Proof.—The points requiring proof are enumerated under the last section, in addition to which prove:—

(5) That the accused was entrusted with such receptacle.

(6) That it was entrusted to him closed or fastened.

(7) And that he had no authority to open it.

5122. Charge.—The charge should run thus:—

(24) *Tasuduk Hossein*, 6 N. W. P. H. C. R. 301.

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you being entrusted with a certain closed receptacle Ex——by A B, containing (*or* which you believed to contain) certain property, to wit——, you dishonestly (*or* with intent to commit mischief) broke open (*or* unfastened) the said receptacle, without having authority to open the same; and that you thereby committed an offence punishable under section 462 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5123. Trustee Breaking Open Closed Receptacle.—A person may be entrusted with a closed receptacle, for any purpose, whether by way of security or for safe custody. In either case if it is closed and deposited, the depositee has no right to open it, but if he opens it he commits no offence unless his intention then was dishonest or mischievous. If, however, he was given authority to open it, his opening it dishonestly is not punishable, though he would be, of course, liable under the general law for any offence he may commit respecting it.

For a further commentary under this section, *see* section 461 (§§ 5116-5118).

CHAPTER XVIII

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS.

5124. Topical Introduction.—Forgery is necessarily an offence which originated with the invention of writing and the custom of preserving written memorials of title. The earliest trace of this offence is to be found in the writings of Bracton who gives only one instance of it which he classes as treason. This was the forging of the seals of state.(25) It was, however, the offence of *crimon falsi* of the civil law punishable with deportation or banishment and sometimes with death.(1) So it was enacted by the *Lex Cornelia de falsis* that a person that writes, seals, publicly reads, or foists in a forged will or other document, or that makes, cuts, or moulds a spurious seal wilfully and maliciously, should be punished—if a freeman, with deportation, and if a slave, with death.(2) And this provision was supplemented by the *Lex Julia de vi publica,* which punished for obliterating inscriptions on tombs, overthrowing a statue of column or carrying away a portion of the tomb or despoiling the dead bodies.(3)

5125. Forgery was an offence at Common Law in England and was as such defined to be "the fraudulent making or alteration of a writing to the prejudice of another man's right," for which the offender might suffer fine, imprisonment and pillory.(4) These provisions were, however, supplemented from time to time by various Statutes, the Forgery Act, 1913,(5) which codifies the law relating to forgery and kindred offences. The English Law Commissioners to whom was entrusted the duty of codifying the English Criminal Law, had proposed the following definition: all now consolidated in "Forgery consists in the false and fraudulent making of an instrument with intent to prejudice any public or private right."(6) But in the Act of 1913, it is thus defined: "Forgery is the making of a false document in order that it may be used as genuine." Then follows the definition of a false document which might be an adaptation of s. 464. The making of a false document is the foundation of forgery—the latter being distinguished from the former in the specific criminal intent accompanying it. Again, forgery is the process of making a false document while "a forged document" is such a document made. The making of a false document is not punishable unless it amounts to forgery. It is then punishable under section 465.

5126. But the chapter presents the offence in forms of varying gravity. For instance, the forgery of the record of a Court of Justice

(25) De Corona, ff., 118-*b*, 119-*b*.
(1) Inst. 4, 18, 7.
(2) *Ib.*
(3) Dig., 47, 12, 3, 7.
(4) 4 Black, pp. 247, 248; followed in *Elsworth*, 9 East, 986; *Riley*, (1896) 1 R. 13, 309.
(5) 3 & 4 Geo. V, c. 27.
(6) Dig., c. XXI, A. E. Act.

or a public register of the kind specified in section 466, is subject to the heavier penalty of imprisonment which may extend up to seven years, which is also the penalty reserved for forgery committed for the purpose of cheating (section 468). As compared to these offences a forgery committed merely to harm another man's reputation is a lighter offence subjecting the offender only to imprisonment for three years. But the forgery of a valuable security or a will or an authority to adopt is naturally esteemed an offence of greater heinousness, for which section 467 prescribes the maximum penalty of ten years. These sections exhaust the catena of principal offence. But there remain others, such as making or possessing forging instrument (ss. 472, 473) or possessing a forged document (s. 474)—offences which are the same as those described in sections 233, 235, 256 and 257 as applied to coins and stamps respectively. The combined effect of these sections then is to punish the making or possession of counterfeiting or forging instruments, whether those instruments relate to the making of a false coin, false stamp or of a false and forged document. Sections 475 and 476 refer to specific instances of forgery—forgery of authentication, while section 477 punishes the fraudulent cancellation or destruction of a document the forgery of which is punishable under s. 467. It will be observed that the latter section punishes the creation of a false document, while section 477 punishes the destruction of what was true, and which law esteems as of greater moment entailing the heavier penalty of life-transportation.

5127. The destruction of a valuable security or a will is not forgery, but the chapter does not merely deal with forgery, but with offences relating to documents. As such, it comprises offences which it will be difficult to bring under the category of forgery. The last section in this branch of the chapter is new and was added by the Amending Act of 1895, to remedy a defect in law, which contained no provision against false accounting as distinct from criminal breach of trust. The amendment brings the law on line with the English Law as enacted in the Falsification of Accounts Act, 1875.(7)

5128. The rest of the chapter (ss. 478-489) is also new, having been substituted for the original by the Indian Merchandise Marks Act(8) while the closing four sections (ss. 489A-489D) are also new having been added by the Currency Notes Forgery Act, 1899.(9) In their general purpose they correspond with the similar provisions (ss. 255-259) against counterfeit stamps. In England all these offences are codified as kindred offences in the Forgery Act, 1913.

Forgery.

463. Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person, or to support any claim or title or to cause any person to part with property, or to enter into any express or implied con-

(7) 38 & 39 Vict., c. 24, s. 1.
(8) Act IV of 1889, s. 3.
(9) Act XII of 1899, s. 2.

tract, or with intent to commit fraud or that fraud may be committed, commits forgery.

[*Person*—s. 11. *Public*—s. 12. *Document*—s. 29.
Injury—s. 44. *False document*—s. 464.]

Synopsis.

(1) *Analogous Law* (5129-5130). (2) *Meaning of Words* (5131).

5129. Analogous Law.—The offence defined in this section presupposes a knowledge of "false document," a term defined in the next section, which should have preceded this section. As it it must necessarily be read as a part of the definition of "forgery."[10]

5130. This and the next section now closely correspond with the provisions of s. (1) and (2) of the English Forgery Act, 1913[11] but which contains the qualifying words "with intent to defraud or deceive" which probably comprises all that this section sets out in greater detail.

For commentary on this section, see s. 464.

5131. Meaning of Words.—"*With intent to commit fraud*": fraud implies an infringement of some one's legal right, though not necessarily connected with deprivation of property. An intent to defraud implies (*a*) an intention to deceive, and; (*b*) such deception involving the causing of legal injury.[12]

Making false document.

464. A person is said to make a false document—

First.—Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or

Secondly.—Who, without lawful authority dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has

(10) *Abbas Ali*, 25 C. 512 (521), F. B.
(11) 3 & 4 Geo. V., c. 27.
(12) *Ahmed Ali*, 42 C. L. J. 215, 90 I. C. 534.

been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly.—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration.

Illustrations.

(*a*) *A* has a letter of credit upon *B* for rupees 10,000, written by *Z*. *A*, in order to defraud *B*, adds a cipher to the 10,000, and makes the sum 1,00,000, intending that it may be believed by *B* that *Z* so wrote the letter. *A* has committed forgery.

(*b*) *A*, without *Z*'s authority, affixes *Z*'s seal to a document purporting to be a conveyance of an estate from *Z* to *A*, with the intention of selling the estate to *B*, and thereby of obtaining from *B* the purchase-money. *A* has committed forgery.

(*c*) *A* picks up a cheque on a banker signed by *B*, payable to bearer, but without any sum having been inserted in the cheque. *A* fraudulently fills up the cheque by inserting the sum of ten thousand rupees. *A* commits forgery.

(*d*) *A* leaves with *B*, his agent, a cheque on a banker, signed by *A*, without inserting the sum payable, and authorizes *B* to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. *B* fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. *B* commits forgery.

(*e*) *A* draws a bill of exchange on himself in the name of *B* without *B*'s authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as *A* draws the bill with intent to deceive the banker by leading him to suppose that he had the security of *B*, and thereby to discount the bill, *A* is guilty of forgery.

(*f*) *Z*'s will contains these words: "I direct that all my remaining property be equally divided between *A*, *B* and *C*." *A* dishonestly scratches out *B*'s name intending that it may be believed that the whole was left to himself and *C*. *A* has committed forgery.

(*g*) *A* endorses a Government promissory note and makes it payable to *Z* or his order by writing on the bill "Pay to *Z* or his order" and signing the endorsement. *B* dishonestly erases the words "Pay to *Z* or his order" and thereby converts the endorsement into a blank endorsement. *B* commits forgery.

(*h*) *A* sells and conveys an estate to *Z*. *A* afterwards, in order to dafraud *Z* or his estate, excutes a conveyance of the same estate to *B*, dated six months earlier than the date of the conveyance to *Z*, intending it to be believed that he had conveyed the estate to *B* before he conveyed it to *Z*. *A* has committed forgery.

(*i*) *Z* dictates his will to *A*. *A* intentionally writes down a different legatee from the legatee named by *Z*'s and, by representing to *Z* that he has prepared the will according to his instructions, induces *Z* to sign the will. *A* has committed forgery.

(*j*) *A* writes a letter and signs it with *B*'s name without *B*'s authority, certifying that *A* is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from *Z* and other persons. Here, as *A* made a false document in order to induce *Z* to part with property, *A* has committed forgery.

(*k*) *A* without *B*'s authority, writes a letter and signs it in *B*'s name, certifying to *A*'s character, intending thereby to obtain employment under *Z*. *A* has committed forgery, inasmuch as he intended to deceive *Z* by the forged certificate, and thereby, induced *Z* to enter into an express or implied contract for service.

Explanation 1.—A man's signature of his own name may amount to forgery.

Illustrations.

(*a*) *A* signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. *A* has committed forgery.

(*b*) *A* writes the word "accepted" on a piece of paper and signs it with *Z*'s name, in order that *B* may afterwards write on the paper a bill of exchange drawn by *B* upon *Z*, and negotiate the bill as though it had been accepted by *Z*. *A* is guilty of forgery; and if *B*, knowing the fact, draws the bill upon the paper pursuant to *A*'s intention, *B* is also guilty of forgery.

(*c*) *A* picks up a bill of exchange payable to the order of a different person of the same name. *A* endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable; here *A* has committed forgery.

(*d*) *A* purchases an estate sold under execution of a decree against *B*. *B*, after the seizure of the estate in collusion with *Z*, executes a lease of the estate to *Z*, at a nominal rent and for a long period, and dates the lease six months prior to the seizure, with intent to defraud *A*, and to cause it to be believed that the lease was granted before the seizure. *B*, though executes the lease in his own name, commits forgery by antedating it.

(*e*) *A*, a trader, in anticipation of insolvency, lodges effects with *B* for *A*'s benefit and with intent to defraud his creditors, and in order to give a colour to the transaction, writes a promissory note binding himself to pay to *B* a sum for value received, and antedates the note, intending that it may be believed to have been made before *A* was on the point of insolvency. *A* has committed forgery under the first head of the definition.

Explanation 2—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made, by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustrations.

A draws a bill of exchange upon a fictitious person, and fraudulently accepts this bill in the name of such fictitious person with intent to negotiate it. *A* commits forgery.

[*Dishonestly*—s. 24. *Fraudulently*—s. 25. *Document*—s. 29.]

Synopsis.

(1) *Analogous Law* (5132).
(2) *Principle* (5133).
(3) *Meaning of Words* (5134).
(4) *What is a False Document* (5135-5136).
(5) *What is Making* (5137-5138).
(6) *Signs, Seals or Executes* (5139).
(7) *Pre-requisites of Falsity* (5140-5143).

(8) *Antedating a document* (5143).
(9) *Execution Without Authority* (5144-5145).
(10) *Fraudulent alteration* (5146-5147).
(11) *Alterations Not Fraudulent* (5148-5150).
(12) *Fraudulent but Not Dishonest* (5151-5152).
(13) *Execution or Alteration obtained Without Free Consent* (5153-5156).
(14) *False Document must be Made Dishonestly or Fraudulently* (5157-5166).
(15) *Intent to Screen Past Dishonesty* (5159-5162).
(16) *Acts Fraudulent but Not Dishonest* (5163-5164).
(17) *Innocent Fraud* (5165-5166).
(18) *Forgery of One's Own Name* (5167-5168).
(19) *Using Fictitious Name* (5169-5174).
(20) *When Fictitious Name Innocent* (5174).
(21) *False Document When a Forgery* (5175-5177).
(22) *Intent Necessary to Constitute forgery* (5178-5189).
(23) *Damage to the Public* (5179).
(24) *Intention Inferred from Knowledge* (5180).
(25) *Injury to a Person* (5181).
(26) *Support any claim* (5182-5184).
(27) *Part with Property* (5185-5186).
(28) *Intent to Enter into a contract* (5187).
(29) *With intent to commit fraud* (5188).
(30) *That fraud may be committed* (5189).

5132. Analogous Law.—This section defines a "false document," which is, in short, the making of a document falsely purporting to have been made by another, which the maker does "dishonestly or fraudulently." The term has thus a narrower meaning than it bears in popular parlance. For if A make a deed and affix thereto B's signature it is a false deed, but not a false document within the meaning of this section, for the falsity there depends upon the presence of the additional circumstance of dishonesty or fraud. But if a document is false, and it is so made dishonestly or fraudulently, it is not only a false document as here defined, but also a forgery, as defined in the last section. For the specific intent there described as converting a false document into a forgery is nothing different to what is not comprised in the two words "dishonestly" and fraudulently" used in describing the term "false document." The two sections are thus tautological, and they have been so held.(13)

The essential features of a "false document" may now be considered.

5133. Principle.—The object of forgery is ordinarily to cheat-to cause wrongful distribution of property by means of a false document. But in cheating as well as in forgery there is deception caused or intended to be caused by false representation—but the representation in the one case is verbal, in the other case written. Forgery may thus be merely a means to an end—that end being deception. But *scripta litera remanet* and the mischief that might be wrought by forgery is proportionately greater, and hence the stringent penalties provided in these sections.

(13) *Abbas Ali*, 25 C. 512 (521), F. B.

5134. Meaning of Words.—"Makes.....a document." This would at first blush suggest a mere preparation independently of the execution of a document. But this is not its meaning (§§ 5137-5138). "*A document or part of a document*": This does not comprise an alteration mentioned in the second clause but refers merely to the forgery of a part of a document as where it contains several clauses of which some are purported to be signed in the forged name of A intending thereby to bind him. "*Or makes any mark denoting the execution of a document*". The making of a mark to symbolize execution is included in the words "signs" and "executes." The making of a thumb-impression would be such a mark. "*With the intention of causing it to be believed*": Not necessarily by the person defrauded—for the intention may be to offer it as evidence in Court. "*By whose authority he knows that it was not made*": This means that if A, the agent of B signs it for B without B's authority, A forges if the other elements of criminality necessary to constitute forgery are present as well. "*Cancellation or otherwise*": Cancellation may be by erasure, as in the illustration (*g*), or by scratching out, as in the illustration (*f*).

5135. What is a False Document?—The section defines a false document by descriptive enumeration of the processes by which it may be rendered false. But in any case the falsity must affect a "document" which is elsewhere defined to be any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.[14] Thus, besides including documents properly so called, the term is wide enough to include a picture bearing the forged signature of a well-known artist (§ 285), but which under the English Common Law has been held not to be a forgery, which it was said must be of some document or writing, though the offender was held to be nevertheless indictable as a cheat.[15] Reasons have been already given for holding the Indian rule to be otherwise (§ 285), and it may be doubted whether the precedent is now consistent with the view taken in other cases.[16] In that case the prisoner had affixed to a picture the name of one J. Linnell, an artist of repute, which he then intended to pass off as Linnell's handiwork. He was indicted both for forgery and cheating, and Cockburn, C. J., thereupon said: "We have carefully examined the authorities, and the result is that we think if a person in the course of his trade openly and publicly carried on, were to put a false mark upon an article so as to pass it off as a genuine one, when in fact, it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at common law. As, for instance, if a man sold a gun with a mark of a particular manufacturer upon it, so as to make it appear like the genuine production of the manufacturer, that would be a false mark or token, and the party would be guilty of a cheat, and therefore, liable to punishment, if the indictment were fairly framed so as to meet the case; and therefore upon the second count the prisoner would have been liable to have been convicted, if that count had been properly framed; but we think

(14) S. 29.
(15) *Closs*, D. & B. 460.
(16) *Collins*, 1 Cox 57.

that count is faulty in this respect, that although it sets out the false token, it does not sufficiently show that it was by means of such false token that the prisoner was enabled to pass off the picture and obtain the money. The conviction, therefore cannot be sustained." As to the indictment for forgery it was said that a forgery must be of some document or writing; and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter had put any other arbitrary mark as a recognition of the picture being his. But the question whether the false mark put upon the picture had been put "dishonestly or fraudulently" is a question of fact, and since the Court found the accused guilty of cheating, it is difficult to see why the signature was presumed to be an innocent addition. However, should such a case ever arise in this country, it will be found exactly met by the provisions of section 468.

5136. The document forged need not purport to be the original document, for it may purport to be merely a copy of another document which may moreover be itself a copy.[17] But in such a case the offence, though forgery, would not be punishable under s. 467.[18] The accused in a suit for possession of land attempted to support his pedigree by filing what purported to be copies of a deed of dower and a deed of security said to have been filed in a previous suit, but it was found that both the copies contained two more names of witnesses than the original. It was held that the accused had committed forgery.[19]

What is Making"?

5137. The word "making" is evidently taken from the English Statute,[20] but it is a word of uncertain import, for it may conceivably mean the writing or preparation of a document as distinct from its authentication by signing, sealing or executing it, in which case the offence of forgery would be complete as soon as a document intended to be executed by another is written, though it may be obviously inoperative and incomplete. In any other view the person may be guilty of an attempt, but he could not be charged for forgery. The question was considered in the following case: The accused Riasat Ali had ordered the Burdwan Press to print one hundred receipt forms similar to those formerly used by the Bengal Coal Company. He then corrected the proof so as to assimilate the form to that in current use of the company. At this stage he was arrested and convicted of an attempt to commit forgery under s. 465 of the Code, the Court taking the view that the commencing to print or write a document which, when completed, was intended to be a false document amounted if coupled with the intent to defraud, to an attempt to commit forgery. And on appeal it was suggested that the printing and correcting of a form, which was intended, by additions which were to be made thereto, to be a false document, was in itself the making of a part of a false document within the meaning of this section, and therefore, as such amounted to forgery.

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(17) *Nijun Ali*, 6 W. R. 41.

(18) *Naro Gopal*, 5 B. H. C. R. 56.

(19) *Essan Chunder Dutt* v. *Prannath Chowdhry*, (1863) W. R. (F. B.) 71, 74.

(20) 1 Will. 4, c. 66, s. 16; re-enacted as 24 & 25 Vict. c. 98, s. 17: "whoever *makes* upon any plate whatsoever any word, number.....the impression taken from which shall resemble..... any part of a bank-note, etc."

But this contention was overruled by Garth, C. J., who said: "If this were so, it seems to me that the mere printing of a single word upon a piece of paper, however innocent the word might be, would be the making of a part of a false document, if it were coupled with an intention to add such other words to it as would make it eventually a false document. In my opinion this is very far from the meaning of section 464; and I think that such a construction of the section involves a misconception, not only of the word 'make,' but also of the sense in which the phrase "part of a document" is used in the section. I consider that the making of a document, or part of a document, does not mean 'writing' or 'printing' it, but signing or otherwise executing it, as in legal phrase we speak of 'making an indenture' or 'making a promissory note,' by which is not meant the writing out of the form of the instrument, but the sealing or signing it as a deed or note. The fact that the word 'makes' is used in the section in conjunction with the words 'signs,' 'seals' or 'executes' or 'makes any mark denoting the execution,' etc., seems to me very clearly to denote that this is its true meaning. What constitutes a false document or part of a document is not the writing of any number of words which in themselves are innocent, but affixing the seal or signature of some person to the document, or part of document, knowing that the seal or signature is not his, and that he gave no authority to affix it. In other words, the falsity consists in the document, or part of a document being signed or sealed with the name or seal of a person who did not in fact sign or seal it."[21] In the end the Court held the act to amount to no more than a mere preparation, and in that view the accused was acquitted.

In this view the making of a document must be something more than its writing or preparation. It must consist of signing, sealing or executing it, but if so, the use of the word "makes" in the first clause would be a surplusage. The word has obviously been used in two senses: the one generic, as embracing all that is implied by the three clauses; and the other specific, as probably implying the preparation or fabrication of a document, so as to give it the appearance of a genuine document. The illustrations appended all suggest the same conclusion, though the word "makes" is susceptible of laxity in interpretation. For instance, suppose the debtor indorses a payment on his bond with the creditor who wipes out the indorsement and claims the entire amount he would be guilty of "making" a false document though what he did was really to unmake his debtor's indorsement.

5138. In England the word "makes" has been differently construed, but it is no authority for enlarging its meaning in this context. Indeed, the term, as used there, left no room for any other interpretation, for the provision there is directed against making upon any plate whatsoever ....any word, number, figure, device, character or ornament, the impression taken from which shall resemble, or apparently be intended to resemble any part of a bank-note. The

(21) *Riasab Ali*, 7 C. 352; followed in *Lim Hoe*, (1894) 1 U. B. R. 279; to the same effect, *Kunju Noyar*, 12 M. 114.

prisoner was indicted for making upon a plate of glass by photographic process a positive impression of a foreign note, when he was apprehended. It was proved at the trial that the positive impression could be easily converted into a negative impression from which a note could be printed off, but that unless the positive impression was converted into a negative one no such printing was possible. It was objected that the act did not fall within the terms of the Statute, which did not contemplate the mere producing of an evanescent shadow, but something more advanced from which the notes could be engraved, but the objection was overruled and on a case reserved it was held to be right.(22)

"Signs", "Seals" or "Executes."

5139. But though the word "make is ambiguous, the words "signs, seals or executes" leave no doubt as to what is intended to be conveyed by them. Indeed, it is the signing or sealing that completes the execution of a document and converts a draft into a deed ordinarily giving it binding force and legal validity. The making of a document is then formally complete though it may still lack compliance with some legal form so as to give it the operation and effect of a conveyance. Such would be the case where the document is one the registration of which is compulsory under the provisions of the Indian Registration Act.(23) The word "signs" would include also a mark in the case of an illiterate person and so the word "seal" would include any impression made in token of authenticity. Both signing and sealing are the usual modes of executing a document in this country. The word "execution" implies completion(24) and in law a document is complete as soon as it is signed by the obligor in token of his accepting its terms.

5140. Pre-requisites of Falsity.—A document may be made "false" in any of the three ways enumerated in the section: In the first place it may be wholly fabricated with the signature and seal both forged, which is a case presented in clause(*i*), or the document though originally genuine may be altered in a material part, in either of which cases the forgery is effected in the absence of the real executant and without his knowledge and concurrence. But the third clause presents a case of forgery effected with the apparent consent of the other affected thereby but whose consent is inoperative because of the misconception of facts brought about by intoxication, insanity or deception. As is enacted in section 90 such consent is not "free" and a person so consenting is in the same position as if he had not consented at all (§§ 858-868).

5141. Forgery may then consist in making a document the whole or any part of which is false but if it is false in part, it must be a material part. Again, in either case the making or altering must be done "dishonestly or fraudulently." (§§ 5146-5155). These are the two elements common to the three clauses. But they do not suffice to make a document false, which requires the presence of other circumstances, somewhat diffusely set out in the three clauses of the section.

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(22) *Rinaldi*, L. & C. 330.
(23) Act XVII of 1908.
(24) From Lat. *ex.*, and *segnor*, to follow to the end.

Clause (1).

5142. Of these, the first clause contemplates the making, signing, sealing or executing a document or part of a document *with the intention* of causing it to be believed: (*a*) that the same had been really signed by the obligor; (*b*) that it had been so signed at a time when it purports to have been signed, but which in fact it was not. In either case, there is a false presentment of a fact which is not a fact, and it is done on purpose and not innocently—that purpose being to make a person believe in the existence of a fact, which is not a fact. A false document may be made either by one person signing the name of another, which he never had authority to sign under any circumstances, or by signing it without authority in the case in point. So if A, the general agent of B, empowered to execute deeds for B, should sign a document for B without his authority and under circumstances of dishonesty or fraud, he would be guilty of forgery, for in doing so, he "dishonestly signs for B causing it to be believed that he had signed it by the authority of B by whose authority he knows that it was not signed."

Ante-Dating a Document.

5143. Again, it may be that a document is otherwise validly signed and executed by the obligor, but if it is signed or executed at a time at which he knows that it was not made, he would be guilty of forgery. Illustration (*b*) is an example, and is taken from an old statement of law that if a party make a feoffment of land, and afterwards make a feoffment of the same land in which he falsifies the date, he is guilty of forgery.[25] A person may thus be guilty of forging a document by fraudulently antedating it. So where A by a deed dated 7th May 1868, conveyed certain lands in fee to B and he subsequently executed a long lease in favour of C antedating it the 12th March 1868, it was held that the subsequent lease having been antedated to defraud B constituted a forgery.[1] So if a stamp-vendor issues a stamp antedating it to enable the purchaser to defraud another, his antedated endorsement is a forgery under this clause. Such was the case of the accused who appealed to the Commissioner against an order of an assessor under the License Tax Act,[2] and filed stamp-paper for a copy of the assessor's decision after the period of appeal had elapsed, but upon which he had fraudulently obtained an antedated certificate, so as to make his appeal within time, it was held that he was rightly convicted of the abetment of the forgery of a document within the meaning of this clause.[3]

It will be observed that the clause does not embrace false recitals in a deed, such as the overstatement of consideration or the like intended to achieve the same purpose. Such acts are otherwise punishable,[4] but they do not make a deed a forgery, nor is such a document "false" merely because it contains a false material recital which was its main underlying purpose. A died issueless possessed of some land. B his widow entered into possession of them C intending to oust B executed a deed of usufructuary mortgage conveying A's land to D falsely describing himself as A's son. He subsequently strove to uphold his demise giving himself as the adopted son of A but it was

(25) 3 Inst. 169; Pult. 46 *b*; 1 Hawk. c. 70, s. 2; Bac. Abridg., tit Forgery (A).
(1) *Ritson*, L. R. 1 C. C. 200.
(2) Act XXI of 1867.
(3) *Sookmoy Ghose*, 10 W. R. 23.
(4) Ss. 206, 421-424.

found that his pretensions were groundless. He was then prosecuted for forging the mortgage deed in favour of D, and it was found that both C and D had conspired to defraud B, but it was a question whether the document was "false" within the meaning of this clause. Munro, J., held that it was not, but Pinhey, J., differed apparently holding that the execution of the deed by "C, son of A" was as good as if C had executed it in the name of any other person, say X. But this view na ally did not commend itself to the third Judge to whom the cas vas referred for decision who had no difficulty in holding with Mun J., that a false description of one's status did not convert a deed o a forgery.(5)

5144. Execution Without Authority.—It is forgery to make a document for another without his lawful authority, provided that it is made dishonestly or fraudulently. The authority to execute a document for another must then have been assumed for the purpose of fraud. Such forgery may be committed by a partner, though he may be the manager of the firm, for the fraud committed by him does not merely affect himself but also affects his co-partners. The accused was the manager of the firm which stood in the name of his son Kalidas. He was also the servant of the prosecutor. He entered into certain speculative transactions for his firm contingent on the arrival of a ship at sea. The ship foundered and thereupon he transferred the contracts to the complainant, fudging up his books to show that the transactions had been entered in due course. He was prosecuted under s. 477-A for falsifying the complainant's book, under s. 468 for substituting a page in one of the books of his own firm, and for criminal breach of trust. As regards the second count, it was contended that the accused could not be charged for forgery which implied a fraud, and the fraud charged was on the firm of which the accused was the managing partner. But it was held that the fraud affected the other partners and that the accused had been therefore rightly convicted of that offence.(6) This case is not unlike that in which three persons were jointly entitled to draw money from a bank but of whom one only drew the money making two strangers to sign for the other two, and who upon being questioned by the bank clerk gave out the names of the members legally empowered to sign and draw the amount, and whereupon Patteson, J., said: "The bankers, being authorized to pay the money to three persons in particular, and to them only, pay it to one of those persons, and to two others who are strangers to the transaction, and that without any authority, genuine or colourable, from the real parties. I am, therefore, of opinion that this was a forgery with intent to defraud Jones, Lloyd and Co."(7)

5145. The question of fraud is thus all in all in the case of a document executed without authority. But there may be fraud intended and yet no absence of legal authority. Such would be the case where a person empowered to sign, used his signature to commit fraud. Again, there may be cases in which, though a person may possess no legal

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(5) *Adaikalammai* v. *Raman*, 32 M. 90.
(6) *Lalloo*, 6 Bom. L. R. 553.
(7) *Dixon's case*, 2 Lew. 378.

authority, he may still believe in his authority, in which case he could not be convicted of this offence, whatever other offence he may be guilty of. The prisoner was both the nephew and attorney of the prosecutor. He demanded £120 from the prosecutor on account of "Holt's executors" by writing to him the following letter: "I shall be glad if you will let me have the whole or part of the amount. Let me hear from you by return post, or I will draw on you for the amount. It is time it was paid. I shall take your silence as an assent to my requirement, unless I hear to the contrary." He received no reply and thereupon he drew a cheque for the amount adding "Holt's executors" in the margin. Lord Campbell, C.J., held that there was no case to go to the jury.(8) So where the prisoner accepted a bill of exchange in the name of Ottoway with whom he had bets and dealings in bills, telegraphing and again writing to him at the same time of what he had done in his name, to which Ottoway did not reply. Byles, J., directed an acquittal holding that Ottoway's conduct amounted to an acquiescence in the prisoner's assumed authority to accept the bill for him.(9) The same view was taken by Crompton, J., in another case in which the prisoner had filled in some voting paper in the name of certain voters affixing their marks. It appeared that the prisoner had either express or implied consent of the voters in question, and he was thereupon acquitted; Crompton, J., holding that though the Statute required that the voter shall affix his mark *propria manu*, still the essence of the crime of forgery was making a false entry or signature knowing it to be without authority, and with intent to defraud, which was wanting in the case before him.(10)

5146. Fraudulent Alteration.—Such a case is, of course, wholly different from one in which a person fraudulently alters a deed whether it be the deed executed by himself or another person. Such alterations, for instance, as are contemplated in illustrations (*a*), (*c*), (*d*), (*e*), (*f*) and (*g*) which are clear instances of forgeries. The five material elements common to all such cases are (*i*) completion of the deed before its alteration, (*ii*) its alteration, (*iii*) in a material part, (*iv*) the said alteration being made without lawful authority, and (*v*) dishonestly or fraudulently. It is, of course, immaterial whether the executant of the deed was the person who altered it or another, and whether that another, was then living or dead, or that the alteration had not in fact defrauded any one in particular.

Clause (2)

5147. The alteration must, however, have been made after completion of the deed, for there is nothing wrong in altering it before its execution so as to bring it in conformity with the real intention of the executant and the alteration of a deed even after its execution is not illegal if it is not a material alteration. But it has been held in a long series of cases that an authorised material alteration of a deed after its execution has the effect of vitiating it, so that nothing can be recovered thereupon, although the alterations made can be easily detected and may be capable of elimination,—the policy of the law being that no man shall be permitted to take the charge of committing a fraud,

(8) *Beardsall*, 1 F. & F. 529.
(9) *Smith*, 3 F. & F. 504.
(10) *Hartshorn*, 6 Cox. 395.

without running any risk of losing by the event when it is detected.(11) But the alteration must be of a material part of the deed, though it need not be an alteration of a part of the contract.

An alteration to be material must be one which alters or attempts to alter the character of the instrument itself, which affects or may affect the contract which the instrument contains or of which it furnishes the evidence.(12) Such are, for example, alterations in the date, (13) the amount payable,(14) the time and place of payment,(15) the addition of a contracting party,(16) an alteration of the consideration,(17) or of the rate of interest,(18) or a joint into a joint and several liability,(19) or tampering with the signatures,(20) or an addition to any matter such as the sum borrowed,(21) or the land mortgaged and specified in the schedules. On the other hand, an alteration which is a mere surplusage, as the addition of the words "on demand" to a promissory note,(22) or the interpolation of the name of a subscribing witness, in a document which is not required to be attested by law,(23) or anything which does not affect the liability of the parties, would be deemed immaterial as not to wholly vitiate the deed. So if the transferee is sufficiently identified, such an addition, as filling up a blank left for his Christian name cannot affect the deed.(24) So filling in a blank with a proper date does not vitiate a document.(25)

5148. Alterations Not Fraudulent.—If the alteration is material, it is no defence to say that it was intended to correct a glaring error, or was otherwise necessary or justifiable. Of course, in such a case it is allowable to a party to correct the error or modify its terms by the execution of a fresh deed, which, though fraudulent and intended to alter the terms of the previous deed, could not then be held to be a forgery. For what is condemned by the clause is the tampering of a document after it is once completed, which bears on its face the evidence of a certain state of facts as existent on that day. But the clause does not make all such documents in every case unalterable—for the rectification of a document is permitted in law;(1) and apart from law, every alteration even though unauthorized, is not necessarily penal. In order to be penal the alteration must be both unauthorized as well as fraudu-

(11) 2 Gour's Law of Transfer (5th Ed.), §§ 1313-1316.

(12) *Vazeerali* v. *Suryanarayana*, 1 M. L. J. 388.

(13) *Leeds Bank* v. *Walker*, 11 Q. B. D. 84.

(14) III. (*a*); *Cardwell* v. *Martin*, 9 East 190; *Walton* v. *Hastings*, 4 Camp. 232; *Cock* v. *Coxwell*, 2 C. M. & R. 291; *Hamelin* v. *Brudd*, 19 Q. B. 306.

(15) *Taylor* v. *Mosely*, 6 C. & P. 278; *Makintosh* v. *Haydon*, Ry. & M. 362; *Calvert* v. *Baker*, 4 M. & W. 417; *Hanbury* v. *Lovett*, 16 W. R. (Eng.) 795.

(16) *Gardner* v. *Walsh*, 24 L. J. Q. B. 285.

(17) *Knill* v. *Williams*, 10 East. 431.

(18) *Sultan* v. *Toomer*, 7 B. & C. 416; *Warrington* v. *Early*, 2 E. & B. 763.

(19) *Perring* v. *Hone*, 4 Bing. 28.

(20) *Mason* v. *Bradley*, 11 M. & W. 590; *Nickolson* v. *Revill*, 4 A. & E. 675.

(21) *Mangal Sen* v. *Shankar Sahai*, 25 A. 580, F. B.

(22) *Aldons* v. *Cornwall*, L. R. 3 Q. B. 573.

(23) *Surendra Nath*, 39 C. 75; *Haidar Ali*, 17 C. W. N. 354.

(24) *Eagleton* v. *Gutteridge*, 11 M. & W. 465.

(25) *Keane* v. *Smallbone*, 17 C. B. 179. See further, 2 Gour's Law of Transfer (5th Ed.,) §§ 1313-1316.

(1) S. 35, Specific Relief Act (1 of 1877).

lent. If it is one and not the other, the accused incurs no liability under this clause.

For instance, suppose A executes a sale-deed of his land in favour of B, he afterwards discovers that the land has not ben properly described by A, and he accordingly alters its description. The alteration is made without the authority of A and it is of a material part affecting the very property conveyed, but it does not convert the deed into a forgery, because the alteration was not made dishonestly or fraudulently. Such was, indeed, the case of the accused who having purchased a certain plot of land numbered 10 in the registered sale-deed, altered it to 272, which was its correct number, and who was thereupon prosecuted under sections 193 and 471, and so far as regards the applicability of this clause it was held that though the alteration was material and unauthorized, it was not fraudulent, because the alteration had the effect of substituting the right for the wrong number of the plot sold, the identity of which was wholly unaffected[2] (§ 1948). Such was also the case of the accused who took up his plaint, after it had been filed in Court without the permission of the Court or of the reader who had charge of the record, and entered therein the number of a field from which he intended to eject the defendant, and which he had not specifically mentioned in the plaint. The accused was detected whilst making these alterations. It was held that his conduct was undoubtedly improper and amounted to a contempt of Court, but it fell short of being fraudulent, though Knox, J. felt some reluctance in finding it to be so, though he gave the accused the benefit of his doubt, holding that since the correction was made openly and with no attempt at secrecy it was at best a foolish act, but did not quite amount to a crime.[3]

5149. In another case the accused had applied to the Revenue Court for reinstatement into his tenancy land from which he had been ejected. To prove his tenancy he filed four receipts which were found to be fabricated in lieu of genuine receipts which had been lost. The Court set aside the conviction holding that they were made neither dishonestly nor fraudulently within the meaning of ss. 24 and 25.[4] To this class belong cases such as those in which the accountant falsified his accounts to conceal his previous misappropriation[5] or negligence[6] or the police constable forged a receipt to prevent his superior officer from illegally deducting a certain sum monthly from his pay to be paid over to his creditor.[7] In all such cases "the intent to defraud" is held wanting within the meaning of s. 25, since the word "intent" is construed in its primary sense as connoting his real object or motive as distinguished from its secondary sense of achieving that purpose by the means employed. As Sir John Edge, C.J. remarked: "Of two probable intentions, the one immediate and more probable, and the other remote and less probable, I do not think we should attribute to

(2) Fateh, 5 A. 217.
(3) *Bisheshar Dayal*, (1905) 25 A. W. N. 93.
(4) *Sheo Dayal*, 7 A. 459.
(5) *Lal Gumul*, (1870) N. W. P. H. C. R. 11; *Jageshar*, (1874) N. W. P. H. C. R. 56; *Jiwanand*, 5 A. 221; *Girdhari*, 8 A. 653; *Jhotish Chandra*, 36 C. 955; but held otherwise if the false account was made to conceal a *contemporaneous* fraud. *Sabapati*, 11 M. (411), but there is really no distinction in principle.
(6) *Shankar*, 4 B. 657.
(7) *Syed Hussain*, 7 A. 403.

the prisoner the remoter intention" (§ 5159).[8] This view has been followed in some cases of the Madras High Court, the cases of which Court are somewhat conflicting. For while in some an alteration of a document merely to secure something to which a person was legally entitled has been held to be no forgery,[9] there are cases which are not reconcilable to this view.[10] For instance, in the first case, the accused had altered a document without the authority of the executant, after its execution, with a view to prevent other people from setting up a claim to property which was admittedly in his possession and ownership. It was held that an intention to defraud implied something more than a mere deceit, and there could be no intention to defraud where no wrongful result was intended or could have arisen from the act of the accused. He was consequently acquitted.[11]

But in another case, where the accused had fabricated a conveyance from one M to himself, in respect of property of which M was admittedly his benamidar and it was found that the accused had fabricated the deed merely to confirm his title to the property which already belonged to him, the Court convicted him holding his act to be clearly fraudulent.[12] But in a similar case two Calcutta Judges had previously acquitted the accused.[13] The same Court had more recently to consider the meaning of the term "with intent to defraud" in which the accused had interpolated his own name as a witness in a *Kabuliat* which does not require to be legally attested and was in fact completed unattested. On the question being referred to a third Judge the accused was acquitted, the Court adhering to the view that there could be no intent to defraud where there was no intent to deceive and thereby injure the person so deceived.[14]

5150. But these cases do not harmonize with the view taken in the Punjab, where since the word "fraudulently" means no more than doing a thing "with intent to defraud"[15] the unauthorized alteration of a document filed in Court is held to be fraudulent, being intended to be a fraud on the Court.[16] Consequently, where A executed a mortgage of land No. 450 in favour of B, who sued therefor and obtained a decree, after which in execution he discovered that A had intended to mortgage land No. 449, but had fraudulently inserted in the dead its number as 450. B sued for rectification of the decree, and in support of his allegation filed the original mortgage-deed in which, however, the description of the boundaries of the property mortgaged had been apparently tampered with so as to make it in conformity with the boundaries of No. 449 which was according to B, the field really

(8) *Girdhari Lal*, 8 A. 653.
(9) *Manicka*, (1915) M. W. N. 278, 28 I. C. 102.
(10) *Somasundaram*, 6 M. L. J. 266, 3 I. C. 736.
(11) *Manicka*, (1915) M. W. N. 278, 28 I. C. 102.
(12) *Somasundaram*, 6 M. L. J. 266, 3 I. C. 736; *contra* in *Kailas Chandra*, 6 C. W. N. 382 dissented from.
(13) *Kailas Chandra*, 6 C. W. N. 382.
(14) *Surendra Nath*, 38 C. 75; *Haidar Ali*, 17 C. W. N. 354, 18 I. C. 881, 14 Cr. L. J. 129.
(15) S. 25.
(16) *Gobinda Mal*, (1895) P. R. No. 6; dissenting from *Sheo Dayal*, 5 A. 459. In Madras the cases are conflicting. In some [*Godla vedu Balayya*, (1902) 1 Weir 551; *Somasundaram*, 6 M. L. T. 266;] such alteration held fraudulent, while in others [*Manicka*, (1915) M. W. N. 278] held not fraudulent.

mortgaged. His suit was dismissed as based on a deed materially altered, and he was, moreover, convicted under s. 471. On appeal it was contended for him that if B altered the deed, it was to circumvent A, who had defrauded him, but the Court held that A's fraud even if proved, did not exonerate B for his counter-fraud on A, and in altering the deed, he had clearly brought himself within the penalty of this clause.[17] But such a case is clearly distinguishable from those in which the alteration is a correction, and made with that intent (§ 259-260).

5151. Fraudulent but not dishonest.—An alteration may be fraudulent, though it may not be dishonest, though a dishonest alteration must be necessarily fraudulent (§§ 243-260). In any case a fraudulent act, though intended to deceive, may be wholly unconnected with the wrongful gain or wrongful loss of property though it must involve the causing of injury as defined in s. 44.[18] The accused obtained service as a temporary subordinate in the Public Works Department on the strength of a certificate purporting to have been issued under the authority and signature of the Principal of the Engineering College at Rurki. On reference to him it was found that the certificate in question was a copy issued in the name of one Gul Muhammad which was altered to "Sheikh Muhammad Abdul Razak"—which was the name of the accused. It was proved that the accused was never a student of the College, and upon which he was convicted, the Court holding that his altering the name to suit himself was fraudulent, in the sense of its being intended and calculated to deceive those who give him employment, believing in the genuineness of his certificate.[19] But on this point a discordant note was struck in some cases,[20] though they have since been rightly overruled. The difference arose in considering "fraudulently" as being something akin to "dishonestly," and as such connected with the wrongful deprivation of property, but this is by no means the case or the necessary outcome of the defination of that term in section 25 (§§ 259-260). And since the term has nothing to do with the wrongful distribution of property, it follows that an alteration may be fraudulent, though it may not materially alter the case, as where a person alters the date in a bond filed in support of a claim in a civil suit, even though it appears that the alteration was not required to bring the claim within limitation,[21] or was not at all necessary to establish his case, his claim being perfectly good without it.[22]

5152. Between an alteration merely fraudulent and one which is as well dishonest, there is an imperceptible transition. But the two are nevertheless distinct, and the illustrations given in support of it are all cases of dishonest alterations. Indeed, wherever there is an alteration and dishonesty, little else remains to establish this offence.

(17) *Gobinda Mal*, (1895) P. R. No. 6.
(18) *Ahmed Ali*, 42 C. L. J. 215, 90 I. C. 534.
(19) *Abdul Razak*, (1895) P. R. No. 2.
(20) *Jan Mahomed*, 10 C. 584; *Haradhan*, 19 C. 380; overruled in *Abas Ali*, 25 C. 512, F. B.: to the same effect *Sashi Bhushan*, 15 A. 210; *Kotamraju*, 28 M. F. B. (90).
(21) *Ram Narain*, (1881) P. R. No. 14.
(22) *Daya Ram*, (1885) P. R. No. 16.

5153. Execution or Alteration Obtained Without Free Consent.— Lastly, there may arise cases in which a person is made to sign or alter his own deed, but which is nevertheless a forgery. Such a case is contemplated in clause 3, which presupposes the case of one who obtains another's signature well knowing of his mental incapacity to understand the meaning of his act. Such mental incapacity may arise from (*i*) unsoundness of mind which produces more or less prolonged incapacity, (*ii*) intoxication, which induces temporary incapacity, producing a condition not different from the former (§ 800), and (*iii*) deception, in which the executant is not appraised of the true nature of the document he is invited to subscribe to. Of course, in any case, the act must have been induced "dishonestly" or "fraudulently"—otherwise the act will be ineffectual, though no one can be convicted of forgery.

Clause (3)

5154. The question what constitutes "unsoundness of mind" within the meaning of this clause must be answered with reference to the unsoundness of mind which is a general ground for exoneration under the provisions of section 84 (§§ 750-797). Now since a person may be of unsound mind (§§ 754-756) temporarily, it follows that a person charged for availing himself of his infirmity must be shown to have been aware of it. For where insanity is temporary or intermittent a person is not wholly disqualified from entering into contracts any more than he is immune from criminal liability. Of course, a person may know another to be insane, and yet he may not act fraudulently by him; what is required is that he should knowingly take advantage of another's imbecility and make him subscribe to a deed, the nature and effect of which he is incapable of understanding. The same consequences attach to a deed taken from one whose intellect is clouded by intoxication. It is not necessary that the accused should have administered the intoxicant, but what is necessary is that he should have taken advantage of it.

5155. But in the case of a person made a victim to deception the case is different. For in that case, knowledge of his deception is only possible if the accused was either himself the deceiver or that he was his abettor. Illustration (*i*) presents an example. There the scribe wrote down the name of a different person, as the legatee from the one nominated by the testator, and the latter was induced to sign the will on the assurance that it contained a faithful record of his wishes. The scribe may not have been the beneficiary under the will, but he had nevertheless obtained the testator's signature to it by his deception. The will is therefore a forgery under this clause. The deception practised must, it is apprehended, relate to the nature or contents of the deed and not merely to its effect. Any misrepresentation as to the latter may render the deed void, but it will not amount to forgery.

So, for example, if in the case last supposed the testator were to order the scribe of his will to name A as his legatee and thereupon the scribe were to falsely induce the testator to believe that A was dead, and whereupon he substitutes B for A, the scribe could not be charged for forgery, though he may have achieved the same purpose by practising deceit. But it is a deceit of a kind which does not preclude inquiry

and exercise of judgment. The deceit which renders a deed a forgery affect a man's cognition and not merely his conviction. Even in this respect the English rule was at one time different, for it was said that it was not forgery to fraudulently induce a person to execute an instrument on a misrepresentation of its contents.(23) So where the defendant was indicted for reading a lease to an illiterate person in other words than it was written, whereby he was induced to seal it, it was taken for granted that it would not support an indictment for forgery.(24) But it was expressly so ruled by Rolfe, B., in a case in which the executant had been made to sign a receipt for £ 12, being given to understand that it was for £ 9.(25) But in this respect the law was amended by the Larceny Act, 1861,(1) which provides generally as follows:—

"90. Whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress or affix his name, as the name of any other person, or of any company, firm, at co-partnership, on the seal of any body corporate, company, or society, upon any paper or parchment in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude or to be imprisoned."(2)

5156. The terms of this Statute are however more general than the clause which is restricted to a misrepresentation which so obscures the mental vision that a person acts on the strength of it without pausing to verify it. Consequently, if there was no such misrepresentation, the fact that a person should sign without scrutiny would not bring his act within this clause. So where the accused, a police subordinate, obtained the signature of the Police Superintendent to an order which he inserted in a heap of papers placed before him for signature, it was held that, that fact did not make the accused liable for this offence, because it did not prevent the Superintendent from knowing the nature of the document.(3) The same view was taken of the Registration moharir who presented certain indorsements for the signature of the Registrar which he signed, believing the moharir to have copied them in the Register as required, and in which case he could have verified the entries if he was so minded.(4) It must be confessed that the question of deception is a question of degree, and while there may have been deception in the latter case it was not sufficient to prevent the person deceived from ascertaining the truth. But the same thing may be said of the testator in illustration (*i*). For if the testator doubted the scribe he could have seen the will to ascertain that the legatee's name had been correctly written down. But he did not do so because of the confidence he reposed in the scribe—and indeed, there can be no deception without confidence. the person deceived taking upon trust what he was at liberty to examine and verify.

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(23) *Per* Rolfe, B. in *Collins*, 2 M. & Rob. 461.
(24) *Skirret*, 1 Sid. 312.
(25) *Chadwick*, 2 M. & Rob. 545.
(1) 24 & 25 Vict. c. 96, s. 90.
(2) This overrules *Danger*, 26 L. J. M. C. 185, in which the fraudulent obtaining of a signature to a bill of exchange was said to be no offence.
(3) *Nujeebedoolah*, 9 W. R. 20.
(4) *Dwarkanath Ghose*, 20 W. R. 49.

5157. False Document must be Made Dishonestly or Fraudulently.—Dishonesty or fraud must underlie the making of a false document, otherwise a document though false in the general sense is not "false" in the especial sense in which that word is used here. The term "dishonestly" is a term of sufficiently precise import, and means as has been seen before, the doing of anything with the intention of causing wrongful gain or wrongful loss, that is, gain or loss, by unlawful means of property to which the person is not or is entitled (§§ 227-239). The adoption of unlawful means is one element of dishonesty; and an intention to employ it with knowledge of "its unlawfulness" is another. Consequently, if what was done was neither unlawful nor believed to be so, it would not be dishonest.

Such was the case of the accused in the Bombay case decided upon the following facts under a Bombay Regulation.(5) There the Mamlatdar is given power to assist tenure-holders in realizing rents on a signed requisition being filed for the arears due before a certain time. The accused was the manager of an estate farmed by A, from a certain landlord. The rents of thirty-two of his tenants having fallen into arrears, he drew up petitions for the same affixing thereto A's signatures imitating A's handwriting and filed them on the last day of limitation. He was prosecuted for forgery and the case of the prosecution was that the act amounted to forgery, because the signatures purporting to be A's were not A's signature, and that he had forged them to save limitation, after which the rents could not have been realized except by regular suit, and which therefore caused wrongful loss to Government in the loss of revenue due from court-fee.

On appeal, however, Melvill and Nanabhai Haridas, JJ., quashed his conviction, holding that A having sworn to have authorized the accused to sign for him the act of the accused was one done in the *bona fide* belief in his authority, and that apart from that circumstance, the act of the accused fell short of forgery, because it was not dishonest, inasmuch even if he had no authority from A to sign for him, and even if the accused wished to deceive the Mamlatdar into the belief that it was A himself who had signed the petition, still since the act was done merely to benefit A, whose gain could not be described as wrongful, and since no one had suffered wrongful loss, the act of the accused was not dishonest, and it was, therefore not punishable as forgery. And adverting to the plea of loss of revenue to Government the Court said: "It is sufficient for us to say that we are not disposed to regard litigation as a machinery invented for the benefit of the revenue, or to consider that avoidance of litigation is a wrongful loss to the Government."(6) It is necessary to add that the Court did not go into the question whether the act was not "fraudulent" which, it is submitted, it was, if the accused did not *bona fide* believe in his authority to sign for A.

5158. In this view the case is not unlike those in which a person secures a post or admission to an examination by means of forged credentials. The accused was prosecuted for forgery of three documents

(5) Reg. XVII of 1827. (6) *Bhabani Shankar*, 11 B. H. C. R. 3

under the following circumstances. He was employed as a copyist in the sub-divisional office at Bhudruck, under the Balasore Collectorate. The third clerkship in that office having fallen vacant the accused applied for it to the Collector adding to his application a forged endorsement (Ex. A), purporting to have been made by the sub-divisional officer recommending him for the post. He also forged a reply from the Collector (Ex. B), appointing him to the vacant post. The sub-divisional officer having suspected the genuineness of the reply wrote a demi-official letter of inquiry to the Collector, which was posted in the local post office, whereupon the accused fabricated a letter (Ex. C), purporting to be written by the Sub-divisional officer to the post master asking him to stop the despatch of the demi-official letter. The accused was convicted for those three acts of forgeries, and on appeal it was contended for him that the documents, though false, could not be said to have been made "dishonestly" or "fraudulently." But the Court held that the first two documents (Exs. A and B) were clearly fabricated "fraudulently" if not "dishonestly," for in making them, his object was to obtain some pecuniary advantage by deceiving the Sub-divisional officer as well as the Collector. But in fabricating the third letter the object of the accused was evidently to screen himself from detection of the fraud which he had already committed by fabricating the two earlier documents. That being his intention, it could not be said that the document C was made either "dishonestly" or "fraudulently." His conviction on that count was consequently set aside(7) (§ 5159).

Intend to Screen Past Dishonesty.

5159. This question raises a somewhat important issue, and one upon which the Courts are divided. For while in the last case the Court was clearly of opinion that a false document made with the intention of screening the offender from the effects of past dishonesty or fraud, is neither dishonest nor fraudulent, a discordant note was struck by Banerji and Sale, JJ., in a case in which the same question came up for adjudication on the following facts. The accused was the agent of a zemindar, and as such received certain sums of money for payment into the Government Treasury on account of land-revenue. He paid smaller amounts for which he received receipts which he altered by adding figures to represent much larger sums as paid into the Treasury, which he sent to his master as vouchers in support of his statement that he had paid the amounts. He was prosecuted both for criminal breach of trust (§§ 4473-4475) as well as forgery, and the question was whether his conviction for forgery was right. The question naturally turned upon the meaning to be ascribed to the terms "dishonestly" and "fraudulently," for it was contended for the accused that since the forgery was committed not with the intention of causing any wrongful gain or wrongful loss, or of defrauding any one, but with the intention of screening the past guilt of the accused, it could not fall within the definition of forgery in section 463.

(7) *Abdul Hamid*, 13 C. 349.

5160. This view was sought to be supported on the strength of two cases of the Allahabad Court[8], the earlier case of the same Court[9] being neither cited nor considered, but as to them the Court said: "With all respect for the learned Judges who decided those cases, we are not prepared to accept the rule of law laid down by them, that it would not amount to forgery under the Indian Penal Code, if the intention with which a false document was made was to conceal a fraud which had been previously committed. If the intention with which a false document was made was to conceal a fraudulent or dishonest act which had been previously committed, we fail to see how that intention could be other than an intention to commit fraud; and if the intention was to commit fraud, the making of false document with that intention will come within the definition of forgery.... Nor does s. 464 stand in the way of the view we have taken; for though to constitute forgery a person must make a false document as defined in section 464 a person is said to make a false document "who dishonestly or fraudulently makes, signs, seals, or executes a document, or a part of a document, etc., so that if there is either dishonesty or fraud in the making or altering of a document falsely, the case would come under section 464"[10]

Against this view stand the cases of the Bombay[11] and Allahabad[12] High Courts which approach the question from the standpoint of section 24 (§§ 243-254) which defines "dishonestly" as the doing of anything *with the intention* of causing wrongful gain or wrongful loss; in other words, which makes criminality depend upon the sole question of intention. It has been, therefore, said that where the sole intention of the accused was to screen himself from detection and not to cause either wrongful gain or loss, or commit fraud, he could not be said to *intend* to make a false document "dishonestly" or "fraudulently" as those terms are defined in the Code[13] (§ 5148).

5161. This view has been consistently applied by those Courts in several cases. In one, the prisoner had altered an office report, with a view to screen his own negligence, he having lost a portion of a record, for which, if the report had stood in its original form, he would have been called upon to account. The purpose of the alteration made by the prisoner was to throw upon another officer responsibility for the missing document. It was held that since the intention of the accused was to screen his own neligence, and not to cause damage or injury to any one, he could not be convicted of forgery.[14] But to this the reply appears to be that though the throwing of one's responsibility upon another may not be fraudulent, the alteration which was intended to deceive those whose duty it was to make use of the document can scarcely be said to be anything short of fraudulent.

(8) *Jiwanand*, 5 A. 221; *Girdhari Lal*, 8 A. 653.
(9) *Abdul Hamid*, 13 C. 349.
(10) *Lal Mohan Sarkar*, 22 C. 313; *Balkrishna*, 37 B. 666.
(11) *Lal Gumal*, 2 N. W. P. H. C. R. 11; *Jageshur Pershad*, 6 N. W. P. H. C. R. 56; *Mazhar Husain*, 5 A. 553; *Girdhari Lal*, 8 A. 653.
(12) *Shankar*, 4 B. 657.
(13) *Lal Gumal*, 2 N. W. P. H. C. R. 11; *Shujauddin*, 20 A. L. J. 662, 68 I. C. 834, 22 Cr. L. J. 10.
(14) *Ib.*

The same remark would hold good in the case in which the accused who had misappropriated the pay of certain school teachers under him, tampered with the office account register by removing certain leaves, substituting for them other leaves containing false entries, whereupon Pearson, J., held that the accused could not be convicted of forgery inasmuch as his accounts were fudged "for the purpose of avoiding disgrace and punishment by concealing the frauds which had been committed."(15) In another case disposed of by Oldfield, J., the accused who was a record-keeper in a certain municipality, was called upon to produce certain orders required in a case. He searched for them, but having failed to find them he forged two orders and produced them as the original orders called for. He was prosecuted both under section 218 (§§ 2297-2299) as well as this section, but it was held that since the documents were forged to screen the accused's own negligence, they were not forgeries within the meaning of section 463.(16)

5162. In these cases there can be no doubt but that the primary and proximate intention of the accused was to screen himself, but at the same time in order to subserve that intention he also intended to use the altered documents for the purpose of deception. The fact that there was one intention, did not negative the presence of another intention, and if the latter intention was fraudulent the mental element necessary to constitute this offence would then be present. This aspect of the question was alluded to by Sir Johan Edge, C. J., in the following case: The accused who was a Treasury Accountant received a sum of Rs. 500 as a Civil Court deposit for payment to one A. He received another sum of Rs. 500 as a Revenue deposit for payment to B. The money due to A was withdrawn by the accused on a forged cheque, and when A applied for its payment, the accused made a false report to the effect that A's money was held as a revenue deposit, which was false and whereupon he was prosecuted both under section 218 as well as for forgery, but as to the latter it was held that inasmuch as the intention of the accused in making the false report was to stave off the evil day and not to defraud A or B, his act could not be said to be either dishonest or fraudulent.

"Of two probable intentions, the one immediate and more probable, and the other remote and less probable, I do not think we should attribute to the prisoner the remoter intention."(17) Kemball, J., arrived at the same result in the case of the forester whose duty it was to issue forest passes for the wood sold and the price charged therefor. As such he sold by auction the wood of a tree stated in the pass to be 0-13-9 sold for Rs. 218. He entered the same quantity in his day-book, but which he subsequently altered to 2-13-9, by changing the original "0" into a "2" after official inquiry into the sale by him had commenced. He was prosecuted for this offence, but the Court held the alteration in the quantity as traceable to neither dishonesty nor fraud, and he was accordingly acquitted.(18)

(15) *Jageshur Pershad*, 6 N. W. P. H. C. R. 56.
(16) *Mazhar Husain*, 5 A. 553.
(17) *Girdhari Lal*, 8 A. 653.
(18) *Shankar*, 4 B. 657. The head-note of this case is inaccurate.

Acts Fraudulent but Not Dishonest.

5163. The question whether an act is dishonest or not is comparatively easy, but the question of fraud is more perplexing (§§ 5159-5164). There are, however, cases in which it is clearly visible. The accused applied to the Police Superintendent at Poona for enlistment in the police force. In support for his application he presented two certificates, one of which was wholly fabricated, while the other had been altered by several material additions made after its execution. He was held to have committed the offences punishable under sections 466 and 471.[19] One Piari, wife of Amir, deserted him and thereupon he made a report to the police asking that a search might be made for her. He also engaged a pleader one Ali Zehad to assist him in the search. The accused who was the pleader's son was a clerk in the Police Superintendent's office, forged two orders purporting to have been issused by the Superintendent for the delivery of the woman from the custody of a Mt. Sibni to which she was apparently traced. It was contended that the orders though false were not made fraudulently, but the Court held that the two elements necessary to constitute fraud were both present, *viz.*, (*i*) deceit or an intention to deceive, and (*ii*) either actual or possible injury to some one. The first was evident and the second was clear from the fact that the woman if delivered to the husband would have lost her right to remain where she was found.[20]

5164. Other cases illustrative of the same principle are to be found in the forged certificates filed with a view to gain admission either to a college lecture[21] or an examination.[22] The accused applied to the Principal, Queen's College, Benares, for admission into the second year law class, alleging that he had passed the F. A. examination and attended the first year law class in another college. The Principal allowed him to attend the second year class on condition that he produced a certificate of his having attended the first year's lectures, and for which he subsequently, produced a forged certificate purporting to have been signed by the Principal of Canning College, Lucknow. This document was a forgery, and the accused was convicted under section 471, and it was held that the forgery was committed not only fraudulently but also dishonestly, because he intended to save thereby one year's fee which he would have had to pay on the first year's lectures which he never attended. That the document was made fraudulently is undoubted, because it was intended to deceive the College authority to admit him to a second year law course.[23]

The question was similarly decided by the majority of the Full Bench of the Madras High Court,[24] in a case in which the accused was admitted to the Matriculation Examination of the Madras University as a private candidate on his producing a forged certificate, purporting to have been signed by the Headmaster of a High school,

(19) *Khandu Singh*, 22 B. 768.
(20) *Ali Hasan*, 28 A. 835.
(21) *Sashi Bhusan*, 15 A. 210.
(22) *Kotamraju*, 28 M. 90.
(23) *Soshi Bhusan*, 15 A. 210, relying on *ill.* (*k*).
(24) *Kotamraju*, 28 M. 90, F. B.

that he bore good character and had attained his twentieth year. It was held that the certificate had been fabricated fraudulently, in that it was intended to deceive the Registrar of the University who acting upon it admitted the accused to the examination. "In my view," said Sir Arnold White, C. J., "if a false document is made in fact, and there is an intention to defraud, the requirements of the law are satisfied."[25] So where the accused, who purchased revolvers and ammunition from three gunsmiths by filling up the certificates of sales with false names and addresses was convicted of forging them inasmuch as the certificates constituted false documents and they were made fraudulently though not dishonestly, because the false names and addresses were intended to deceive those who required the certificates for identification of the purchasers and the weapons.[1]

Innocent Fraud.

5165. But such cases are clearly distinguishable from those in which a person practises innocent fraud upon the public without intending to do any specific wrong to any individual. An intent to defraud implies something more than deceit. The object for which the deceit is practised has to be considered. The advantage intended to be caused need not have relation to property or be such as is implied in the term "dishonestly," but it must be something to which the party practising the deceit is not either legally or equitably entitled. There can be no intention to defraud where no wrongful result was intended or could have arisen from the act of the accused. A man cannot be convicted of forgery where his intention has been merely to secure something to which he was legally entitled, or even *bona fide* believed himself to be entitled.[2] Such was the case of the accused who filed a forged *sanad* before the settlement officer in support of his claim to purely titular distinction of "Loskur" which was unconnected with any right to property.[3] So it has been held that if a man forged a document such as a diploma of the College of Surgeons, with intent only to induce people generally or particular persons, to believe that he is a member of that college, but having no intent of committing any particular fraud, or doing any specific wrong to any individual he could not be held guilty of the offence of forgery at common law.[4]

In another case the executee of a sale deed inserted therein a clause conveying to him a strip of land to which a third party was setting up a claim. The strip belonged to the executee and his object in making the addition was merely to disarm the opposition made to his claim. It was held that the accused could not be convicted of fraudulently altering of the sale deed.[5] But this view probably carries the doctrine of criminal irresponsibility too far to be generally acceptable. Indeed, the contrary has been held by a Divisional Bench of the same Court in a case in which the accused had got up a sale deed purporting to be executed by one M by whom it had never been executed, though

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(25) *Jan Mahomed*, 10 C. 584.
(1) *Causley*, 43 C. 421.
(2) *Manicka*, (1915) M. W. N. 278; 28 I. C. 102.
(3) *Hodgson*, 25 L. J. M. C. 78.
(4) III. (*d*) is taken from *Ritson*, 39 L. J. M. C. 10, which, however, follows an ancient rule, 3 Inst. 169; Pult. 46 (*b*), 1 Hawk. P. C., c. 70, s. 2; Bac. Abridg. tit; Forgery (A), 27 H. 7-3 pl. 21.
(5) *Manika*, (1915) M. W. N. 278, 28 I. C. 102.

he was a mere *benamidar* of the accused. It was argued for him that the deed deceived no one but merely confirmed the title of the accused, but the Court nevertheless confirmed his conviction holding that it did not make the deed any the less fraudulent.(6) But even this view does not stand unchallenged, since it has been held that where the accused, who was a tenant produced before the Revenue Court certain rent receipts which he had forged in lieu of the originals which were lost, the Court acquitted him holding that there was no "intent to defraud" within the meaning of s. 25(7) which, it may be submitted is arguing *obscurum per obscurius* since the meaning of that concept is, if at all, thus made even more obscure.(8)

5166. That the terms "fraudulently" and "dishonestly" are terms apart cannot be doubted, though in some cases they were treated as synonymous.(9) But at the same time, there must be some one to defraud and a purpose to serve, which cannot be left to conjecture. Such was the case of the accused who was found in possession of two sale deeds purporting to be executed by the same vendor in respect of the same land but in favour of two separate purchases, namely, himself and his wife. It was found that the former was copied from the latter which was a duly registered deed. The former deed was unregistered and bore a later date. The vendor supported the registered deed and laid no claim to the property which he swore belonged to the accused. The prosecution could only suggest that the second sale deed may have been made by the accused to defraud his wife or to raise money on, but the Court accepted the explanation of the accused that the second deed was intended to convey to him the property which he had himself purchased by the first deed *benami* in the name of his wife.(10) As rightly understood this case appears to be correctly decided, and there is nothing stated therein to call for the dissent of the Madras High Court.(11)

In the following case the Judges could not agree, and the case was ultimately acquitted by reference to a third Judge. There the accused had falsely described himself as the son of his deceased uncle, in a mortgage executed by him of properties some of which belonged to his uncle who had died issueless. It was suggested that both the accused and the mortgagee had conspired to defrand the widow. The accused pleaded adoption by his uncle but it was found against him. It was, however, found that the mortgagee who knew him well was in no way deceived. It was therefore held that the accused could not be convicted for using a false description as his act which was merely an attempt to set up his claim to an adoption could not be described as fraudulent.(12) Such was held to be also the case of the accused who had signed a bail bond in a fictitious name after informing the magistrate of it.(13) So there

(6) *Somasundaram*, 6 M. L. T. 266, 3 I. C. 736; dissenting from *Kailas Chandra*, 6 C. W. N. 382.
(7) *Sheo Dayal*, 7 A. 459.
(8) *Abbas Ali*, 25 C. 512, F. B. in which the word "to defraud" in s. 25 is held to be obscure, as it leaves to be determined whether it implies deprivation of property.
(9) *Kishen Pershad*, 2 N. W. P. H. C. R. 202, in which however "fraudulently" and "dishonestly" were assumed to mean the same thing.
(10) *Kailas Chandra*, 6 C. W. N. 382.
(11) *Somasundaram*, 6 M. L. T. 266.
(12) *Adaikal*, 32 M. 90.
(13) *Venkaraju*, (1910) M. W. N. 232

is nothing fraudulent in sending a message in the name of another signing for him as the sender unless it is done on purpose to injure him.[14]

For further commentary, *see* s. 463, (§§ 5175-5189).

5167. Forgery of One's Own Name.—From what has been said before (§ 5143) it is evident that forgery may as much be committed of the signature of another, as of one's own signature. Such a case may arise where a person executes a fraudulently antedated deed to defeat a transfer of which an example is given in illustration (*b*), and another example is furnished by illustrations (*d*) and (*c*) appended to this explanation, which is merely a restatement of the rule generally enunciated in clause 1. Where a bill of exchange payable to A B or order got into the hands of another person of the same name, who knowing that he is not the real payee, endorsed it for the purpose of fraudulently possessing himself of the money, he was held guilty of forgery.[15] There is, however, nothing criminal in one man signing the name of his namesake by mistake, so long as it is not done for the purpose of fraud. And subject to the same limitation, there is nothing wrong in a person using a *nom de plume* and passing himself off as such or signing a deed in that name. This is indeed provided in the next explanation (§§ 5169-5174). But this clause is not intended to deal with such cases. It rather refers to those acts which render a man's own deed a forgery according to the object and purpose accompanying its execution.

Explanation 1.

5168. The five illustrations appended to the explanation are intended to illustrate the working of this rule. Of these the first illustration assumes the simplest case. Of two persons of the same name one has credit at a bank, on which the other draws a cheque signing his real name, but intending to pass himself off as the customer of the bank. Here though in signing his own name the person commits forgery, because of the criminal purpose for which he uses his signature or rather because in affixing his signature, he intends that it should pass off as the signature of his namesake. In such a case his guilty intention may be inferred from his attempt to imitate the signature of his namesake, and to profit by it, by presenting the cheque for encashment or the like or his fraudulent intention may be inferred as in the illustrations (*b*) and (*c*) in the last of which A finds a cheque payable to A or order, on the road. A knows that he is not its payee, but nevertheless taking advantage of the coincidence of the payee bearing his own name, he endorses it over for payment, in which case he is as much guilty of forgery as if the cheque being payable to B or order A had forged B's name and presented it for payment. For where is the difference between the two cases? The fraud practised in each case was the same, though the similarity of names in the one case makes one or two things possible: either it was a mistake in which case the question of forgery does not arise, or A had taken advantage

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(14) *Kali Persad Banerjee*, 26 I. C. (Cal.) 668.

(15) *Mead* v. *Young*, 4 T. R. 28.

of the similarity of names, in which case the fact does not affect his criminality.

Illustration (*b*) furnishes another instance of forgery, but it is scarcely one of the kind contemplated in the explanation. For the acceptance by A in blank under the forged signature of Z of a bill of exchange which B, afterwards draws upon him either in or without collusion with A does not amount to A's forgery of his own name. The reference to B is more in point. For if B draws on Z assuming Z's acceptance which B knew to be a forgery, his execution of the bill of exchange would be a forgery. This illustration was evidently suggested by the case,[16] in which the prisoner offered a bill of exchange payable to Barnard McCarty or order in payment of a watch. The bill purported to be drawn by "Jer. Connell" and it was endorsed as accepted by Rich Betty & Co. The jury found that the prisoner whose name was John Hevey was an entirely different person from Barnard McCarty who was existing and who had made the endorsement, and that Betty & Co., was practically a fictitious name; as though there lived a man called Beatty at the address given, and he was a clerk and had been since then imprisoned, and they finally convicted the prisoner of forgery; but on a case reserved the Judges were unanimously of opinion that the conviction could not be sustained as the endorsement had been found to be by a real person and in his correct name. In short, the case was held not to amount to forgery because the endorsement was found to be real though in fact it was worthless. In illustration (*c*) the case presented is the very reverse—for in it the endorsement is forged and therefore the bill is declared a forgery, illustrations (*d*) and (*e*) call for no comment, for they present the same aspect of the case as is contemplated in clause 1 and is the subject of illustration (*h*).

5169. Using Fictitious Name—The subject of using one's own name in place of another, is closely connected with the assumption and use of a fictitious or false name, or the name of a deceased person of credit and repute. Here again, the offence lies not in the use of a false name as in its use for a fraudulent purpose. For if one thing is more settled than another, it is that there is nothing wrong in using a fictitious name, provided it is not used for the purpose of fraud. So in an old case[17] it was agreed by the Judges that "in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person give a note entirely as his own, his subscribing it by a fictitious name wil not make it a forgery, the credit there being wholly given to himself, without regard to the name, or any relation to a third person." Cockburn, C. J., applied this rule to a case in which the prisoner, Robert Martin, paid a tradesman in a cheque drawn in the name of *William* Martin, which he gave out as his own name. He knew that the cheque would be, as in fact it was, dishonoured. It was shown that the prosecutor had accepted the cheque believing in the prisoner's statement that it was

Explanation 2.

(16) *Hevey's case*, 1 Leach 229; 2 East, P. C. 856.

(17) *Dunn's case*, 1 Leach C. C. 59 (68), followed in *Martindale*, 52 C. 347 (368, 369).

drawn in his own name. He was indicted for forgery, but on a case reserved, the Judges held it to be no case of forgery as the mere use of a fictitious Christian name by a person could not constitute that offence.[18] (§§ 2107-2108).

5170. The law on the subject was thus summed up by Sir E. H. East:—

"*First*, that if a person give a note or other security as his own note or security, and the credit thereupon be personal to himself without any relation to another, his signing such a note with a fictitious name may indeed be cheating, but will not amount to forgery, for in that case it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view.

"But, *secondly*, that if a note be given in the name of another person, either really existing or represented so to be, and in that light it obtains superior credit, or induce a trust, which could not have been given to the party himself, it is the false instrument and punishable as forgery.

"*Thirdly*, that the law would be the same though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the imposter and the party whose name is made use of were both strangers to him; for then he could not know that such imposter was not really the person whose name he assumed, and, therefore, the other would be equally deceived.[19]

5171. It is not of the essence of this offence that fraud should in fact be committed. All that is necessary is that it should have been intended. And so, it follows that if a person make use of a forged instrument with intent to defraud the prosecutor, it is forgery though the prisoner's real name would have carried with it as much credit as the assumed name. The prisoner, Samuel Whiley, went to a tradesman purchased certain goods and gave him a draft drawn by Samual Milward on a bank in London, which on presentation was dishonoured. The prosecutor admitted in evidence that he did not know the prisoner and that he should have given him credit equally whether the bill was subscribed by his real or fictitious name, and the jury found that the bill had been drawn to defraud the prosecutor; the Judges were, on a case reserved, of opinion that the conviction was right.[20] In order to justify a conviction for forgery, the forger must have, it seems, assumed the fictitious name for that particular purpose, for if the assumed name was his general *alias*, he could not be charged with forging the name of a "fictitious" person.[21] So where the prisoner, whose real name was John Francis issued a cheque in the name of James Cook, Junior, which was dishonoured, no person of that name having any credit at the bank, the Judge left it to the Jury to say whether the prisoner had assumed the name of James Cook, Junior, with a fraudulent purpose, and on a case reserved, twelve Judges upheld the conviction holding,

(18) *Martin*, 5 Q. B. D. 34 (37), *See* his case commented on in § 2108 *ante*.
(19) 2 East. P. C, 961.
(20) *Whiley's case*, R. & R. 90.
(21) *Bontien*, R. & R. 260.

that if the names were assumed for the purpose of the fraud and avoiding detection, it was as much a forgery as if the names assumed were that of any other person of known credit; though the case would have been different if the party defrauding had habitually used and become known by another name than his own.(22)

5172. Even the fact that the assumed name had been used for the purpose of general concealment and fraud would not make its use in a particular case "fictitious." It was so laid down by the Judges in a case in which the prisoner stood charged for forging an acceptance upon a bill of exchange in the name of Scott, but in which the prosecution had failed to establish that the prisoner had assumed that name for that purpose.(23) But it is apprehended that this does not lie on the prosecution in every case. It is sufficient for them to prove that the prisoner had used a name other than his own for the purpose of the fraud, and it will then be upon him to prove that the assumed name was his second name and not adopted on the particular occasion in question.(24) But though the name must be assumed for a particular purpose, it does not follow that it should be assumed to defraud any one person in particular. The accused advertised a work on English idioms purported to have been compiled by "Robert S. Wilson, M.A.," for sale at Rs 2-4, the price being payable in advance to Robert S. Wilson, M.A., Council House Street, Calcutta. He instructed the post office at Calcutta signing himself as Robert S. Wilson, to redirect the money orders to Rajam, to the postmaster of which he addressed another communication instructing him to pay the money order to his clerk Seshagiri Rau, which he did. It was found that the Seshagiri Rau was none other than the accused himself, who signed the money order in that name; that there was no such person as Robert S. Wilson nor any book of the kind advertised. The accused had in fact cheated the public using the fictitious names, and he was convicted of both cheating and forgery; of the latter offence because the accused had forged Robert S. Wilson's signatures on the money orders and so induced the post office to deliver their contents to him.(25) In another case the accused concocted a pseudonymous petition complaining against a person to the District Magistrate, whereupon he was rightly held to have been convicted of this offence.(1) In still another case the accused, a European, who was exempt from the provisions of the Indian Arms Act purchased several revolvers and ammunition from the gunsmiths to whom he gave certificates giving false names and addresses. He was convicted of forging the certificates on the ground that though the conduct of the accused was not dishonest, it was fraudulent in that it deceived the firms into selling him revolvers, and also the Government who had prescribed the forms to be able to trace the weapons and their owners.(2)

(22) *Francis' case*, R. & R. 90.
(23) *Bontien*, R. & R. 260.
(24) *Peacock*, R. & R. 278.
(25) *Pera Raju*, 13 M. 27.
(1) *Sheefait Ally*, 10 W. R. 61.
(2) *Causley*, 43 C. 421; following *Toshak*, 1 Den. C. C. 492, Certificate of character to admit accused to the Trinity House); *Dhunum Kasee*, 9 C. 53 (using document with a forged registration indorsement; *Abbas Ali*, 25 C. 512, F. B. (forged certificate of competency as engineer).

5173. So a person may forge a will in the name of a fictitious person living or dead,(3) and raise money thereon in which case he would be guilty of forgery, for as Patteson, J., said: "There is nothing to limit the offence to the forgery only of the wills of persons that have existed, and it has been expressly held that forgery may be committed by the false making of the will of a living person."(4)

When Fictitious Name Innocent.

5174. But the use of fictitious name is only penal when a person uses it for the purpose of fraud or deception. Consequently, where these elements are wanting a person cannot be convicted of forgery. Such was held to be the case of the mortgager who described himself as the son of his uncle, presumably to strengthen his claim to his adoption,(5) or where the accused signed a bail bond in a fictitious name after having previously informed the Magistrate of it.(6) Such again was the case of the accused who warned his confederate in a dacoity case of an arrest in a telegraphic message, for the sender of which he used and signed in the name of another who complained of the forgery of his signature but the accused was acquitted on ground that the use of the complainant's name as sender of the message, though improper, was not fraudulent inasmuch as it was used to conceal the identity of the accused and not with any view to injure the complainant.(7) The accused was the executant of a *kabuliat* which was attested by three witnesses including one C. B. which was the name of his landlord. It was found that "C. B." was added as the name of a fictitous person with intent to estop the landlord later on. But it was held to be no forgery.(8)

S. 463.

5175. False Document When a Forgery.—Though section 464 defines a "false document" as something distinct from "forgery" as defined in section 463, it is clear that the simple making of a false document as defined in s. 464 amounts to forgery as defined in section 463. This section, no doubt, requires that such document should have been made "with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed," but these elements are necessarily implied in the terms "dishonestly" and "fraudulently" as used in section 464. And since the offence is complete as soon as a false document is made with the requisite intent, it follows that it is not necesary that the document in question should have been used, or published, or that the injury intended should have, in fact, been caused(9) should the document forged be on its face good and valid for the purpose for which it was created. It was so laid down by Eyre, B.,(10) and so in another place it has been said to be material that the false instrument should carry on the face of it the semblance of that for which it is counterfeited, and should not be illegal in its very frame.(11) But this

(3) *Kennang*, (1917) 1 K. B. 25.
(4) *Avery*, 8 C. & P., 596.
(5) *Adaikal*, 32 M. 90.
(6) *Venkaraju*, (1910) M. W. N. 232.
(7) *Kali Prasad Banerjee*, 26 I. C. 668.
(8) *Haidar Ali*, 17 C. W. N. 354, 18 I. C. 881, 14 Cr. L. J. 129.
(9) *Sheefait Ally*, 10 W. R. 61.
(10) *Jones' case*, 1 Leach 367.
(11) East. P. C., c. 19, s. 43, p. 943.

was never a rigid rule of law, and as the section is worded the question of resemblance is not directly relevant for the purpose of the offence, though indirectly it has a material bearing on the offence as reflecting on the question of intention. For as in the case of counterfeiting coins (§§ 282, 2440) or stamps so in the present case the intention of the accused is to practise imposition upon another by passing off the false as the true document. Consequently how can he be said to possess the intention to defraud another, when what he has done is obviously insufficient to deceive even a person using ordinary observation?

5176. In order to deceive, the instrument must then appear upon the face of it to have been made to resemble a true instrument, though the resemblance may not be exact, but it must be at least such as to deceive a person of ordinary intelligence and observation,[12] though it may be wholy insufficient to deceive an expert.[13] Nor again, is it necessary that the forged document should have been in every respect in conformity with the directions of law as to the making of a document of which it purports to be a forgery. So a conveyance may be forged on the stamped paper though even if genuine, it would have been otherwise ineffectual.[14] And so in another case the Judges were of opinion that, in order to constitute forgery it was not necessary that the instrument should be available; that though a compulsory payment by course of law could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him; that if this were a sufficient defence, forged securities might be published on improper stamps with impunity, which would carry the mischief to an alarming extent; that the stamp itself might be forged; and it would be a strange defence to admit in a Court of Justice, that because a man had forged a stamp he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another.[15]

So a man may be indicted for forging an instrument which if genuine, could not he made available, by reason of some circumstance not appearing upon the face of the instrument but to be made out by extrinsic evidence.[16] So a person may be indicted for forgery though the document forged may not conform to the form in which to be valid, it must be made,[17] nor need it be the legal evidence of the matter expressed,[18] provided that it was *intended* to be used as evidence of any matter[19] (§ 285). Now since the signing of a document is by no means necessary to give it this character, it follows that " signing, sealing or execution " is by no means an essential prerequisite of a false document within the meaning of s. 464 (§§ 5140-5147) and a document may be made false, though it is unaccompanied by the maker's signature.

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(12) *Collicott*, 4 Taunt. 300; *Jones*, 1 Leach 204; *Mahoney*, 6 Cox 487.
(13) *Hoost*, 2 East. P. C. 950.
(14) *Hawkeswood's case*, 1 Leach 57; *Lee's case*, 1 Leach 258-*n*.
(15) *Morton's case*, 2 East P. C. c. 19, s. 45, p. 955; to the same effect, *Teague's case*, 2 East P. C., c. 19, s. 55, p. 979; *Pike*, 2 Moo. C. C. R. 70.
(16) *McIntosh*, 2 Leach, 833.
(17) *Ligon*, R. & R. 255; *Froud*, *ib.*, 389.
(18) *Sheefait Ally*, 10 W. R. 61.
(19) S. 29; *Sheefait Ali*, 10 W. R. 61 (62).

5177. A false entry in an account book made to be evidence of a certain payment made to the prosecutor may be a forgery if it was a false entry and made "dishonestly" or "fraudulently" or with any of the specific intents enumerated in this section.[20] But it cannot be said that such an entry is *per se* false and amounts to forgery. Even if false, it does not necessarily follow that it amounts to forgery. The accused and the prosecutor were at account, and the former being found indebted to the prosecutor in the sum of Rs. 33-5-3, the latter asked the former to acknowledge the sum in his account book, which the accused professed to have done in Malayalam, a language unknown to the complainant, but what he had in fact written was not that the sum was due but that it had been paid in settlement of all previous accounts. The entry was unquestionably false, but the question was whether it amounted to a false document, upon which the Court observed: "In order that a document should be a false document within the meaning of section 464 it must appear that it was made with the intention of inducing the belief that such document as made by, or by the authority of one, who did not make it or give such authority. There is nothing on the face of this entry in the complainant's book to make it appear that the writing was made or authorized by him. The entry was not signed by the complainant, and contained no indication that he acknowledged it as his own statement. We cannot, therefore, say that the entry is a document which was made by the prisoner with the intention denoted by the first clause of section 454, or caused by him to be signed or executed within the meaning of the third clause of that section." The Court then converted the accused's conviction into one for attempted cheating.[21] Other cases[22] of false entries turned upon the absence of dishonesty and fraud, the accused having made the entries more to conceal their past misconduct than to perpetrate any act of dishonesty or fraud upon another (§§ 5148-5150).

5178. Intent Necessary to Constitute Forgery.—This recalls once more the question of intention—a subject, the general aspects of which have been already considered (§§ 5148-5165), but which is again referred to here with some particularity and which furnishes the true crux of the crime. Generally speaking, however, all that is implied by the intents specified in s. 463 is that the false document should have been made either dishonestly or fraudulently. But in enumerating the intents more specifically in section 463, the only object conceivable is to exclude, by elimination, all other intents though dishonest or fraudulent which do not fall into the category of anyone of the specific intents which alone make a false document a forgery, and the forger punishable under section 465.

(1) Damage to the Public.

5179. Of these intents the first speaks of an "intent to cause damage or injury to the public" which then necessarily implies that an intent to defraud any particular person is not necessary. So Maule, J., said: "The Recorder seems to have thought that, in order to prove an intent

(20) *Per* Holloway and Innes, JJ., in I. T. J. (L. S.) 46.

(21) *Kunju Nayar*, 12 M. 114.

(22) *Shankar*, 4 B. 657; *Balwant*, (1894) B. U. C. 595; *Jawala Ram*, (1895) P. R. No. 12.

to defraud, there should have been some person defrauded or who might possibly have been defrauded. But I do not think that at all necessary. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his banker's, and a friend with his knowledge, forges a name to his cheque, either to try his credit or to imitate his handwriting there would be no *intent* to defraud, though there would be parties who might be defrauded. But where another person has no account at his banker's but a man supposes that he has, there would be an intent to defraud in that case although no person could be defrauded."(23) "Again, there may be an intent to defraud without the power or the opportunity to defraud."(24)

The prisoner had purchased twenty shares of a certain railway of A, a broker, which stood in the name of P, but A did not send the prisoner the transfer-deed as he had then become insolvent, and he thereupon caused a boy to execute the assignment in the name of P. All calls on the shares had been paid. It was held, that the prisoner might be convicted of forgery, whether his intent was to defraud P or the Railway. As Rolfe, B., put it: "The prisoner's act was a wrongful act, whereby others might be damnified. In one respect the case may be said to be a case of misfortune, as perhaps, the prisoner considered himself entitled to the transfer; he had, most likely, contemplated helping himself by wrong to what he thought his right. I can, however, perceive no reason for doubting that the act involved a fraud.(25) The fact that a person fabricated a false document does not, however, carry with it a presumption that he had a fraudulent intent. The question of such intent, is, however, a question of fact to be found by the jury.(1) It is, however, sufficient for them to find that the prisoner had fraud in view, though the fact that he had actually defrauded some one would be the best evidence of such intent, though proof that the act could not have defrauded him, would not suffice to negative fraud."(2) So where the prisoner pledged a forged bill of exchange merely to obtain credit, it was held to be fraudulent, though the prisoner may not have intended to defraud the prosecutor.(3)

Intention Inferred from Knowledge.

5180. The question of intention is a question of inference, and in England, it has been held that the jury are bound to infer it if they are satisfied that a document was uttered by the prisoner as true, intending it to be

(23) *Nash*, 2 Den. C. C. 493.

(24) *Nash*, 2 Den. C. C. 493. It is just as well to note that the English rule on this subject has only been made clear since the passing of 24 & 25 Vict., c. 98, s. 44, which expressly declares that in an indictment for forgery a general intent to defraud without alleging an intent to defraud any particular person is sufficient. The previous Statute (14 & 15 Vict., c. 100, s. 8), on the subject, was by no means so clear, though the Judges held a general intention sufficient. But referring to it Wightman, J. (Creswell and Earle, JJ., and Bramwell B. concurring) said: "Before the late Statute it was necessary to allege an intent to defraud some one, and there must be an intention to do so now."—(1856) *Hodgson*, D. & B. 3.

(25) *Hoatson*, 2 C. & R. 777.

(1) *Holden*, R. & R. 154; *Marcus*, 2 C. & R. 356; *Hoatson*, *ib.*, 777.

(2) *Sheppard*, R. & R. 169; *Harvery*, 2 St. Tr. (N. S.) 1.

(3) *Birkett*, R. & R. 86; *Masagora*, R. & R. 291; *Trenfield*, 1 F. & F. 43.

taken as such, and that he knew it to be forged.(4) But knowledge has been looked upon as distinct from intention in the Code (§ 341) and one *may* justify an inference as to the presence of the other, but it is not a necessary consequence. This was evidently implied in a case(5) decided upon the following facts: The accused, who was a copyist in the Collector's office, wrote a letter purporting to be on behalf of a jail-warder applying for a transfer, which was sent to the Inspector-General of Jails stamped with a "service" postage stamp. It was proved that the application was written by the accused, who, however, stated that it had been written at the request of the warder who, however, denied having authorized it and the accused was thereupon prosecuted for forgery, but the Court held that the intention to cause damage or injury or to commit fraud was not proved by the prosecution. It could be inferred from the mere fact that the warder had not authorized the writing of the letter. It was proved that the prisoner and the warder were strangers, which the Court considered in favour of the accused, for if he did not know the warder he could have borne no ill-will against him. It was possible that some warder's enemy induced the prisoner to write the letter, but this was a mere surmise. The Session Judge had convicted the prisoner holding that he might, at any rate, have known that the letter would injure the warder, but the Court held such knowledge insufficient, as what the section required was intention and not merely knowledge. The prisoner was therefore acquitted.(6) But in another case the Court held it to be a necessary inference which the jury should be directed to draw if they were satisfied that the accused had uttered a forged document as a true one, meaning it to be taken as such and knowing it to be forged.(7)

(2) Injury to a Person.

5181. Between an act intended to the injury of the public and one intended only to injure a person, there is no difference except one of degree. In other respects it is immaterial. Forgeries intended to injure persons are, however, more common and present less difficulties in proof. They are at the same time usually of a more serious nature than those in which no one in particular was intended to be injured. But in either case, the offence is complete with intention—it is not necessary that any person in fact should be defrauded.(8) Nor need the intention be to cause any pecuniary loss to him, for the words "damage or injury" would appear to have been used here in cognate sense as implying the doing of any "harm whatever illegally caused to any person in body mind, reputation or property."(9) The harm must have been then caused illegally—not in the sence that it was caused by means of forgery, but the harm caused must be an illegal harm, that is to say, it must be a harm the causing of which is an offence or prohibited by law or that it at least furnishes a ground for a civil action.(10) But an act which merely causes a civil injury to another is not necessarily done "dishonestly" or "fraudulently" and it must have been so done to amount

(4) *Hill*, 8 C. & P. 275; *Cooke, ib.*, 582 (586); *Geach*, 9 C. & P. 499.
(5) *Feda Hossein*, 10 C. L. R. 184.
(6) *Ib.*
(7) *Dhunum Kazee*, 9 C. 53.
(8) *Crooke*, 2 Str. 901; *Goate*, 1 Ld. Raym. 737.
(9) S. 44.
(10) S. 43.

to this offence. The terms of this section are, consequently, somewhat wider than those of section 464, but, as observed before, no act not amounting to the making of a false document under that section is punishable as forgery, so that whatever may be the intention of the accused, whether to cause "injury" to the public or to any person or whether it be to support any claim or title, it must at the same time be an act which is "dishonest" or "fraudulent" as those words have been used in the Code.

(3) Support any Claim.

5182. This will be manifest from the next clause which is more general and speaks of the intent being "to support any claim or title." Now a document may be fabricated to support a righteous claim as much as to bolster up a false claim, but it does not follow that the accused is equally guilty in either case. Where, for instance, the accused who was the occupancy tenant of a certain land from which he had been illegally ejected by the landlord, applied to the Revenue Court for his reinstatement and in support of his tenancy forged and filed certain rent receipts in lieu of the genuine ones which he had lost, and whereupon he was convicted, Bordhurst, J., quashed the conviction holding that, though the documents had undoubtedly been fabricated to support his title to the land, still they had been made to replace the genuine ones lost, and though they were filed to support a claim or title, it could not be said that they had been made "dishonestly or fraudulently" so as to constitute them "false documents" within the meaning of section 464.[11] But this case may probably require reconsideration for it is not clear why they were not made "fraudulently" as that term is defined in the Code (§§ 255-263). Moreover, it is not necessary for the purpose of this offence that the claim or title should be false or unfounded, since a person commits equally an offence even if he forges a document to support a claim otherwise good [12] (§ 5159).

5183. The term "claim" is wide and is not intended to be restricted in its application to a claim to property.[13] It may, indeed, be a claim to anything, as for instance, a claim to a woman, as the claimant's wife, a claim to the custody of a child as being the claimant's child, or a claim to be admitted to attendance at a law-class in a college or to be admitted to university or other examination, or a claim to continue in service [14] or one for the possession of immoveable or any other kind of property.[15] So where the accused obtained admission to a second year lectures of a certain college on the strength of a forged certificate produced by him, to shew that he had completed the first year's course at another college, it was held that the false certificate was used to support the accused's claim to attend lectures of an advance course and was as such a forgery within the meaning of this section.[16] This view was considered and concurred in by a Full Bench

(11) *Sheo Dayal*, 7 A. 459.
(12) *Dhunum Kazee*, 9 C. 53.
(13) *Soshi Bhusan*, 15 A. 210 (217); *contra* held in *Haradhan*, 19 C. 380, has since been overruled in *Abbas Ali*, 25 C. 512. F. B. To the same effect, *Khandu Singh*, 22 B. 768; *Kotamraju Venkatragadu*, 28 M. 90.
(14) *F. C. Woodward*, 18 S. L. R. 199, (1925) S. 233.
(15) *Soshi Bhusan*, 15 A. 210.
(16) *Ib.*

of the Madras High Court in a case in which the accused who was a candidate for admission to the Matriculation examination of the Madras University, produced to the Registrar a forged certificate purporting to be from the Headmaster of a recognised high school which was required by the rules, and for which he was held to have been rightly convicted under section 471.[17] The accused must, however, produce the document in support of a claim or title which presupposes that such claim or title is alleged, though it need not be alleged by the person who commits the forgery, for he may be a hireling witness filing a forged document in support of his (party's) claim. Nor is it necessary that the document should be sufficient to support the claim made or the title set up.

5184. The terms "claim or title," though large, are not intended to mean a mere plea or an argument, as distinct from a demand of a right or a supposed right. So where a person made certain entries in his creditor's account-book showing re-payment of his loan which in fact was not made, the entry could not be said to have been made to support a claim within the meaning of this section, though the act of the accused might otherwise amount to forgery (§§ 5159-5165).

(4) Part with Property.

5185. A forgery which has for its object the transfer of property must be made "dishonestly" as distinct from "fraudulently," for a person who intends to cause another to part with property by means of a forged document, cannot conceivably have any other object in view. But here, again, the clause is somewhat too wide, for it may conceivably include cases in which the transfer of property is not obtained wrongfully. Such a case may arise where A deposits money with C, and intending to withdraw it, C illegally refuses to pay it unless A procures B's concurrence. A forges it, and thereupon obtains payment of what was payable to him without the concurrence.

5186. The term "property" is nowhere defined in the Code, or for that matter, in any other Indian enactment. It may, however, be defined to be anything that is the subject of ownership. As such, it includes not only such things as are ordinarily classed as property, but also those which law protects and recognizes as fit objects of ownership.[18] A college certificate has been so held.[19] It is, however, a term of varying import, as implying not only a thing which has an actual existence but also one which exists potentially, as for example, future property. The word as used here has been held to extend to both. And it could not be otherwise. For example, if A gave an order to B to buy the materials for making, and to make a silver tea-service for him and C before the tea-service was made, or the materials for making it had been bought, were to make a false letter purporting, but falsely, to be signed by A, authorizing B to deliver to D the tea-service when made, C would have committed forgery within the mean-

(17) *Kotamraju*, 28 M. 90, F. B.; *Nga Ba Thein*, 4 U. B. R. 174; 76 I. C. 225 (accused used a forged certificate to support his claim for employment).

(18) Gour's Law of Transfer (5th Ed.), §§ 182-184.

(19) *Soshi Bhusan*, 15 A. 210.

ing of this section by making that false document with intent to cause B to part with property, namely, the tea-service, when made.[20]

(5) Intent to Enter into Contract.

5187. Again, a false document made with intent to enter into any express or implied contract, falls into the same category. Such document must be presumably made to enable the person using it to obtain an advantage by means of the contract it enables him to enter into. Such contract may be personal or it may relate to property. In the former case, there must be presence of fraud, and in the latter case, there must be dishonesty. In the one case the accused may secure service by producing a forged certificate (§§ 5163-5165), in the second case he may obtain property by using the same means (§§ 5154-5155).

(6) With intent to Commit Fraud.

5188. Lastly, the intent of the forger may be "to commit fraud, or that fraud may be committed." Now since the document must of necessity, have been made "fraudulently" which is defined to connote an "intent to defraud," a question may arise, and has been raised as to whether this phrase is any different to the one used in section 463. In other words, is there any difference between doing a thing "fraudulently" and doing it "with intent to defraud." In the opinion of Sir Arnold White, C. J., though the two are otherwise distinguishable as in s. 239, they are intended to mean the same thing in this connection. Consequently, if a document is made false "fraudulently," it is forgery irrespective of this clause which is then superfluous.[21] But though the intent to "defraud" and to "commit fraud" is the same, still it is something more than mere "deceiving." For instance, A tells B a lie, and B believes him. B is deceived, but it does not follow that A intended to defraud B. But A tells B a lie intending that B should do something, which A conceives to be to his own benefit or advantage, and which, if done, would be to the loss or detriment of B, A intends to defraud B. So Sir James Stephen observes: "Whenever the words 'fraud' or 'intent to defraud,' or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of the crime; namely, *first*, deceit or an intention to deceive or in some cases mere secrecy; and *secondly*, either actual injury or possible injury, or an intent to expose some person either by actual or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury, by means of that deceit or secrecy."[22]

It is not necessary that in an intent to defraud there should be present both an intention to secure a benefit or advantage to oneself and to cause loss or detriment to the other, for the presence of one without the other is sufficient. The presence of one may sometimes involve also the presence of the other, but this is rather an aggravated case of fraud and by no means the usual one. As Sir James Stephen remarked, the principal object of a fraudulent person is, in nearly every case, his own advantage. But such advantage need not be connected with pecuniary gain. For instance, such gain is not apparent in the attempt of a person to obtain admission to the examination of a university by producing a forged certifi-

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(20) *Sosi Bhusan*, 15 A. 210.
(21) *Kotamraju Venkatragadu*, 28 M. 90, F. B.
(22) 2 Hist, Cr. L. 121.

cate, though the advantage he intends thereby to obtain is manifest.[23] But the advantage in this connection must, it is conceived, be of a character connected—though it may be remotely connected—with property or pecuniary gain. Otherwise it would be difficult to distinguish those cases[24] in which the accused had merely courted titular or social distinction by means of forged documents.

That Fraud may be Committed.

5189. Lastly arise cases in which the forger does not himself intend to commit fraud, but does an act to facilitate its commission by another. Such person may be held guilty of abetment, but the Code regards his offence as far too serious to leave his punishment to general section. It is, indeed, one of those sections in which the Code makes a 'special' provision for the punishment of the abettor. A person who knowingly scribes or attests a false document would thus be held guilty under this clause, though he may be acquitted of any intention to use the false document himself. So where a police-constable in disguise approached the accused who was alleged to be a professional forger with intent to entrap him, and asked him to substitute his name in a notice issued by a Deputy Collector, as he intended to file it in a civil suit, and the accused thereupon effected the alteration charging the prosecutor Rs. 25 for the act, it was held that the accused had brought himself within the penal visitation of s. 466—which he had, but it is submitted by virtue of this clause.[25]

Session. Pres. Mag. or Mag. of 1st class. Non-cog. Warrant. Bailable. Not comp. Sanction.

Punishment for forgery.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

[*Forgery*—s. 463.]

Synopsis.

(1) *Analogous Law* (5190).
(2) *Procedure and Practice* (5191-5194).
(3) *Proof* (5195).
(4) *Form of Charge* (5196-5197).
(5) *Evidence of Forgery* (5198).
(6) *Handwriting Expert* (5199-5201).
(7) *Leading Rules for Detection of Forgery* (5202-5203).
(8) *Finger Prints* (5204).
(9) *Foot Prints* (5205).

5190. Analogous Law.—This section merely prescribes a punishment for forgery not otherwise provided for. Subsequent sections provide for the same offence when accompanied by more aggravating circumstances, as where the document forged is a Court or public record (s. 466), or a valuable security, will or the like (s. 467), or the intention of the forger is to cheat (s. 468), or to harm the reputation of another (s. 469), in all of which cases the Code prescribes higher penalties of varying degree according to the nature and degree of the crime. Other sections deal with

(23) *Kotamraju Venkatragadu*, 28 M. 90 F. B.
(24) *Jan Mahomed*, 10 C. 584; *Hodgson*, 7 Cox 78.
(25) *Haradhan Maiti*, 14 C. 513, F. B.

cognate offences and present a close analogy to the corresponding offences relating to coins and stamps, as will best be seen from the following table:—

Subject.	Coin.	Stamp.	Document.
Possession of counterfeit	Ss. 239, 242	S. 259.	S. 474.
Using counterfeit as genuine.	Ss. 242, 243, 252, 253.	Ss. 259, 260.	S. 471.
Making or possessing counterfeiting instruments.	S. 235	S. 256.	Ss. 472, 473.

5191. Procedure and Practice.—This offence is non-cognizable but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. While, ordinarily, no complaint of a Court is required for the prosecution of the accused for this offence, such complaint is necessary "when such offence has been committed in any Court in respect of a document produced or given in evidence in such proceeding.(1) Complaint of the Court is then a prerequisite only in a case in which the document alleged to be forged is "produced or given in evidence." The word "produced" was added for the first time in the Procedure Code of 1898 to widen the scope of the rule by embracing cases in which a document is merely filed though it is not given in evidence.(2) The amendment was made to overrule the Madras case(3) in which a document merely *filed* but not tendered in evidence was under the law, as it then stood, held to afford no ground to the Court for ordering a prosecution under this section. The term forgery as used in s. 195 of the Procedure Code, is to be understood in its generic sense as implying all derivative offences generally so designated. For instance, an offence under s. 467 would be so called.(4)

5192. It is also worthy of note that the necessity of complaint arises only for the prosecution of a *party* to a proceeding and consequently since witnesses are not parties to a proceeding, no complaint of a court is required for their prosecution, though witnesses may be committed for trial under the more general provisions of s. 476.(5) So where the accused who acting as agent of a party to a civil suit, filed a forged document, the Court held his prosecution justifiable without sanction, as s. 195 (*c*) applied only to a "party" and did not extend to his agent.(6) Since complaint is only required in respect of a document produced in a "Court" which means a Court of Justice as defined in the Code(7) and since a Sub-Registrar of Assurances is not a Court, it follows that no complaint is

(1) S. 195 (c), Cr. P. C.
(2) *Akhil Chandra De*, 22 C. 1004.
(3) *Abdul Khadar* v. *Meera Sahheb*, (1892) 15 M. 224.
(4) *Tulja*, 12 B. 36.
(5) *Devji*, 18 B. 581 (585); *Mathura Das*, 16 A. 80 (83).
(6) *Chand Mal*, (1879) P. R. No. 9.
(7) S. 20.

required in respect of a forged document presented for registration in his office.[8]

5193. As regards the principles that should guide the Court in granting or refusing sanction, it has been already stated (§ 2171) that the Court incurs some responsibility in setting the criminal law in motion, and it must, therefore, be satisfied that it does not merely lend its aid to one party or the other without satisfying itself that a *prima facie* case exists to support the prosecution of the accused, and that there are reasonable chances of his conviction. It is not merely enough that reasonable suspicion attaches to the accused, but that such suspicion is strong enough to carry conviction to a judicial mind upon an impartial consideration of the facts and circumstances upon which it usually bases its judgment. The fact that the document impeached as forged has been found to be genuine by one Court is not of itself a sufficient ground to refuse sanction, even though the decision of the Civil Court was upheld on appeal which finally affirmed its genuineness, but it is a fact which though not creating a legal bar to the criminal prosecution by the accused is still a fact which the Court sanctioning or ordering the prosecution could not lightly ignore.[9] At the same time, where the prosecution of a person is ordered the judgment of the Civil Court is wholly inadmissible either for or against the accused, and the judge is not entitled to refer to it or to the opinions therein expressed to the jury.[10] An application for sanction, dismissed in default under the old law, did not amount to a refusal of sanction,[11] the application for which might be revived. Though the Court may complain against the accused for forgery, the committing Magistrate is competent to charge him for any other offence disclosed by the evidence, as for example, fabricating false evidence under s. 193.[12]

5194. The acquittal of the prisoner for one charge of forgery would not preclude his trial for the same offence based on a different document. The prisoner was charged with having forged two pattahs A and B bearing the same date and adduced in evidence by him in the same suit. No mention of any charge as to pattah B was made in the order of commitment; and the prisoner having been acquitted on an indictment for forging pattah A, it was held that the plea of *autrefois acquit* was inadmissible on a subsequent trial of the prisoner for forging pattah B.[13]

5195. Proof.—This offence is no exception to the general rule that the evidence against the accused justifying his conviction for this offence must prove conclusively all the ingredients of the offence charged. It is, of course, on the prosecution to prove that the document was forged, and forged by the accused. It is not for the defence to prove that it is genuine.[14] The gist of the crime is dishonesty or fraud. Where therefore the plaint was signed by the plaintiff's unauthorised agent in the name of the plaintiff and he also verified it, but the plaintiff admitted that he had authorised his agent to sign for him, it was held that though the

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(8) *See* s. 195 (2), Cr. P. C.; *Tulja*, 12 B. 36.

(9) *Gulmuhammad*, (1882) P. R. No. 36.

(10) *Gogun Chunder Ghose*, 6 C. 247.

(11) *Gopal*, 10 Bom. L. R. 95.

(12) S. 195 (5), Cr. P. C. overruling *contra* in *Subi Sani*, 8 B. H. C. R. 28.

(13) *Dwarkanath Dutt*, 7 W. R. 15.

(14) *Luchmi Singh*, (1918) Pat. 36, 44 I. C. 456, 19 Cr. L. J. 344; *Haidar Ali*, 17 C. W. N. 364, 18 I. C. 881, 14 Cr. L. J. 129.

agent's act was improper he could not be convicted for forgery as he had not done so dishonestly or fraudulently.(15)

It is open to the accused to deny a fact and afterwards explain it by averring a fact inconsistent with his denial.(16) A person should not be convicted of a serious crime solely on the evidence of similarity of thumb impressions,(17) or of handwriting.(18) The fact that a man who files a document is intersted in establishing its contents does not raise a presumption that he had filed it knowing it to be forged. Where a man filed a document upon which he relied, but when it was discovered that the document had been forged, he fled away, it was held that his conduct was in no way consistent with his innocence.(19)

The points requiring proof are:—

(1) (*a*) That the accused made, signed, sealed or executed the document in question, or any part thereof, or (*b*) that it was made by some one else.

(2) That it was made under any of the circumstances stated in s. 464.

(3) That the accused made it dishonestly or fraudulently, or with any of the specific intents enumerated in s. 463.

5196. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you forged a certain document, to wit (*describe it*) with intent to cause a damage *or* injury to A B *or* to support a certain claim of title to wit——; *or* to cause A B to part with certain property, to wit——; *or* to enter into a certain contract with A B with regard to (*mention the object*) *or* with intent to commit fraud (*specify it*) *or* that fraud may be committed by P Q (*or* a person unknown) and that you thereby committed an offence punishable under s. 465 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5197. A charge is bad which does not state the intention.(20) A person charged under this section and s. 471 cannot be convicted under s. 466 read with s. 471,(21) and even where he is charged with and convicted of this offence read with s. 471 he cannot be separately sentenced as for committing two independent offences.(22) A person cannot be charged for making or causing to be made a false document, since one is

(15) *Ram Sarup*, 43 I. C. (Pat.) 828, 19 Cr. L. J. 236.
(16) *Kali Prasad*, 26 I. C. (C.) 668, 16 Cr. L. J. 76.
(17) *Jassu Ram*, 4 L. 246.
(18) *Mhd Kobiruddin*, 51 I. C. (Pat.) 775, 20 Cr. L. J. 534.
(19) *Mobarak Ali*, 17 C. W. N. 94, 15 I. C. 81, 13 Cr. L. J. 449.
(20) *Haidar Ali*, 17 C. W. N. 354, 18 I. C. 881, 14 Cr. L. J. 129.
(21) *Mobarak Ali*, 17 C. W. N. 94.
(22) *Pirbhu Dial*, (1913) P. R. No. 4; *Mokand Lal*, (1901) P. R. No. 26; *Umrao Lal*, 23 A. 84; *contra* in *Badri Prasad*, 35 A. 63, in which no cases were cited to support the view of the text.

an offence under this section, while the other is only an act of abetment. A conviction based upon such a charge cannot be upheld.(23)

5198. Evidence of Forgery.—The elements necessary for the composition of this crime are set out in the last two sections which define the offence. As there stated (§§ 5135-5136) the basis of this offence is a false document defined in s. 464 which comprises all the elements constituting the offence more specifically defined in the earlier section. A forged document is then a false document in the special sense in which that term is used in s. 474, for the falsity of the document there consists not only of its being made to resemble another, but that it is so made on purpose, that purpose being dishonest or fraudulent (§§ 5151, 5152, 5157-5165). In short, this section was not intended to punish the accused for imitating or fabricating a document, but for doing so with intent to commit fraud. The gist of the offence then lies in the criminal intent which, when not obvious, must be clearly and conclusively established.(24) The following cases illustrate the application of this principle to concrete cases. The accused Ram Sarup was the *gumashta* of the plaintiff Sagar Mal who instituted a suit in which the plaint was signed and verified by the accused falsely describing his own writing as "Sagar Mal *ba kalam khas*" (*i.e.*, Sagar Mal by his own pen). Sagar Mal admitted that he had authorised the accused to sign for him. It was held that though the act of the accused was improper, it was not done fraudulently or dishonestly and that therefore the order for his prosecution was cancelled.(25)

In another case two persons were charged—one Haidar Ali for forgery and one Affsaruddin for its abetment. Affsaruddin was the scribe of a *kabuliyat* executed by Haidar Ali in favour of his landlord Chand Buksh. It was attested by three witnesses one of whom was Chand Buksh. The charge was that the name of Chand Buksh was a forgery, added to make the lessee's title secure by creating an estoppel against the landlord. The defence alleged that that signature was of an itinerant teacher. The Court held that if the accused intended to use that attestation against the landlord it might constitute the fabricating of false evidence or it might be a preparation for cheating but it did not amount to forgery because there was nothing to show that the accused had forged it or caused it to be forged by another and there was no proof of dishonesty or fraud on the part of either accused. They were therefore acquitted.(1) The accused had executed a marriage-deed in favour of one Aimona whose wealth he coveted. He was not married to Aimona and the deed contained a false recital of his marriage to her. It was held that though the deed was false the accused could not be convicted of this offence for making it because it was in reality a document executed by him though his motive for executing it was fraudulent.(2) Such might have been the intention of the accused, who had added to an entry in his account book, thumb

(23) *Haidar Ali*, 17 C. W. N. 354, 18 I. C. 881, 14 Cr. L. J. 129.

(24) *Luchmi Singh*, (1918) Pat. 36, 44 I. C. 456, 19 Cr. L. J. 344, *Haidar Ali*, 17 C. W. N. 364, 18 I. C. 881, 14 Cr. L. J. 129.

(25) *Ram Sarup*, 43 I. C. (Pat.) 828, 19 Cr. L. J. 236, following *Bhavanishankar*, 11 B. H. C. R. 3. To the same effect, *Kali Prasad*, 26 I. C. (C.) 668, 16 Cr. L. J. 76 (Signing another's name on a telegram without his authority but with no intent to injure him).

(1) *Haidar Ali*, 17 C. W. N. 354, 18 I. C. 881, 14 Cr. L. J. 129.

(2) *Gunjar Mohammed*, 69 I. C. (C.) 451, 23 Cr. L. J. 723.

marked by the debtor, words of his own to the effect that if the amount was not paid as agreed upon, he would take one and a half times the principal including interest. It was held that the addition was made as a statement by the accused and that therefore it did not amount to forgery.(3)

The following was, however, a clear case of forgery. The accused was insolvent. He wanted to take a contract from a Municipality and wanted to prove to them the return of his solvency. He owed a sum of Rs. 73-12 to the Cantonment authorities. He forged a receipt for that sum and filed it before the District Judge in support of his application for annulment of the adjudication order. He was convicted. It was argued for him that his motive was not dishonest which it was not, but it was clearly fraudulent in that he intended to deceive the District Judge into cancelling his previous order adjudging him insolvent.(4)

5199. Handwriting Expert.—Proof of falsity and fraud are then the two cardinal points which go to establish the crime and the only question that a case under this section is likely to present itself for solution is—how are they to be proved? Of these two the proof of the first must depend upon either direct or indirect or circumstantial evidence. The former may comprise the evidence of eye-witnesses, or the opinion of "experts"(5) or of those acquainted with the handwriting of the forger of the author of the genuine document,(6) or of the Court itself on the comparison of the disputed with the genuine handwriting.(7) Of these the first and third call for notice, the second depends upon the credibility of the witness, the nature and extent of his acquaintance with the handwriting and his general intelligence as disclosed or tested in his cross-examination.

5200. The evidence of a handwriting expert is, however, admissible out of a wholly different consideration. His evidence is admissible as of a person specially skilled in questions as to the identity of handwriting.(8) In order to be admissible such evidence must then be of a person *specially skilled* in questions as to the identity of handwriting. It is only when he is proved to possess such knowledge that his evidence becomes relevant. The Court cannot take judicial notice of such an expert, for there is no recognised institution for their training on the subject. Handwriting experts are mostly persons who set themselves up as such in business, in which case they pass themselves off as professional experts, and it is then for the Court to judge whether there is any justification for their pretensions. In England it is customary to call bank cashiers, postal officials and lithographers as such experts, it being supposed that such persons having to compare different signatures in the course of their official duties acquire an experience which qualifies them in the science of detecting forgeries. But this cannot be assumed as a matter of course, though the fact that in their official duties they have to discriminate between genuine and forged signatures, is certainly a point which tells in their favour. For as Maule, J., said: "All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required."(9) All the same, experts in handwriting are not in the same

(3) *Badan Singh*, 3 L. 373, (1923) A. I. R. (L.) 11.
(4) *Abdul Ghafoor*, 43 A. 225.
(5) S. 45, Indian Evidence Act (I of 1872).
(6) *Ib.*, s. 47.
(7) *Ib.*, s. 73.
(8) *Ib.*, s. 45.
(9) *Vander Donckt* v. *Thelluson*, 8 C. B. 112.

favour with the courts as other experts, as for instance, a medical witness. Indeed, if truth be told, they are secretly regarded as mercenary charlatans who are ready to place their self-styled expertness at the disposal of any party valuing their evidence. Moreover, even when such an expert is otherwise above suspicion, the Court nevertheless looks askance at the testimony of experts called by a party, and at all events, as Abbot, C.J., said, it is evidence " to which no great weight should be given.....for I think it much too loose to be the foundation of a judicial decision, either by Judges or juries."(10)

5201. Indeed, it has been even denied that there can be such a thing as expertness in handwriting. As it was said in a case: Many persons, write alike; having the same teacher, writing in the same office, being of the same family—all these produce similitude in handwriting, which, in common cases, and by common observers, is not liable to be distinguished. The handwriting of the same person varies at different periods of life: it is affected by age, by infirmity, by habit,"(11) and—it may be added—by the pen he writes with, and the ink he uses, the temper he is in and the posture in which he then places himself. Writing is reducing to symbols a man's mental thoughts, and the former often vary as much as a man's mental mood. All the same with all these differences, there is an individuality impressed on a man's handwriting which is all his own and cannot be simulated. This is the vindication of experts—but though this undoubtedly affords a firm foundation for the science of handwriting, it contains so many elements of uncertainties that there is as much danger of the expert deceiving himself as of deceiving others. Consequently it is now a recognized rule of practice not to convict a person on the mere uncorroborated testimony of a handwriting expert.(12)

5202. Leading Rules For Detection of Forgery.—These are words of necessary caution, but with that reservation, there is no reason why the following analysis of the elementary rules should not prove useful, not only as aids for detecting forgeries, but also for checking the work of those who may be called to give evidence as experts:—

(1) The sole and only means of detecting forgery from the genuine handwriting, is by close comparison of the disputed with the proved or admittedly genuine handwriting. It is, therefore, necessary that the expert should have before him undisputed handwriting to afford basis for pronouncing on the character of the disputed document. For this purpose, the more specimens he has of genuine writings written at different times and with different pens the better, for it would then enable him to eliminate immaterial differences and take in only their common individual characteristics which give an individuality to the writing.

(2) The expert must be told the respective ages of the two writings as far as possible for the effect of age, disease and excitement is characteristically reflected in the handwriting.

(3) The examination for the two must at first be superficial, that is with the naked eye without the aid of a microscope or a magnify-

(10) *Gurney* v. *Langlands*, 5 B. & A. 330; to the same effect, *Srikant* 2 A. L. J. R. 444; *Jalaluddin* (1912) P. W. R. 18, 15 I. C. 979, 13 Cr. L. J. 563.

(11) *Arguendo* in *Johnson* (*Mr. Justice*), 29 How. St. Tr. 475.

(12) *Shrikant*, 2 A. L. J. 44; *Jalaluddin*, (1914) P. L. R. 147, 15 I. C. 979.

ing lens. It should be confined to the detection of the characteristics of differences present between the disputed and admitted hand writings and not present between the two admitted specimens of genuine hand-writing.

(4) It is universally recognized that no person is capable of producing two writings or signatures exactly identical. It therefore naturally follows that the two writings of the same person must necessarily present differences —sometimes great and deceptive, at other times small—but still differences which must be noted for the purpose of comparison, and elimination as immaterial differences, which in no way affect the question of genuineness.

(5) The aid of microscope specially constructed to expose a large surface is at this stage necessary—a magnifying lens is scarcely of any value for it possesses neither the necessary magnifying power nor does it afford that steadiness to the object and the eye which is absolutely necessary for the purpose of examination.

(6) Looking through the microscope the handwriting will reveal details of the writer's habit which the naked eye had failed to discover. It will, for instance, disclose the following points for observation:—

(*a*) The usual course taken by his hand in forming certain letters, whether they are formed by one continuous writing, or after pen-rests, each of which will leave a distinct dot in the continuous line which otherwise marks the course of the pen.

(*b*) The method of his pen-presentation will be disclosed by the uneven ink on the lines which form the letters of his handwriting. To the naked eye these lines appear evenly black, but the microscope discloses a wholly different fact. For it will appear that the line really consists of two unequal lines one of which is distinctly blacker than the other. These furrows are made by each of the split points of the pen, and a little trial will convince anyone that the writer ordinarily applies more pressure to one than to the other, according as he holds the pen with its outer end slanting in one direction or the other.

(*c*) The measure of pen-pressure in the admitted and disputed handwriting should become manifest. But for greater accuracy the two handwritings may be superimposed so that the two can be seen as a transparency with a strong light behind it. This feature of habitual pen-pressure is one which more than anything else assists the examiner in detecting a forgery. For while the writer's pressure being continuous and normal, the pen-furrow will be continuous and contain an even flow of the writing fluid, the forger has either to stop to look at the model, or go over the same writing over again to finish the simulation with approaching resemblance.

(*d*) Traces of pencil marks or tracing lines and scratching caused by rubber or erasure destroying the gloss or smoothness of the paper.

(7) Having examined so far the writings must next be compared for habitual parallelisms between the disputed and admitted handwritings. This depends upon the comparison of the furrows in the lines of each, which must present the same outlines in the two writings.

(8) At this stage care must be taken to see that the disputed handwriting is not the disguised handwriting of the same person. Where it is done by one himself conversant with the science of handwriting, it may well defy detection; but in any other case the imitation of oneself does leave behind the same peculiarities which distinguish the true from the false handwriting.

(9) The examiner may now be able to formulate a provisional opinion whether the two writings are from the same or different hands. If the latter, the writing must be closely examined to see whether it is a tracing of a copy or a freehand drawing. One of the most prominent features of forgeries made by tracing, is the general lameness of the writing as appearing in the uniform width of the lines, and the omission of the usual shading emphasis. This is due to the absence of the habitual pen-pressure, and the necessitated slow movement of the pen held closely in contact with the paper, and by which a uniform and steady flow of ink is deposited thereon; thus making what should be the heavier and lighter lines of one width and density as to shading. This method of tracing is restored to by novices but is seldom employed by expert forgers.[13]

The more usual method of tracing is to make a pencil sketch of the writing over which it is afterwards copied. But this method will produce the tell-tale pen-rests, retouchings, angularity or change of direction of lines due to hesitancy, which reveal all forgeries by copying.

(10) As compared to tracings and copy, the detection of forgery by freehand by a person who has made a study and practice of the writing to be copied, is still more difficult, and if the imitator has, moreover, practised in view of the rules by which handwriting is detected, the risk of detection is probably too remote. The two writings then present the same alignment, pen-presentation, pen-rests, angles and curves as to deceive even the writer of the genuine writing. The question may then depend only upon his reliability as a witness if he remembers that he never wrote the disputed writing. Fortunately, however, such adepts in imitation are rare, and in ordinary cases of even skilful imitators, traces of the writer's individuality are frequently left to serve as guides to the expert in his examination of the writing. For this purpose attention should be given to any hesitancy in form or movement, manifest in angularity or change of direction of lines, changed relations and proportions of letter, slant of the writing, its mechanical arrangement, disconnected lines, retouched shades or the like.[14]

(11) The examiner should not despise the crude but none the less reliable test of comparing the mode of the formation of letters in the

(13) Hagan on Disputed Handwriting p. 90.

(14) Ames, Forgery, 72.

admitted and disputed handwritings. For this purpose attention should be concentrated not on the general effect of the two writings but on the individual letters. But this does not mean that a general view of the two writings should be altogether ignored. For attention should be equally paid to the dots and the dashes, the spacings and flourishes, the habit of writing in straight or sloping lines, and the like, but these are sometimes treacherous guides, for they may be disguised, and an ambidexterous writer may be able to produce two specimens as unlike each other as possible. But in the case of letters howmuchsoever simulated, the leading characteristics are often easily detectable—such as the angular and heavy shades at certain points, the curves and angles, the loops and strokes which though subdued still remain as mangled trophies of the writer's penmanship.

(12) It must be remembered that the tests though applicable to an ordinary writing with a split nib do not all apply to a writing with a stylographic pen or a pencil, or even to a writing executed with a fountain pen, for the pressure given to open the nibs of the pen on a downward movement is not possible in the other case, the result being that the writing loses most of its individual characteristics, and the only thing then available to the expert is a comparison of forms of letters and other points noted in the last rule.

5203. These are practically all the rules yet known to assist the expert in his examination of a disputed handwriting. They may be equally availed of by the Court for the purpose of comparison, which should probably give it more satisfaction than the testimony of an expert.

5204. Finger Prints.—As no two persons are alike, so their finger prints are also dissimilar. But as no two persons are wholly unlike each other, so no two finger prints are entirely dissimilar. They present some similarities but a much larger number of dissimilarities. All finger prints have been divided into four main groups, namely: (1) Arches, (2) Loops, (3) Whorls, and (4) Composites. "In Arches the ridges run from one side to the other making no backward turn; there is ordinarily no delta, but, when there is the appearance of a delta, no ridge must intervene between the 'inner' and 'outer terminus.'[15] In Loops some of the ridges make a backward turn but without twist; there is one delta. In Whorls some of the ridges make a turn through at least one complete circuit; there are two deltas. Composites are combinations of the first three." Sir E. R. Henry, who was responsible for introducing the system, states that the possibility of coincidence of any ten characteristics being found in two thumb impressions is only one in a million.[16] The larger the number of coincidences between the two impressions the greater the probability of the two being of the same hand. But in point of practice where two thumb impressions are different, the characteristic differences would be far more numerous. Nothing, of course, turns upon a few common characteristics between

(15) E. R. Henry's Classification and use of Finger Prints, p. 20.

(16) *Ib.*, p. 57.

the two impressions. It is the aggregate differences which add to the logic of probability.

5205. Foot Prints.—Similar rules apply to foot prints. Mr. Gayer in his book on 'Foot Prints' writes as follows:—"It is obvious that every individual's foot-print must have a distinct individuality, for even if there were only three common types of each of the features, and we had nothing else to go on, the total possible number of different types would be 531, 441, so that, on the average, two feet in about every million would be similar. A careful study of the illustrations and of the text will show that these figures do not err on the side of exaggeration."(17) To a similar degree features can be traced by their shoe tracks, since shoes leave distinct impressions some showing sharp edges, others rounded worn edges, others again may have holds or patches, or rubber pads or they may be shod with iron horse shoes, tips and bars.

5206. Adverting now to the evidence of intent, it is but seldom that direct evidence is likely to be available. The question must then be approached from the standpoint of acts and circumstances which are unmistakeably badges of such intention.

Session. Non-cog. Warrant. Not bail. Not comp. sanction.

Forgery of record of Court or of public register, etc.

466. Whoever forges a document purporting to be a record or proceeding of or in a Court of Justice, or a register of birth, baptism, marriage or burial or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

[*Court of Justice*—s. 20. *Public servant*—s. 21. *Document*—s. 29. *Forges*—s. 463.]

Synopsis.

(1) *Analogous Law* (5207).
(2) *Procedure and Practice* (5208).
(3) *Proof* (5209).
(4) *Form of Charge* (5210-5211).
(5) *Forgery of a Public Record* (5212-5214).
(6) *Documents Included* (5215-5216).

5207. Analogous Law.—This section takes the offence of forgery punishable under the last section one step higher, owing to the importance of the documents forged. The offence must, however, be distinguished from that punishable under s. 167, though the Courts are

(17) G. W. Gayer on Foot Prints, Art. 11. p. 3.

by no means agreed on the subject. For while according to Garth, C. J. (Field, J., concurring) this section was not intended to apply to cases where a public officer, or a person acting for a public officer whose duty it is to make entries in a public book, knowingly makes a false entry, but to cases where a certificate or other document is forged by some unauthorised persons with a view to make it appear that it was duly issued by a public officer,[18] the contrary has been held in the Punjab, where this section is held to be wide enough to cover even the case of a public servant making a false record, if it was made dishonestly or fraudulently.[19] The question really depends upon the meaning to be assigned to the words "purporting to be" which are unfortunately ambiguous, for they are susceptible of being construed to mean that the document tampered with is a record or proceeding, or that the forger intended to pass it off as a record or proceeding. In the one case the existence of a genuine record or proceeding must be assumed, in the other case there need be no genuine record to correspond with the forgery.

5208. Procedure and Practice.—This offence is non-cognizable but warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and exclusively triable by the Court of Session. For other points of practice reference should be made to the last section (§§ 5191-5195).

5209. Proof.—The points requiring proof are:—

(1) That the document in question was a forgery (s. 463).

(2) That the accused forged it.

(3) That is was one of the kinds specified in the section.

5210. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you forged the document, exhibit—which purported to be a record [or proceeding of (or in) a Court of Justice, &c.] and that you thereby committed an offence punishable under s. 466 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5211. A person charged under the last section cannot be convicted under this section,[20] nor can one convicted under this be convicted equally under the next section.[21]

5212. Forgery of a Public Record.—This section is ambiguously worded (§ 5207) and may be construed to mean either fabrication of a document so as to pass it off as the record or proceeding of a Court

(18) *Juggun Lall*, 7 C. L. R. 356 (366).
(19) *Mul Singh*, (1895) P. R. No. 13, dissenting from *Juggen Lall*, 7 C. L. R. 356; to the same effect, *Hari Chand* (1903) P. L. R. 15.
(20) 17 C. W. N. 94, 18 I. C. 81.
(21) *Girdhari Lal*, 2 O. W. N. 174, 86 I. C. 993, (1925) O. 413.

of justice or tampering with such record or proceeding by a public servant. In the view of the Calcutta High Court the section is only intended to apply to the former, and to the latter only when it is done by a person other than the public servant whose duty it was to prepare that record.[22] But this view has been held in the Punjab[23] to be too narrow, the Court holding the section equally applicable to either case, provided that the act is shown to have been done "dishonestly" or "fraudulently."

But in this view the false record of a corrupt judge would be forgery, and since forgery implies the making of a false document, it is difficult to bring such record within any of the three clauses of the section[24] which describes that term. Moreover, since the Code specially enacts s. 167 which deals with this abuse, it is reasonable to suppose that it was not again intended to provide against it in this section. The section was, indeed, probably intended to apply to a case in which property is obtained or an advantage gained by means of spurious documents such as the warrant of a Civil Court or the birth, baptism, marriage or death certificate of a person. So, if a person should forge a warrant of arrest or attachment of another's property, and on its strength obtain delivery of property, he should be guilty of the offence punishable under s. 468 and *a fortiori* of this offence. The accused obtained employment as a bailiff and Bench Clerk in a District Court on the strength of an educational certificate issued in favour of another person, but in which he altered the name and age to suit himself, which he produced as his own certificate. He was held to have been rightly convicted under this section and section 471.[25]

5213. In another case the facts were these: The accused was alleged to be a professional forger, and the police consequently laid a trap for him by sending a constable in disguise to employ him to forge a notice by altering the name in a genuine notice issued by a Deputy Collector, and which he did on payment of Rs. 25. He was then convicted under this section. He appealed, and Sir Comer Petheram, C.J., and Ghose, J., feeling some doubt whether a person could be guilty of forging a document when the document was never intended to be used at all and whether the person who was the agent of the other for the purpose of making the document could have a wicked intention when the person who employed him, the principal, had no such intention referred the case to a Full Bench of five Judges, whose judgment was delivered by the learned Chief Justice who decided both the points in the affirmative, basing his decision on the judgement of Erle, C. J.,[1] and holding with him that the document being used for the purpose of being used to deceive the Court, must be deemed to have been used with the intention of being used for that purpose.[2] It is submitted that the same conclusion might have been more clearly deduced from the concluding

(22) *Juggun Lall*, 7 C. L. R. 366.
(23) *Mul Singh*, (1895) P. R. No. 13; *Hari Chand*, (1903) P. L. R. 15.
(24) S. 464.
(25) *Nga Pya*, (1904) 2 L. B. R. 316; following *Nga Shwe The*, (1893) P. J. L. R. 52.

(1) *Hillman*, 1 L. & C. C. C. 343.
(2) *Haradhan Maiti*, 14 C. 513, F. B. The words "for the purpose" occur in 24 & 25 Vict., c. 100, s. 59, which Earl C. J., had to construe in *Hillman*, 1 L. & C. C. C. 343.

words of s. 463 to which, curiously, no reference was made but reference to which was sufficient for the purpose of the case. For, that clause is an authority for the proposition that if the intention of the forger was that the document might be used for the purpose of fraud, his act amounts to forgery irrespective of the ultimate purpose to which it might be intended to be put by another (§§ 5157-5165). Of course, such a case is widely different from one in which the accused, whose duty it was to give copies, gave a true copy of a document which was false and known to be false to him.(3)

5214. Of course, there can be no forgery and no offence under this section, unless the alteration or addition is made dishonestly or fraudulently. The Sessions Judge of Noakhali committed one Reily, a Police Superintendent into custody for having antedated his inspection note, but the High Court quashed the commitment holding that adding the date of inspection afterwards was not antedating it, and that in any case even if it was antedated there being no reasonable suggestion of fraud, the accused could not be tried for this offence.(4) In another case the accused, a Barrister of Sierra Leone was convicted of altering, which he committed, the names of two witnesses in a summons of a Court, but the Privy Council quashed his conviction on the ground that there was no motive or intention to defraud, though the alterations were unquestionably unjustifiable and irregular.(5)

Documents Included.

5215. It will be observed that the section is not confined merely to documents made or maintained by a public servant, for it refers to a register of birth, baptism, marriage or burial irrespectively of the nature of the person by whom it may have been kept. Consequently, it has been held that the section applied to a private register of marriages of Mahomedans kept by a Kazi.(6)

5216. As regards the documents purporting to be made by a public servant, it is obvious that the document must on its face be a colourable imitation of a public document, but it is not necessary that the imitation should be too close or exact. Indeed, if the imitation is too remote, it may naturally be a question left to the jury whether the accused could have intended to use such a crude production for the purpose alleged. But otherwise, the degree of imitation has no further bearing on the case. So where the accused produced an order purporting to be from an official to a constable to deliver to bearer some cattle and it appeared that the seal impressed thereon corresponded to no official seal and the signature was a scrawl intended to be an imitation of English signature, the Court held that the difference did not vitiate the conviction, for the question was one properly left to the jury whether the accused had intended to use the document knowing it to be forged.(7) Since a plaint after it is once filed becomes a part of the record of a Court, its fraudulent alteration would be punishable under this section.(8) So where the accused indorsed payment

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(3) *Marigawda*, (1891) B. U. C. 583.
(4) *Reily*, 5 C. W. N. 609.
(5) *Taylor*, (1912) A. C. 317 (353).
(6) *Bacha Miah*, (1891) 1 Weir 541.
(7) *Prosunno Bose*, 5 W. R. 96.
(8) *Shama Charan*, 15 I. C. (A.) 1004.

upon his mortgage which the mortgagee had filed in Court, he was held rightly convicted of this offence.(9)

Session. Non-cog. but cog. if the security is Govt. note. Warrant. Not bail. Not comp. Sanction.

Forgery of valuable security, will, etc.

467. Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon or to receive or deliver any money, moveable property or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

[*Moveable property*—s. 22. *Document*—s. 29. *Will*—s. 31
Valuable security—s. 39. *Forges*—s. 463.]

Synopsis.

(1) *Analogous Law* (5217).
(2) *Procedure and Practice* (5218-5220).
(3) *Proof* (5221).
(4) *Form of Charge* (5222-5223).
(5) *Forgery of a Valuable Security or a Will* (5224-5230).
(6) *Meaning of "which purports to be"* (5227).

5217. Analogous Law.—This section advances another step in point of aggravation owing to the still more important nature of the documents forged, and the risk of proportionately more serious loss to the persons aggrieved. In other respects this section is the same as the last.

5218. Procedure and Practice.—For the purpose of procedure this section is divided into two parts—one in which the valuable security is a promissory note of the Government of India, in which case the offence is cognizable, and the rest, in which case it is non-cognizable, and in either case warrant should ordinarily issue in the first instance, and it is both non-bailable and non-compoundable and is exclusively triable by the Court of Session.

5219. It is not safe to order a prosecution for this offence upon the sole evidence of an expert witness,(10) a person convicted of the abetement of this offence cannot again be convicted of using it under s. 471; since the latter section applies to persons other than the forger.(11)

(9) *Abdul Rashid Khan*, 12 A. L. J. 104, 22 I. C. 1005.
(10) *Budhabai*, 86 I. C. 428, (1925) N. 358.
(11) *Ismail Panju*, 89 I. C. 523, 21 N. L. R. 152; *Digambar*, 88 I. C. 1051, (1925) N. 440.

5220. Two persons A and B conspired to forge an account. They were both jointly tried but B was acquitted as the only evidence against him was the uncorroborated testimony of an accomplice. A was convicted under this section read with s. 109. A contended that after B's acquittal he could no longer be convicted of having forged the account with B. But the Court upheld his conviction holding that the failure of the conspiracy could not affect A's individual liability for having abetted C to forge the accounts.(12) For other points of practice *see* s. 465 (§§ 5191-5195).

5221. Proof.—The points requiring proof are:—

(1) That the document in question was a forgery.

(2) That the accused forged it.

(3) That the document is one of the kinds mentioned in the section.

5222. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you forged a certain document purporting to be a valuable security, to wit——(*or* a will made by—; *or* an authority to adopt given by- —to——; *or* an authority given to——to make or transfer a certain valuable security to wit——); and that you thereby committed an offence punishable under s. 467 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5223. A person may be charged for and convicted of forging under this section and using a forged document under s. 471,(13) though it is improper to pass on him independent sentences for the two offences.(14) A person forging a document outside the limits of the jurisdiction of the Court cannot, of course, be convicted of this offence though he may still be convicted of using it under s. 471.(15)

5224. Forgery of a Valuable Security or a Will.—The high penalty of transportation provided in this section is only applicable to the special class of documents here enumerated. They are all documents of title relating to or affecting property, and in many cases negotiable and consequently, their forgery necessarily involves grave risk to private property as well as to commerce. For it will be observed that, of the documents here enumerated (*i*) a valuable security, (*ii*) an authority to assign a valuable security or to pay or receive the same or any dividend due thereon, or (*iii*) a receipt, acquittance or acknowledgment

(12) *Chhotalal*, 14 Bom. L. R. 367.

(13) *Badri Prasad*, 35 A. 63; *Kamatchinatha*. 42 M. 558; *Madhu Chinnagi*, 32 I. C. (M.) 665, 17 Cr. L. J. 73; *Nga Ba Sein*. 3 Bur. L. J. 113; *Gajanan*, 77 I. C. (N.) 825, 25 Cr. L. J. 473; *contra* in *Umrao Lal*. 23 A. 84; *Mokand Lal*, (1901) P. R. No. 26; *Prabhu Dial*, (1913) P. R. No. 4.

(14) *Pirbhu Dial*, (1913) P. R. No. 4, 19 I. C. 183.

(15) *Bhagavatty*, 17 I. C. (M.) 798.

of money or valuable security or moveable property, are all documents of title relating to moveable property, while (*iv*) a will, and (*v*) an authority to adopt a son are other documents affecting the devolution of property. Law therefore naturally esteems such documents of title far above those comprised in the last section. But as the offence is serious, so proportionately strict must be the proof of the facts distinguishing section from others. It should be noted that all the documents are such of which registration is not compulsory. Consequently there is no easy means of unravelling the fraud and so prevent lasting injury.

5225. Again, since forgery is complete as soon as the forged document *purports to be* a valuable security, it follows that it is not necessary that the document should be *prima facie* good. So forgery may be committed of a promissory note on unstamped paper, even though a Statute prohibits its being stamped afterwards[16] or the document is not to be valid, in the form prescribed by the Statute.[17] So where the accused acknowledges his liability to the prosecutor by merely writing down the figure "Rs. 164" with no particulars and signed it, without stamping it, the Court held that though invalid, since it "purported to be" an acknowledgment, its tearing up amounted to the destruction of a valuable security punishable under s. 477.[18] So it has been held that a deed of gift[19] or sale[20] being compulsorily registrable "purports to be" a valuable security before its registration, so that its forgery is complete with its execution though it was awaiting registration.

5226. But there are certain deficiencies which have necessarily the effect of rendering a document so incomplete as the maker could not be punished for forging it. Such would be the case where a promissory note is wanting in signature, which without the signature signifies nothing. So where the accused altered a bank note for one pound into forty pounds and cut out the signature of the payee, upon which he was indicted for forgery, on a case reserved it was held that the want of signature was fatal to the prosecution.[21] Such a case would not even amount to an attempt. So where the accused got printed certain forms as used by the Bengal Coal Company, it was held that the fact that the accused had got the forms printed for the purpose of forging receipts of the Bengal Coal Company, could not be held to be a forgery, because there could be no forgery of a receipt of which the signature was all in all, nor even an attempt because the act had not advanced far enough so that it might be said of the act that it would have ended in forgery if not interrupted.[22] Such was the case of the accused who was found in possession of several blank stamp papers purchased in different names which the prosecution suggested were intended to be used for forging bonds in the names of those persons, but which the Court held did not convert them either into a docu-

(16) *Morton*, 2 East. 955.
(17) 2 East. P. C. 956; *M'Intosh*, 2 Leach 883.
(18) *Ramasami*, 12 M. 148, *Kapalovoya*, 2 M. H. C. R. 247, 7 M. H. C. R (App.) 26.
(19) *Kashi Nath Naik*, 25 C. 207.
(20) *Gobind Ramappa*, (1889) B. U. C. 467.
(21) *Pateman*, R. & R. 45.
(22) *Riasat Ali* 7 A. 352.

ment or a valuable security so as to make the possessor liable under this section.[23]

Meaning of "which Purports to be."

5227. The words "which purports to be" are wide, but they are not wide enough to include a document which, though it does not purport to be a valuable security, has still that effect or is evidence of a money obligation. An example will make this clear. Suppose a person were to forge a letter from a dying man, inviting him to his house as he had appointed him his heir, the accused could not be convicted under this section because the letter forged does not purport to be a will, though it may have been intended to support it. The documents contemplated by the section must be documents which of their own force are or are intended to be those enumerated in the section.[24] In this view the section has no reference to what purports to be merely a copy of an original, which, apart from the original, did not of its own force purport to be a valuable security, or an order for the delivery of moveable property. The accused had forged an order purporting to be the copy of the original order issused by a mamlatdar for the delivery of possession of moveable property, and whereupon he was convicted under this section, but the Court held this section inapplicable on the ground that the forged paper, being only a copy and unauthenticated, would not, if genuine, be a document which could give authority to deliver moveable property.[25]

5228. Lastly, this is an aggravated form of forgery, and it must, consequently, possess all the essential elements of that offence. Of these, dishonest intent or the intent to defraud as described in s. 463 is the most important.[1]

5229. The accused brought two documents (A and B), the one (A) registered, and the other (B) unregistered and wanted a lad to copy out on B in red ink the registration endorsements from A. A was the conveyance of property executed by one P in favour of the accused's wife; B purported to be P's conveyance of the same property of a later date in his own favour. It was proved that A had been duly executed and registered by P who knew nothing about B. The prosecution suggested the accused's motive for forging B to be to defraud his wife, but of this there was no evidence. It was a mere surmise. The Court accordingly held that in the absence of evidence of dishonesty or fraud the accused could not be convicted of this offence.[2] But where H had remitted a sum by money order payable to B who was advised to pay it to H's creditor P who intercepted the postman took him to one A and made him deliver the money to him misrepresenting to the postman that A was B. B was not informed of the payment. It was held that both P and A were guilty of this offence of forging a valuable security, *i.e.*, the money order receipt.[3]

(23) *Raghoonundun*, 15 W. R. 19.
(24) *Ib.*
(25) *Naro Gopal*, 5 B. H. C. R. 56.
(1) *Kailas Chandra Das*, 6 C. W. N. 382 (384).
(2) *Ib.*, pp. 384, 385.
(3) *Jogidas*, 24 Bom. L. R. 99, 66 I. C. 328, 23 Cr. L. J. 264, (1922) A. I. R. (B.) 82.

5230. As the purpose of fraud must be something more substantial than obtaining recognition to an empty title,(4) a document forged to support it fails to fall under any of the documents here enumerated, and the forger could not then be convicted under this section, or for that matter even under section 465.

Session. Pres. Mag. or Mag. of 1st class. Non-cog. Warrant. Not bail. Not comp. Sanction.

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Forgery for purpose of cheating.

[*Document*—s. 29. *Cheating*—s. 415. *Forgery*—s. 463.]

Synopsis.

(1) *Analogous Law* (5231).
(2) *Procedure and Practice* (5232).
(3) *Proof* (5233).
(4) *Form of Charge* (5234).
(5) *Forgery to Cheat* (5235-5236).

5231. Analogous Law.—This section refers to a special case of forgery in which the document is made subservient to cheating which is the main purpose of the offender. It is not however, necessary that the forger should be himself the cheat, for all that the section contemplates is that the forger shall intend that the document shall be used for that purpose. It may then be that the forger may be convicted of this offence though he could not be of cheating.

5232. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. For other points of practice reference should be made to section 465.

5233. Proof.—The points requiring proof are:—

(1) That the document in question is a forgery.

(2) That the accused forged it.

(3) That in forging it he intended that it shall be used for the purpose of cheating.

5234. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you forged a certain document to wit—(*describe it*) intending that it shall be used for the purpose of cheating, and that you thereby committed an offence punishable under section 468 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court)

(4) *Jan Mohamed*, 10 C. 584.

"And I hereby direct that you be tried (by the said Court) on the said charge."

5235. Forgery to Cheat.—Forgery has been described before (§§ 5136-5189) as involving the presence of one or other of the two elements of dishonesty or fraud. As fraud when connected with the delivery of property is dishonesty, and as cheating is an offence against property, it follows that this offence has for its object the dishonest acquistion of property. Forgery is then a means to an end—that end being the wrongful acquisition or retention of property. This must be the intention of the forger, though it is not necessary that he should use the document himself for the purpose of cheating, or that he should cheat at all. He must, however, *intend* it to be used for cheating, which makes him at least the abettor of the cheat. So where a school-master forged a school attendance register for the purpose of obtaining a Government grant, he was held to be punishable under this section.(5) The same was held to be the case where the cashier of the prosecutor had falsified the latter's account books in his custody, his object being to deceive his employer.(6) The facts of this case are, however, not reported, and it does not appear whether the alterations in the accounts were made to conceal a past crime or to facilitate the commission of a new one. It is, however, evident, that if forgery is committed in the former case, it would not be punishable under this section, for the intent that the forged document shall be used for the purpose of cheating points to futurity and has no reference to the case supposed.

The accused, a process server was given summons for service returnable by a certain day. The server was a week late and said that he was ill, in support of which he produced a certificate countersigned by two witnesses. It was found to be forged, and upon the question arising whether his offence fell under this section the Madras Court held that it did.(7) But where the accused, who was the consignee of goods liable to octroi duty, was shown to have falsely and incorrectly read out to an octroi daroga the contents of an invoice of a consignment of goods and so making the value to appear to be less than it actually was, and he was shown to have afterwards altered the invoice so as to make it afterwards correspond with what he had dictated to the daroga, it was held that the alteration in the invoice having been made after the offence of cheating was complete, and being made by the accused for the purpose of saving himself or concealing the offence of cheating, a charge under this section was not sustainable.(8)

5236. Even where forgery is committed with intent to cheat by its means in the future the accused is not necessarily punishable under this section, for the cases supposed in the last two sections

(5) *Kuppua Pillai*, (1885) Weir (3rd Ed.) 336.
(6) *Bannessur Biswas*, 18 W. R. 46.
(7) *Kamatchinatha*, 42 M. 558, following *Sabapati*, 11 M. 411; *Rash Behari*, 35 C. 450, dissenting from *contra* in *Jiwanand*, 5 A. 221; *Girdhari Lal*, 8 A. 653.
(8) *Hurmukh Rai*, (1876) P. R. No. 15.

may equally fall under this—as where the accused forges a document such as a cheque or a warrant of attachment and by that means obtains money or property, in which case the offender would be liable to punishment under the last section or section 466 as the case may be. This section provides then for a case not otherwise specially provided for.

Session. Pres. Mag. or Mag. of 1st class. Non-cog. Warrant. Bailable. Non-comp. Sanction.

Forgery for purpose of harming reputation.

469. Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[*Document*—s. 29. *Forgery*—s. 463. *Harm the reputation*—s. 499.]

Synopsis.

(1) *Analogous Law* (5237).
(2) *Procedure and Practice* (5238).
(3) *Proof* (5239).
(4) *Form of Charge* (5240).
(5) *Principle* (5241).
(6) *Meaning of Words* (5242).
(7) *Forgery to Harm Reputation* (5243-5244)

5237. Analogous Law.—This section, again, deals with a case in which forgery is made for the purpose of "harming the reputation" of another, or which the forger "knows that it is likely to be used for that purpose." Such forgery would then have "fraud" more than "dishonesty" for its purpose.

5238. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Court of Sessions, Presidency Magistrate, or the Magistrate of the first class.

5239. Proof.—The points requiring proof are:

(1) That the document in question is a forgery.
(2) That the accused forged it.
(3) That he did so intending that the document forged would harm the reputation of some one, or knew that it was likely to be used for that purpose.

5240. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you forged a certain document to wit—(*describe it*) intending that the same shall harm the reputation of A B (*or* knowing that it is likely to be used for the purpose of harming the reputation of A B) and you thereby committed an offence punishable under section 469 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5241. Principle.—A person who forges a document intending to use it to defame another is not only guilty of forgery but of defamation as well. He is, at any rate, guilty of abetting the latter offence. But a person who forges a document with only knowledge of the likelihood of its being so used may be less blameworthy, but the difference in his case is not such as to place him in a different category. His case is, however, one deserving of consideration in passing the sentence.

5242. Meaning of words.—*"Shall harm the reputation of any party"*: Such harm would be illegal on account of the means adopted, though it may be otherwise justifiable under any of the exceptions to section 499. *"Knowing that it is likely to be used for that purpose"*: Such knowledge must be assumed where there is intention, but there may be knowledge without intention, as where one is hired to forge an incriminating document purporting to have been written by another whom the writer does not know. The offence lies in the use of forged writing to publish a lampoon.

5243. Forgery to Harm Reputation.—A person who publishes any imputation concerning another intending to harm his reputation or knowing it likely to harm it thereby, is guilty of the offence of defamation. But a person who forges a deed with that intention or knowledge need not necessarily be a defamer, for he may forge libellous matter without publishing it. But his criminality is nevertheless heightened by the fact that he wilfully uses his first offence to facilitate the commission of another. It may be that the person defaming another on the strength of the forged document is privileged and so escapes scotfree, but the forger cannot plead the same ground of exoneration, for he cannot be heard to say that he had the right to forge a document to support his libellous truth. The section, consequently, eschews the use of such a term as defamation, for it may then give rise to the question about the applicability of the exceptions. The question of justification is, therefore, wholly immaterial to this offence, for no one has the right to do evil so that good may come. So if a person were to send a forged pseudonymous petition charging A with the murder of B, he would bring himself within the mischief of this section, though A may have in fact murdered B.(9) Of course, the offence of the accused would be aggravated if A was innocent, but the fact that he was guilty did not justify the accused in committing *forgery*. But if, in such a case the petition were sent anonymously without signature or with only a *nom-de-plume* of the writer the case would be different. For the document could not then be held to be forgery, and the accused could not then be convicted of this offence.

5244. But this is not, of course, the only way for committing this offence. A person may forge a letter or other document to establish some compromising fact concerning another. He may, for instance, show that another person leads an immoral life by forging a letter

(9) *Shifait Ali*, 10 W. R. 61.

purporting to be addressed by him to his sweetheart, or *vice versa*, or he may show that the other is a man of no character by forging a document purporting to be a demand of a bribe, or in fact anything likely to lower him in the estimation of his fellow-men. The offence is complete as soon as the forgery is complete. The publication is unnecessary, nor is it necessary that any person should have, in fact, been injured.

Forged document.

470. A false document made wholly or in part by forgery is designated "a forged document."

[*Forgery*—s. 463. *False document*—s. 464.]

Synopsis.

Analogous Law (5245).

5245. Analogous Law.—This section defining a "forged document" is a necessary corollary to section 464 which defines a document to be a false document whether it is wholly or partially false. And since the making of a false document has been shown to amount to forgery it follows that the document forged must of necessity be a forged document (§ 5132).

Session. If document a G. P. note otherwise same as forgery, Non-cog. but cog. if document a G. P. note. Warrant. Bailable. Non-comp. sanction.

Using as genuine a forged document.

471. Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

[*Dishonestly*—s. 24. *Fraudulently*—s. 25. *Reason to believe*—s. 26. *Document*—s. 29. *Forged document*—s. 470.]

Synopsis.

(1) *Analogous Law* (5246).
(2) *Procedure and Practice* (5247-5253).
(3) *Form of Charge* (5254).
(4) *Fraudulent and Wilful Use of Forgery* (5255).
(5) *Knowledge or Reasonable Belief in Forgery* (5256-5260).
(6) *Evidence of Other Acts* (5259-5260).
(7) *What is Using as Genuine* (5261-5265).
(8) *Using a False Copy* (5265).
(9) *Use must be Fraudulent or Dishonest* (5266-5270).
(10) *Forgery to Conceal Previous Fraud* (5269).

5246. Analogous Law.—This is a section under which not only the dishonest user of a false document but also the forger himself is prosecuted if there is evidence of use but insufficient proof of forgery. The section is all-embracing and would include not only one who uses it to defraud another as also one who stands to gain by its use,

5247. Procedure and Practice.—For the purpose of procedure this offence is divided into two parts—one in which the document is a promissory note of the Government of India, in which case the offence is cognizable and exclusively triable by the Court of Session. Otherwise, it is non-cognizable and triable by the same Court as that by which the forgery is triable, and in either case, warrant should ordinarily issue in the first instance, and it is bailable, but not compoundable.

5248. If the person using the document alleged to be forged was a party to a proceeding then the sanction of the Court is a necessary preliminary condition to the institution of a prosecution under this section. But no such sanction is required where the person producing such document was only a witness.(10)

5249. The offence of using a forged document assumes a serious complexion if it is used as evidence in a Court of law, in which case it must be visited with the severest punishment allowed by law.(11) In this case the accused had filed forged powers-of-attorney in a case which he swore had been duly executed and attested, but which were eventually found to have been forged, and which the Court regarded a flagrant example of this offence. One or two other points of practice may be here noticed. A charge under this section should specify the offence according to the nature of the document forged under which the accused would have been convicted if he had been tried and found guilty of the substantive offence.(12) This is necessary because the section prescribes no sentence of its own, but makes the user punishable "in the same manner as if he had forged such a document," and which necessitates reference to the section under which he would have been so punishable.

In one case in which the prisoner had been simply charged under this section, but was sentenced to ten years' transportation with reference to section 467, the Judge considering the document to be one of the nature of those specified in that section, the High Court quashed the conviction and ordered a new trial, holding that if the Judge intended to convict the accused for using a forged valuable security, he should have been so charged.(13) But a person so charged could not be convicted of both the offences, if the evidence establishes against him a case both of forgery as well as user. So where A sued B in ejectment and B claimed the right of occupancy on the strength of his possession for twelve years, and to prove which he called the accused, a patwari, as his witness, and who supported B and produced in support of his case an entry in which B's possession had been altered from ten years to twelve years, and it was held that the alteration had been made by the accused, whereupon he was convicted both under this section as well as under section 466, Aikman, J., quashed the conviction for this offence, holding this section applicable only to a user as distinguished from the forger and adding that the same person even though

(10) S. 195, Cr. P. C., *Akhil Chandra*, 22 C. 1004; *Debi Lal* v. *Dhaja Dhasi*, 36 M. 392; *Digumbar Ram* v. *Taran*, 41 I. C. (C.). 603.

(11) *Mohesh Chunder Sircar*, 3 W. R. 13.

(12) 1 W. R. Cr. L. 10, 3 W. R. Cr. L. 8; *Gangaram Mulji*, 6 B. H. C. R. 43.

(13) *Gangaram Mulji*, 6 B. H. C. R. 43

the forger as well as the user, could not be convicted of the two offences.(14) But there would have been no objection to convict the accused in the alternative.

5250. Again, since the offence of having a forged document in one's possession with intent to use it and punishable under section 474 is necessarily implied in the offence under this section, a person cannot be convicted of the two offences, at the same time.(15) Moreover, the terms of this section may at times overlap those of section 196. In that case the proper course for the Magistrate is to charge the accused under this section and commit the case for trial to the Court of Session.(16)

5251. Where the accused files a number of forged documents in one case, he may be charged with and tried in respect of all the documents as one offence. The accused was charged with using as genuine eleven forged receipts which were put in by him in sets on three separate occasions, each set with a written statement, in three suits pending against him. A charge was framed against him in respect of the using of each set of receipts, and he was tried on these three charges and convicted and sentenced. The legality of this procedure was challenged on appeal in which it was contended that the filing of each document constituted a separate use for which the accused should have been separately tried, but it was held that as the "using" charged was putting in each set of documents with the respective written statements in the three suits and as there was nothing to show that any of the documents had been used at any other time, there was only one using in respect of each set of documents, and that the conviction could not therefore be questioned on that ground.(17)

A person charged for using two documents as forged, cannot be convicted unless it is proved that both of them were forged and he used them both. Consequently, if the forgery of one of them is not established he cannot be convicted at all.(18) The question what amounts to user will be found discussed in the sequel (§ 5261). It will suffice here to state that the mere filing of a forged document in a judicial proceeding may amount to an attempt if accompanied by the requisite intent. It should therefore be so charged.(19) But filing a list mentioning a document alleged to be forged is a mere preparation, and not even an attempt to file the document and is therefore not punishable at all.(20)

5252. The fact that on a document being denounced as a forgery, the plaintiff hastily withdrew his suit is no evidence of forgery since the

(14) *Umrao Lal*, 23 A. 84.

(15) *Nusar Ali*, 6 N. W. P. H. C. R. 39.

(16) *Kherode Chunder Mozumdar*, 5 C. 717; the contrary *dictum* in *Oodum Lal*, (3 W. R. 17), was explained by Jackson, J., on the ground that the trial was there held by the Court of Sessions with the aid of a jury so that no question of jurisdiction could arise.

(17) *Raghunath Das*, 20 C. 413.

(18) *Jang Bahadur Lal*, 14 C. L. J. 652.

(19) *Rati Jha*, 39 C. 463; *Krishna Proshad* v. *Rabindra Nath*, 13 I. C. (C.) 99; *Mobarak Ali*, 17 C. W. N. 94; explaining *Ambika Prashad*, 35 C. 820.

(20) *Rati Jha*, 39 C. 463; explaining *Ambika Prashad*, 35 C. 820.

plaintiff may well have withdrawn his suit on his apprehended failure to prove it, and there might be other reasons.[21] The fact that a person files a document is no reason for assuming that he must be personally cognizant of its falsity.[22] It is a fact which must be proved like any other fact. A series of transactions which are not the offence charged, may be used as evidence of intention.[23]

5253. A person convicted for an attempt to commit this offence may, on appeal, be convicted of this offence, provided that the accused is not prejudiced by the finding.[24] But a person cannot be convicted on the same facts both of this offence as well as that under section 466-109,[25] section 465[1] or under section 466.[2] Nor can convictions under sections 471 and 474[3] stand together.

5254. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of—— at——you fraudulently (*or* dishonestly) used as genuine a certain document, to wit—which you then knew (*or* had reason to believe) to be a forged document; and that you thereby committed an offence punishable under sections 465 or 466 *or* 467) and 471 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5255. Fraudulent and Wilful Use of Forgery.—This is a somewhat general section intended to punish a person for making use of a forged document, for which he is liable to punishment under this section, if at the time of using it he (*i*) knew or had reason to believe the document to be forged; and (*ii*) he used it fraudulently or dishonestly. In order to constitute this offence, there must be both knowledge and fraudulent intention. And this is necessary, for a person may intend to practise fraud upon another by the use of a document which he may not know to be forged, in which case to convict him of this offence would be to convict him for fraud and not for using a forged document. On the other hand, a person may know that a document is forged and he may use it, but he could not be convicted of this offence if he did not use it fraudulently or dishonestly. Of this, examples have been already given when discussing the liability of the forger for making a false document to conceal a past negligent or dishonest act (§§ 5162, 5163), or when it is filed to support a true case (§ 5182). These

(21) *Mutaya* v. *Maung Shwe Bou*, 3 Bur. L. T. 152, 8 I. C. 996.

(22) *Karimdad*, (1913) P. R. 25, 21 I. C. 907; *Ramsawmy* v. *Maung Shwe Bau*, 3 Bur. L. T. 151, 8 I. C. 995; but see *Mobarak Ali*, 17 C. W. N. 94; *Akbar Hussain*, 89 I. C. 398, (1925) N. 294.

(23) *Krishna Govinda*, 43 C. 783.

(24) *Lala Ojha*, 26 C. 863.

(25) *Godlavedu Balayya*, (1902) 1 Weir, 551; *Mokand Lal*, (1901) P. R. No. 26.

(1) *Mobarak Ali*, 17 C. W. N. 94.

(2) *Umrao Lal*, 23 A. 84; *Authoor*, 24 I. C. (M.) 976; *Mohund Lal*, (1901) P. R. 26; *Pirbhu Dial*, (1913) P. R. No. 4; *contra* in *Badri Prashad*, 35 A. 63; *Madu Chimnaji*, 32 I. C. (M.) 665.

(3) *Nuzar Ali*, 6 N. W. P. H. C. R. 39; *Mobarak Ali*, 17 C. W. N. 94.

cases are instructive, but they refer to the fraudulent making of a false document as distinct from fraudulently using it. A person may know nothing about the one, though he would be guilty of this offence if he used it fraudulently.

The two main questions that arise under this section are then (*i*) whether the accused knew or had reason to believe the document to be forged; and (*ii*) whether he used it fraudulently or dishonestly.

5256. Knowledge or Reasonable Belief in Forgery—Now, the question whether the accused knew or had reason to believe a document to be forged, would, in many cases, be a matter of inference, for the question depends upon the proved circumstances of each case. But knowledge and belief imply a certain state of mentality. As defined elsewhere[4] "a person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing, but not otherwise." In order to enable a person to say that he had reason to believe, there must then be "sufficient cause" for belief. The word "belief" is a much stronger word than "suspect," and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind,[5] that the document he was filing was a false document. If he had facts brought to his notice sufficient to put him upon inquiry, and even to arouse his suspicions, still he could not be held criminally liable for filing a deed proved to be forged, unless the facts presented to him were sufficient to carry conviction to his mind.

For instance, a party may entrust his pleader to file a document on his behalf. He may have a shrewd suspicion that the document was a forgery, but he would not be justified on such slender grounds to refuse to file it, and if he files it, he could not be held liable for this offence. The defendants in a civil suit for ejectment, engaged the accused, a pleader, to defend their suit, and they gave him a certain document alleged to be a lease to be filed in support of their defence. The other party alleged the document to be a forgery, and the Sessions Judge sanctioned his prosecution holding it to be the duty of a pleader to examine all documents as to their genuineness and authenticity before tendering them in evidence and the accused having failed to do so, the Judge directed his prosecution. The accused moved the High Court to revoke the sanction, which Parson, J., had no difficulty in doing, holding that the standard of duty prescribed by the Sessions Judge was too high.

"We do not think," he added, "that any Court would be justified in ordering the prosecution of a pleader for presenting on behalf of his client, a document merely because the document was suspicious in appearance, nor do we think that pleaders are in duty bound to examine the documents given them to produce in Court, and to come to a conclusion upon their genuineness, for which conclusion, if wrong, they are liable to be criminally prosecuted. We think that a pleader is under no higher obligation than any other agent would be, and that to justify

(4) S. 26.

(5) Cf. *per* Melville, J., in *Rango Timaji*, 6 B. 402.

his prosecution it must be shown that he was a party, principal or accessory, to the concoction of the document or that he had the knowledge that it was concocted. The words in section 471 of the Penal Code, 'knows or has reason to believe,' are of general application, and the allegation must be proved as strictly in his case as in the case of any one else. It would be difficult, we think, to say that when a pleader, acting on the instruction of his client, tenders in Court a document he cannot plead and rely upon those instructions as sufficient cause."(6)

5257. Moreover, it must not be forgotten that an alteration to be suspicious, should be such as would lead a person on a casual inspection to suspect that it had been made fraudulently. As Mahmud J., remarked in a case of altered bond filed by the plaintiff's pleader, the latter could not be expected to scrutinize all documents handed to him by his client with suspicion, nor could the alterations be regarded as suspicious which became apparent only when one's attention was called to them.(7)

5258. The question of criminal liability then depends not upon any artificial rules of duty but upon those facts which convinces the Court that the accused must have believed that the document he was using is forged. For this purpose the nature of the document and the purpose for which it was filed are equally material. And if the document bears on its face visible signs of alteration, it is a fact which the Court may well take into consideration in judging of the question of the accused's mind. But the mere fact that the document was altered is not a sufficient reason for belief that it is a forgery—for it depends upon the nature and character of the alteration. There are some alterations which are clear evidence of forgery; there are others which as clearly point the other way. The alteration, on a material point, such as the names of parties, the date or the amount is a material alteration and as such may be indicative of fraud, but an immaterial alteration would not rivet the same attention. The question whether an alteration is material or immaterial may sometimes depend upon the nature of the dispute, and the purpose for which the document is filed. The purpose would not only explain the alteration but further shew whether the intention of the accused was fraudulent or otherwise.

Evidence of Other Acts.

5259. In this connection a question arises whether evidence of other similar acts, is admissible. Such evidence is clearly admissible under the Indian Evidence Act.(8) And it is admissible under English Law. So upon an indictment for disposing of and putting away a forged bank-note knowing it to be forged, proof that the accused passed other forged notes, is held to be admissible for the purpose of proving that he knew the note, which is the subject of indictment to be forged.(9) But in such case evidence of a transaction which is itself the subject of an

(6) *Ranchoddas*, 22 B. 317.
(7) *Jiwan*, (1887) A. W. N. 195 (196).
(8) Act I of 1872; s. 14, ills. (*b*), (*d*); s. 15, ills. (*b*), (*c*).
(9) *Millard*, R. & R. 245; *Moore*, 1 F. & F. 73; *Whiley*, 1 B. & P. (N. R.) 92; *Tather Sal*, *ib.* 94*n* (*Ball.* 1 Comp. 32) (*Hough*, R. & R. 120); *Green*, 3 C. & K. 209; *Salt*, 3 F. & F. 834; *Francis*, 12 Cox. 612; *Colelough*, 15 Cox. 92.

indictment was at one time excluded.(10) But more recent cases recognize no such distinction and admit evidence of all transactions whether they form or do not form the subject of a distinct indictment.(11) Such evidence has, however, limited value, and though receivable for one purpose, it should not be used for a purpose wholly different. For example, such evidence is admissible only to shew that the act which is the subject of inquiry, was done intentionally and not merely accidentally. If it fails to establish that fact, it could not be utilized for the purpose of adding to the probability of the accused having forged the document in suit. If this is the charge, it must be established *aliunde*.

5260. And even as evidence is indicative of intention, regard must be paid to the interval of some time between the two acts. As Rolfe, B., said "even in the case of an interval of twenty years between the utterings, the evidence would be receivable in principal; but I should in that case direct the jury to pay no attention to it."(12) But in another case where the interval of time was great, the Judge said that he reposed confidence in counsel that they will not give in evidence what has no tendency to prove guilty knowledge, but only to prejudice the prisoner.(13) Such evidence must not, moreover, be vague or illusory, but must be definite as to the time and place and the nature of the document forged.(14) A general allegation that the accused was suspected of forging documents or that he kept the company of professional forgers, is not only not admissible, but can have only one purpose in view, that is, to prejudice the prisoner.

5261. What is Using as Genuine?—Assuming now that a document is shown to be forged, and the accused knows it, the next question that arises is, whether the accused used it as genuine. Of course, it is no offence to use a forged document as such. The prosecution who base their case on such a document file it in Court for the purposes of evidence. The act becomes criminal as soon as a false document is used as true. But what is using a document? In the corresponding provision of the English Law, the words used are "utters, uses, publishes or tenders in evidence with either of the intents necessary to constitute the offence of forging the document," words which are wide enough to include not only what is here designated using a document but also an attempt to use it.(15) But the mere filing of a document with a view to its subsequent use in evidence is sufficient to constitute user.(16) Of course, the term "use" is not confined to the use of documents as evidence in Court or for the purpose of obtaining money. The term would, for instance, be satisfied, where a forged document

(10) *Smith*, 2 C. & P. 633; *Smith*, 4 C. & P. 411; *Griffiths v. Payne*, 11 A. & E. 131.

(11) *Forster*, 24 L. J. M. C. 134; *Balls*, 7 C. & P. 429.

(12) *Phillips*, 3 Cox. 88.

(13) *Salt*, 3 F. & F. 834.

(14) *Millard*, R. & R. 245; *Moore*, 1 F. & F. 73.

(15) S. 6 (2), Forgery Act, 1913 (3 & 4 Geo. V, c. 27).

(16) *Bansi Sheikh*, 5 I. C. 469 (477); but see *Krishna Prasad* v. *Robindra Nath*, 13 I. C. (C.) 99; *Rati Jha*, 39 C. 463; *Mabarak Ali*, 17 C. W. N. 94; explaining *Ambika Prasad*, 35 C. 820. The head-note of this case is wrong; *Idu Jolaha*, 3 Pat. L. J. 386, 46 I. C. 293, 19 Cr. L. J. 709; *Fasal Ilahi*, 72 I. C. (L.) 383, 24 Cr. L. J. 383, (1922) A. I. R. (L.) 346.

is filed for registration and it is registered[17] or where it is produced before the Police during investigation.[18]

The accused applied to a Superintendent of Police for enlistment in the police force. In support of his application he produced before that officer two certificates, one of which was found to be a wholly fabricated document, while the other had been altered by several additions. It was held that his presenting the two certificates constituted their user so as to justify a conviction under this section.[19] It will thus appear that the mere filing of a forged document may at times amount to its user, but this must be the case where the document as filed can be acted upon without formal proof by the person before whom it is filed. This seems to be the distinguishing feature of the Calcutta case, which might otherwise seem to lay down a different rule. In that case,[20] the accused had filed private receipts which the Court could not act upon until formally proved. It was therefore rightly held that their mere filing was insufficient to constitute such user as is contemplated by this section. But the case would have been widely different, if the documents filed had purported to be public document which the Court could receive in evidence without formal proof, in which case the mere filing of them would have been probably considered sufficient to complete their user. But in any case the involuntary production of a document in obedience to a summons from Court is not tantamount to "using" it in Court inasmuch as that term is obviously used in the sense of its being put forward in some way for one of the purposes mentioned in s. 463.[21] It may, for instance, be used by a witness if he produces it uncalled, to support a claim, though he was not summoned to produce it.[22]

5262. So in the case of a bill of exchange, its mere presentation for encashment would be sufficient to constitute its user. So where the prisoner was indicted for uttering a bill of exchange containing a forged indorsement and it appeared that he presented it for payment, whereupon the clerk noticing a difference in spelling refused payment, it appears to have been the view of the Court that uttering was completed with the presentation, but the prisoner was acquitted on a different point.[23] It has been held that uttering may be conditional, as where the accused tendered a forged bill to his banker for acceptance which the latter accepted conditionally upon its encashment and to which the former agreed, and it was held that uttering was complete, though it was conditional.[24] But the presentation of a forged note by the accus-

(17) *Azimoodeen*, 11 W. R. 15; *Cheta Mahto*, 89 I. C. (Pat.) 1050.

(18) *Ramappa Hebbara*, (1890) 1 Weir, 550; *Sajal Lall*, 60 I. C. (Pat.) 274, 22 Cr. L. J. 274.

(19) *Khandusingh*, 22 B. 768.

(20) *Ambica Prasad Singh*, 35 C. 820 (822); *Mohit Kumar Mukerjee*, 52 C. 881.

(21) *Assistant Sessions Judge* v. *Rammal*, 36 M. 387; *Arunachella*, 36 M. 392; *Boddu Ramayya* v. *Chitturi*, 28 M. L. J. 486; 29 I. C. 71; *Ishar Das*, 6 L. 50: *Girdhari Lal*, 2 O. W. N. 174; *Madha* v. *Bhagwant*, 88 I. C. 181. (1925) N. 345; 86 I. C. 993, (1925) O. 413.

(22) *Asrabudin* v. *Kali Doyal*, 19 C. W. N. 125, 28 I. C. 645; *Digambar* v. *Ram Taran*, 41 I. C. (C.) 663.

(23) *Arscott*, 6 C. & P. 408; *Arura Mal*, (1916) P. W. R. 30; 36 I. C. 154; 17 Cr. L. J. 474 (negotiation of forged hundi knowing it to be forged punishable under this section.)

(24) *Cooke*, 8 C. & P. 582.

ed, as a specimen of those he wanted to sell, may or may not amount to uttering it: it is a question of fact for the jury; and so Littledale, J., in a case told them: If the prisoner meant it as specimen, or that the witness might see whether the others were made according to the pattern, then, in my opinion, it would not be an uttering within the meaning of the Act. If you are satisfied that it was not uttered with intent to put it into circulation, but was to be kept as a pattern, and afterwards thrown away or put into the fire, then you may acquit the prisoner."(25)

5263. Using like uttering may be complete without manual transition out of the hands of the accused. The accused owed money to the prosecutor who pressed him for payment, whereupon the accused showed him a receipt purporting to be signed by his predecessor, but would not part with it. The prosecutor, however, snatched it away from him and it was held that he had been rightly convicted of uttering it.(1) So where the accused showed the prosecutor certain receipts purporting to be for payment of certain rates to establish his solvency and accept his security for an advance which he induced the prosecutor to make to a third party, it was held that the uttering was complete: "This was a using of the forged receipt to get money upon it, or by means of it, as much as if the prisoner himself had been the borrower of the money, and the receipt had purported that he had paid the rates, and the prosecutor had thereupon advanced him a sum of money, and had been cheated out of it by him. We, therefore, think that the conviction was according to decided cases and sound principles of law."(2)

5264. Again, a person may use a forged document even though he employs another to put it in circulation: *qui facit per alium facit per se.* The accused, a pawn-broker, was sued for non-return of the goods pledged by the prosecutor, whereupon he filed through his attorney a pawn-broker's ticket which he said mentioned the goods pledged. It was a forgery, and the Court in convicting him held that the fact that the prisoner had filed it through his attorney did not preclude his being convicted for uttering it.(3)

Using a false copy.

5265. Since documents includes an original as well as a copy, a person may be convicted for using the true copy of a false original,(4) or a false copy of a true original.(5) The accused wishing to establish his title to a certain mango grove put in copies of the *khasra* which he knew to be forged. He was held to have been rightly convicted under this section.(6) So, again, a person may be convicted of using as genuine a document which he knew to be forged, though he in the first instance produced only a copy of a copy of it.(7) A person may, for instance produce a document purporting to be the copy of a deed, horoscope or a will, in

(25) *Harris*, 7 C. & P. 428.
(1) *Radford*, 1 C. & K. 707.
(2) *Ion*, 2 Den. C. C. 475.
(3) *Filche*, D. & B. 175; *Lala Ojha*, 26 C. 863; *Jiwan*, (1887) 7 A. W. N. 195.
(4) *Nujum Ali*, 6 W. R. 41; *Malai Singh*, 28 A. 402; knowledge and intent material; *Krishna Govinda*, 43 C. 783; *contra* in *Gopalakrishna*, 6 M. L. T. 428, 6 I. C. 776.
(5) *Krishna Govinda*, 43 C. 783.
(6) *Mul Singh*, 28 A. 402; *Mathura Prasad*, 93 I. C. 66, (1926) O. 255.
(7) *Nurjum Ali*, 6 W. R. 41.

which cases if either the original or the copy is false he may be charged under this section, provided, of course that there is evidence of his criminality. The accused being sued for a strip of land, delivered a copy of a plaint previously filed by his pleader to show that he had omitted to include this land in that suit. The plaint purported to be a copy of the plaint served on him by the plaintiff in the previous suit, which it was, but he had interpolated certain words to suit his present defence. The plaint did not go beyond the hands of his pleader, and he was, therefore, convicted of an attempt to commit this offence, but on appeal Prinsep and Hill, JJ., held it to be a completed offence under this section. "It seems to us," they said, "that having, as we find he did, given his pleader a copy of a false document, that is to say, a copy of the plaint after it had been falsified by the interpolation already mentioned, for the purpose of using it in the trial of this suit, he intentionally and fraudulently made use of the fabricated plaint by misrepresenting or causing to be misrepresented in the copy, that the plaint as presented by him and used in the trial of that suit was set out in that copy. The object was clearly by means of this copy fraudulently to use it as genuine with its interpolations, knowing that in that state it was a forged document."(8)

5266. Use must be Fraudulent or Dishonest.—The fact that the document is forged and was so known to the accused is not decisive of his guilt. For in order to make him criminally liable he must have used it "fraudulently" or "dishonestly."

5267. These words are defined in the Code, and their bearing on the offence of forgery, has been already discussed. But, as observed before, there is a difference between making and using a document fraudulently. A person who makes it for the purpose of deception and uses it as such is not necessarily guilty of this offence. An apt example of this, is furnished by the case in which the accused had fabricated rent-receipts for genuine ones which he had lost. which he filed in a Revenue Court to establish his occupancy against the landlord who had applied for his ejectment, and who was held to have used the receipts neither dishonestly nor fraudulently so as to render himself liable under this section.(9) Here there was clearly an intention to deceive the Revenue Court, but such deception is not fraud, which presupposes the primary intention of deceiving another, whereas in the case under reference the primary intention of the accused was to make up for his lost receipts.

So where the accused was found to have produced a forged receipt to induce his superior officer from doing an illegal act, the Court held it to be no case for conviction under this section. In this case the creditors of a constable applied to the Superintendent to deduct Rs. 2 per month out of the debtor's pay until the amount of Rs. 18 due to him was repaid. The Superintendent acceded to their request and Rs. 8 were so recovered for which the creditors passed a receipt. The constable altered the figure 8 into "18" and showed the altered receipt to the Superintendent with a view to induce him to cancel his order for monthly deductions. He was convicted of this offence, but Petheram, C. J.,

(8) *Lala Ojha*, 26 C. 863. (9) *Sheo Dayal*, 7 A. 459.

and Straight, J., quashed the conviction, holding that the Superintendent's order for deducting the accused's pay was illegal, as his pay could not be deducted except upon a proper attachment by a Civil Court, and "therefore it comes to this, that the appellant used the altered receipt in order to induce his superior officer to refrain from doing an illegal act. This, to our minds, was the real intent in the mind of the prisoner, and we do not think that in a criminal case we ought to speculate as to some other intent over and above this that might have presented itself to him. For it does not, in our opinion, at all necessarily follow that because the appellant objected to have his pay put under monthly stoppages to satisfy his creditor's debt, that he therefore necessarily contemplated setting up the altered receipt to defeat his creditor's claim. In this view of the matter, we think there was a doubt in the case to which the appellant was entitled" and he was accordingly acquitted.(10)

5268. In another case the Court held that the production of a forged deed in support of a true case is punishable under this section, since such act though not dishonest is nevertheless fraudulent.(11) In another case the accused being anxious to secure recognition from a settlement officer of the title of *Loskur*, which carried with it no emoluments, presented a forged *sanad* purporting to have been granted by a Rajah, but it was held that the intention of the accused was to produce a false belief in the mind of the settlement officer, and that he had no intention to defraud him.(12) The distinction between the two is rather fine, but the decision might be supported on the ground that where the deception is practised without intention to commit any particular fraud, or doing any specific wrong to any individual, there is no "intent to defraud" which is the essence of "fraudulently."(13)

Forgery to conceal Previous Fraud.

5269. So a forged document filed to conceal a previous dishonest, fraudulent or negligent act, is according to one view not fraudulent, because the primary intention of the accused is then to save himself and not to defraud another.(14) But the harmony of this view was disturbed in a Madras case in which the accused who was a pleader's clerk, having failed to file an execution petition within the period of limitation, altered the date of the decree so as to bring it within time, whereupon he was held to have been rightly convicted both under this section, as well as under section 193.(15)

5270. However, such cases are very different to those in which the forged document is used to obtain wrongful gain or cause wrongful loss, or in which the intent to defraud is plainly visible. The accused, a head constable of police, was in charge of a cattle pound into which 73 heads of cattle were one day impounded, and the fact was noted in the police diary by one A. The owners of the cattle afterwards appeared and had some conversation with the accused, whereupon the accused

(10) *Syed Hussain*, 7 A. 403.
(11) *Bansi Sheikh*, 51 C. 469.
(12) *Jan Mahamed*, 10 C. 584.
(13) *Hodgson*, 25 L. J. M. C. 78.
(14) *Lalit Mohun Sarkar*, 22 C. 313 (321); *Sabapati*, 11 M. 411; *Lal Gumal*, 2 N. W. P. H. C. R. 11; *Jogeshur Pershad*, 6 N. W. P. H. C. R. 56; *Jiwanand*, 5 A. 221; *Mazhar Hussain*, 5 A. 553; *Girdhari Lal*, 8 A. 653; *Shankar*, 4 B. 657.
(15) *Godlavedu Balayya*, (1902) 1 Weir 551.

asked A to alter the figure "73" to "13" but which he declined to do. The alteration was, however subsequently made and fine for only 13 heads of cattle recorded as received. He was held to have been rightly convicted of this offence.(16)

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467.

472. Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession any such seal, plate or other instrument knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Session. Non-cog. Warrant. Bailable. Not comp.

[*Possession*—s. 27. *Counterfeits*—s. 28.]

Synopsis.

(1) *Analogous Law* (5271).
(2) *Procedure and Practice* (5272).
(3) *Proof* (5273).
(4) *Form of Charge* (5274).
(5) *Principle* (5276).
(6) *Meaning of Words* (5277).

5271. Analogous Law.—This section and the next correspond with sections 235, 255, and 256 which relate to the possession of instruments for counterfeiting coins or stamps. The object in each case is to prevent forgery by punishing a preparatory act.

5272. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance It is bailable but not compoundable and is exclusively triable by the Court of Session A person found in possession of several seals of different descriptions with intent to commit forgery, may be separately charged for possession of every seal, and for which he may be separately convicted, unless it appears that the different seals were intended for the purpose of committing one particular forgery.(17)

5273. Proof.—The points requiring proof are:—

(1) That the seal, plate or other instrument in question was capable of being used for committing forgery.

(2) That the accused made or counterfeited it or had it in his possession.

(3) That he had as in (2) with intent that it shall be used for committing forgery, or in the case of possession, he knew the same to be counterfeited.

(16) *Rughoo Barrick*, 11 W. R. 44. (17) *Goluk Chunder*, 13 W. R. 16.

(4) That such forgery was punishable under section 467.

5274. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of ——at——you made (*or* counterfeited) a seal, Ex——(*or* plate or instrument) for making an impression, intending that the same shall be used for the purpose of committing any forgery punishable under section 467 of the Indian Penal Code, [*or* had in your possession the seal, Ex——(*or* plate, *or* instrument) intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of the Indian Penal Code] and that you thereby committed an offence puinshable under section 471 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5275. Principle.—This section does not punish the mere possession of forging instruments other than those used for forging the documents mentioned in section 467. As that section refers to such documents as wills and receipts, it follows that this section does not merely apply to instruments used for forging a valuable security such as notes, cheques, bills of exchange, and the like. At the same time it is obviously intended to be restricted only to instruments specially made or adapted for the special purpose of forgery. A pen and inkpot may be instruments necessary to execute a will, but a person could not be convicted of this offence, even though he was ready to use them for forging it.

5276. Again, the mere making or being in possession of such plates or instruments does not expose the maker or possessor to the penalty of this section, for the gist of the crime is intention or knowledge, which, however, may be inferred from mere possession unaccounted for. The accused was found in possession of a number of counterfeit seals together with instruments for making them, as also a forged document purporting to be a judgment of a Civil Court. He could not account for their possession, and on the other hand, repudiated their possession, holding them to have been placed there by his enemy which was not possible, and the Court consequently held that as the accused could not explain his possession, it might be reasonably inferred that his possession was with an intent to use them fraudulently. He was accordingly convicted under this section.(18)

5277. Meaning of Words.—"*Or other instruments*": must be read "*ejusdem generis* with seal or plate. The word is susceptible of two meanings, *first*, a tool used for any work or purpose, or *secondly*, a writing expressive of some act, contract, process or proceeding.(19) It is here used in the former sense.

(18) *Kisto Soonder Deb*, 2 W. R. 5.

(19) *Per* Hawkins, J., in *Reley*, (1896) 1 Q. B. 309 (314).

For a further commentary under this section, reference should be made to sections 235, 255, and 256.

Session. Non-cog. Warrant. Bailable. Not comp

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable otherwise.

473. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this Chapter other than section 467, or with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Possession*—s. 27. *Counterfeits*—s. 28.]

Synopsis.

(1) *Analogous Law* (5278).
(2) *Procedure and Practice* (5279).
(3) *Proof* (5280).
(4) *Charge* (5281).
(5) *Possession of Seal, Plate or other Forging Instruments* (5282).

5278. Analogous Law.—This section is exactly the same as the last from which it differs only in the fact that the forgery intended is not of the serious nature described in section 467, and the punishment prescribed is consequently less. In other respects the two sections are identical.

5279. Procedure and Practice.—This offence is non-cognizable, but warrant should, ordinarily, issue in the first instance. It is bailable, but not compoundable and is exclusively triable by the Court of Sessions. For other points *see* under section 472.

5280. Proof.—The points requiring proof under this section are the same as those in the last section except that instead of (4) prove:—

(4) That the forgery was punishable otherwise under this chapter than under section 467.

5281. Charge.—The charge should be in the form given under the last section.

5282. Possession of Seal, Plate or Other Forging Instrument.—The making of a seal for the purpose of forgery need not be the duplicate of the genuine seal, since it is not essential for the offence of forgery that the seal made should correspond with any other seal. The counterfeiting of a seal implies imitation of the original, though the imitation need not be exact, but it must be sufficient to impose upon a person of ordinary intelligence. The seal, plate or instrument imitated may be by itself insufficient to produce the finished impression. It may for instance, be the mere negative of a seal (§ 2462)

of itself insufficient to produce the forgery, but it must be specially adapted for that purpose. For instance, pen and ink, erasure and lens are necessary for forgery, and they may in a sense be then designated forging implements, but they are not intended to be comprised in the section which relates exclusively to such instruments as are devised for that special purpose. But if they are found in such combination as to suggest an intended forgery the possessor may be conceivably punished under this section (§ 2475).

The question what constitutes possession must be answered here in the same sense as in section 236 (§§ 2469-2474), and so must be the question of intention and knowledge (§§ 2568-2569).

Session. Non-cog. Warrant. Bailable. Not comp.

Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.

474. Whoever has in his possession any document, knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine shall, if the document is one of the description mentioned in section 466 of this Code, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the document is one of the description mentioned in section 467, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Dishonestly*—s. 24. *Fraudulently*—s. 25. *Possession*—s. 27. *Document*—s. 29.]

Synopsis.

(1) *Analogous Law* (5283).
(2) *Procedure and Practice* (5284).
(3) *Proof* (5285).
(4) *Principle* (5286).
(5) *Criminal Possession of Forged Document* (5287-5288).

5283. Analogous Law.—This section corresponds to sections 242 and 243 relating to coins, and section 259 relating to stamps....It is another instance where the Code punishes a mere preparation as distinct from an attempt.

The gist of this offence is possession, which is used here in the sense already discussed (§§ 2470-2474) which is thus defined in English Law[20] with special reference to this offence:—

"S. 45. Where the leaving any matter in the custody or possession of any person is in this Act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in the actual custody or possession of any other person, or shall knowingly

(20) Forgery Act, 1861 (24 & 25 Vict., c. 98), s. 45.

and wilfully have any such matter in any dwelling-house or other building, lodging apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this Act."

5284. Procedure and Practice.—This offence is non-cognizable, but warrant should, ordinarily issue in the first instance. It is bailable but not compoundable and is exclusively triable by the Court Session.

5285. Proof.—The points requiring proof are:—

(1) That the document was forged.

(2) That it was in possession of the accused.

(3) That he held its possession knowing it to be forged, and intending that the same shall be used fraudulently or dishonestly as a genuine document.

(4) That the document was one described in section 466 or 467.

5286. Principle.—This is one more instance where the Code punishes a mere preparation as distinct from an attempt—the reason being the heinous character of the offence and the great danger of permitting the accumulation of forged documents awaiting employment at the earliest favourable opportunity. It is not necessary that the possessor should himself use them, or that they should have been used at all, but what is necessary is that he must hold them knowing the purpose for which they are destined—that purpose being their fraudulent or dishonest user as genuine documents. Such a person may stand in the position of an abettor, though the provisions of abetment as defined in the Code do not apply to him.

5287. Criminal Possession of Forged Document.—On the analogy of section 242, 243 and 259 relating to coin and stamps this section constitutes the possession of a forged document an offence, provided that it was accompanied by those elements which make such possession criminal. These are the gist of the offence whether it relates to a document or to a coin or stamp, the possessor in each case being required to possess knowledge that the thing in his possession is forged, and intending that it is to be used fraudulently or dishonestly as a genuine document. The question what constitutes possession is important, but has been discussed before (§§ 2470-2474). It will therefore suffice here to state that possession implies control, and to be criminal it must be exclusive, though it may be joint. For instance, two or more inmates of a house may be in joint possession of a receptacle used for the custody of a forged document, though there may be more inmates sharing with them joint possession of the house. The question of possession is, of course, a question of fact dependent upon proof of the facts and circumstances of each case. Besides possession, there must be knowledge that the document is a forgery. This may be the subject of proof, but it is more likely to be a matter for inference. For instance, if a person is found in possession of several counterfeit seals and forged documents, which he cannot satisfactorily account for, the Court may well be justified in

presuming guilty knowledge and an intention to use them fraudulently.(21) So a person who merely files in Court or takes with him for filing a forged document may be convicted under this section, though he could not be convicted for using it under the provisions of section 471.(22) Where A takes a *Hundi* from B knowing that the latter had fabricated it, A is guilty of this offence, and if he negotiates it he is guilty of the offence punishable by s. 471.(23)

5288. The question whether the document was intended to be used fraudulently may be solved having regard to the nature of the document and the purpose, if genuine, it would have served. If for instance, a person had filed a suit for money against the accused and the latter was found in possession of a forged acquittance, an inference would be justifiable that the accused knew it to be forged and was in possession of it with the intention of using it in his defence. Proof of intention is then no less than the proof of knowledge an inference from circumstances. But the presence of both must be clearly made out, and the judge must direct the attention of the jury to the necessity of finding them. He must, moreover, draw their attention to the fact that the document, if forged, should be found to fall under the description of documents mentioned either in section 466 or 467.(24) A mere "tracing or attempt to portray a pedigree" is not such a document.(25)

Session. Non-cog. Warrant. Bailable. Not comp. Sanction. S. 195 (*c*) Cr. P. C.

Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material.

475. Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with transportation for life or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Possession*—s. 27. *Counterfeit*—s. 28. *Document*—s. 29.]

Synopsis.

(1) *Analogous Law* (5289).
(2) *Procedure and Practice* (5290).
(3) *Proof* (5291).
(4) *Form of Charge* (5292).
(5) *Counterfeiting or Possession of Authenticating Device* (5293).
(6) *Criminal Possession of Such Device* (5294).

(21) *Kisto Soonder Deb*, 2 W. R. 5. 36 I. C. 154, 17 Cr. L. J. 474.
(22) *Hatim Moonshee*, 8 W. R. 11. (24) *Abaji Ramchandra*, 16 B. 165.
(23) *Arura Mal*, (1916) 8 W. R. 30. (25) *Ib.*

5289. Analogous Law.—This section is supplementary to section 472 and extends criminality to another preparatory act necessary, though not invariably so, for forging a document defined in section 467. It is conceivable that the provisions of this section will overlap those of section 472 and other sections, but it creates a special offence and prescribes a penalty which must be resorted to in a proper case arising under it. Where the forgery is punishable otherwise than under section 467, the provisions of the next section should apply. The two sections thus deal with the same offence committed under circumstances of varying gravity, measured by the nature of the document whether belonging to the important class of those specified in section 467 or in any other section.

5290. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable and is exclusively triable by the Court of Session. The offence requires sanction if it is committed by the party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding.(1) The meanings of terms used in this clause of the Procedure Code have been already set out (§§ 2170-2179).

5291. Proof.—The points requiring proof are:—

(1) That the accused counterfeited upon, or in the substance of, any material, a device or mark.

(2) That such device or mark is used for the purpose of authenticating any document prescribed in section 467.

(3) That the accused intended to use it for the purpose of giving the appearance of authenticity to a document.

(4) That such document was forged or thereafter to be forged.

Or prove—

(1) That the accused was in possession of any material or substance.

(2) Upon which the device or mark was counterfeited.

(3) That the device or mark was such as is used for the purpose of authenticating any document prescribed in section 467.

(4) and (5) as (3) and (4) above.

5292. Charge.—A charge under this section should distinctly specify whether the accused is to be tried under the first or the second part of the section, and in either case it should specify the particular paper or papers bearing a counterfeit mark or device which the accused was alleged to have had in his possession with the intent mentioned in the section.(2) It may be worded thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you counterfeited upon (*or* in the substance of) any material, to wit—(*describe it*) a device, to

(1) S. 195 (*c*), Cr. P. C. (2) *Abaji Ramchandra*, 15 B. 189.

wit——(*or* mark) used for the purpose of authenticating any document, to wit——[*or* that you were in possession of any material, to wit——upon (or the substance) in which any device or mark used for the purpose of authenticating a document, to wit] intending that such device (*or* mark) shall be used for the purpose of giving the appearance of authenticity to some document then forged, to wit——(*or* to be forged on such material) and that you thereby committed an offence punishable under section 475 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5293. Counterfeiting or Possession of Authenticating Device.—A document is authenticated by affixing the signature or seal of the executant, and this section is then intended to prevent the forgery of a person's signature, or mark used in lieu of signature, by engraving it on a plate or other substance or forging it on a paper so that it may be used for the purpose of authenticating a forged document. Where the substance is a seal or plate the offence would equally fall under the terms of section 472, but this offence may be committed under circumstances not covered by that section, as where a person forges only the signature of another upon a document which is a forgery. But whatever the substance or the nature of the device or mark, it must correspond to something used for authenticating a genuine document, and such document must be one of those specified in section 467.

The counterfeiter must, moreover, intend that the device or mark prepared shall be used for authenticating a forged document. A person may know that a device is to be so used, but he cannot be convicted under this section unless there is the proof of intention. Such would be the case of a person who is employed to engrave a plate, and who knowing of the purpose for which it is to be used engraves it,(3) but at the same time communicates with the authorities of the design of his employer (§ 2475). The intention to use the device or mark for the purpose of forging may have to be gathered from circumstances. A person found in possession of a number of forged documents with counterfeit seals which he is unable satisfactorily to account for, may be presumed to possess the intention of using the seals for the purpose of committing forgery.(4) But such documents and seals must have been clearly traced to the possession of the accused. The fact that they were found in a place to which others had access is sufficient to negative his possession.(5) So again, if there were found in the possession of another person they could not be used against him on the bare allegation that the two belonged to the same gang.(6)

5294. Criminal Possession of Such Device.—The first clause which is limited to the counterfeiter would require not merely proof of possession but also of the fact that the device or mark was counterfeited by the accused. Such proof may not be always available. It would be then advisable to charge the

Clause (2).

(3) *Benjamin Bannen*, 2 Moody 309.
(4) *Kisto Soonder Deb*, 2 W. R. 5.
(5) *Raghoonundun*, 15 W. R. 19 (21).
(6) *Abaji Ramchandra*, 15 B. 189.

accused under the second clause, which is more general and deals with a person who is in possession of "any material upon or in the substance of which any such device or mark has been counterfeited." It will be observed that this clause does not punish a person for mere possession of counterfeiting materials. What is punishable is a material bearing some counterfeit device or mark sufficient for the purpose of giving the appearance of authentication. This clause is not then intended to include such acts, for instance, as the possession of blank bonds purchased in the names of other persons, and one or two bearing certain genuine signatures, since, though they may have been intended for forgery, they could not be said to bear any device or mark possessing the appearance of authentication(7)—a phrase which necessarily excludes the existence of a genuine signature.

476. Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document other than the documents described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Session. Non-cog. Warrant. Not bail. Not comp. Sanction. S. 195 (c) Cr. P. C.

Counterfeiting device or mark used for authenticating documents other than those described in section 467 or possessing counterfeit marked material.

[*Possession*—s. 27. *Counterfeit*—s. 28. *Document*—s. 29.]

Synopsis.

(1) *Analogous Law* (5295).
(2) *Procedure and Practice* (5296).
(3) *Proof* (5297).
(4) *Charge* (5298).
(5) *Principle* (5299).

5295. Analogous Law.—This section is exactly the same as the last, the only difference being in the nature of the document in respect of which the offence is committed, which must be "other than the documents described in section 467."

5296. Procedure and Practice.—This offence requires sanction in a case arising under section 195 (*c*) of the Procedure Code, the operation of which has been already set out (§§ 2170-2181). It is noncognizable but warrant should ordinarily issue in the first instance. It is both nonbailable and non-compoundable and is exclusively triable by the Court of Session. The policy of making this offence nonbailable when the offence in the last section is bailable may be question-

(7) *Raghoonundun*, 15 W. R. 19 (20, 21).

ed. That offence is naturally an aggravated form of the offence here described, and the points calling for notice in each case are the same.

5297. Proof.—The points requiring proof are the same as those mentioned in the last section, but instead of proving that the document was one of those mentioned in section 467, prove:—

(2) That such device or mark is used for the purpose of authenticating a document other than those described in section 467.

5298. Charge.—For form, *see* § 5292.

5299. Principle.—This section is enacted to prescribe a reduced penalty for the offence described in the last section, in view of the fact that the document in respect of which it was committed is not of the same importance as documents enumerated in section 467. In all other respects the two offences are identical, and the commentary under the last section should be read as a commentary also under this section.

Session. Non-cog. Warrant. Not bail. Non-comp.

Fraudulent cancellation, destruction, etc., of will, authority to adopt or valuable security.

477. Whoever fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys or defaces or attempts to cancel, destroy or deface, or secretes or attempts to secrete any document which is or purports to be a will or an authority to adopt a son, or any valuable security, or commits mischief in respect to such document, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[*Person*—s. 11. *Public*—s. 12. *Dishonestly*—s. 24.
Fraudulently—s. 25. *Document*—s. 29. *Will*—s. 31.
Valuable security—s. 30. *Injury*—s. 44. *Mischief*—s. 425.]

Synopsis.

(1) *Analogous Law* (5300).
(2) *Procedure and Practice* (5301).
(3) *Proof* (5302).
(4) *Form of Charge* (5303).
(5) *Fraudulently Tampering with a Valuable Security* (5304).
(6) *Acts Punishable* (5305-5306).

5300. Analogous Law.—This section is scarcely an instance of forgery, the essence of which is the making of a document and not its destruction. But in so far as the section refers to cancellation or defacement the offence may amount to forgery.

5301. Procedure and Practice.—This offence is non-cognizable but warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by

the Court of Session. It being so, a Magistrate is not competent to dispose of a case arising under this section as one of mischief.[8]

5302. Proof.—The points requiring proof are:—

(1) That the document in question is, or purports to be a will, or an authority to adopt or a valuable security.

(2) That the accused cancelled, destroyed, defaced or secreted it, or attempted to cancel, destroy, deface or secrete the same.

(3) That he did so fraudulently or dishonestly or with intent to cause damage or injury to the public or to any person.

5303. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you fraudulently [*or* dishonestly, or with intent to cause damage or injury to A B (*or* to the public)] cancelled [*or* destroyed, or defaced, or attempted to cancel, destroy, deface or secreted or attempted to secrete, or committed mischief in respect of] a document, Ex——which is [*or* purported to be] a will [or an authority to adopt or any valuable security] and that you thereby committed an offence punishable under section 477 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5304. Fraudulently Tampering with a Valuable Security.—Out of the documents enumerated in section 467, this section singles out three documents as deserving of special protection against their being tampered with. These are a will, an authority to adopt a son, and a valuable security. An authority to adopt a son must necessarily be executed by a Hindu amongst whom alone is the adoption of a son valid. A will may be executed by anyone, whether a Hindu, Mahomedan or a Christian, and though a Mahomedan cannot will away more than one-third of his property, that fact has no bearing on the present question, since it is enacted to protect all wills irrespective of their validity or sufficiency. In short, the section protects not only what is a valid deed, but also what "purports to be" a deed, though its validity may be doubtful.[9] So the fact that the document was not duly stamped,[10] or was unsupported by consideration,[11] or inadmissible for want of registration[12] could not take it out of the category of a "valuable security" as that term is understood in this connection[13] (§ 288-289).

(8) (1888) 1 Weir 552.
(9) *Mali Muthu*, 4 R. 251.
(10) 7 M. H. C. R. (App.) 26.
(11) *Kotha Goundan*, (1890) 1 Weir 554; *Ramaswami*, 12 M. 148.
(12) *Ramaswami*, 12 M. 148.
(13) (1888) 1 Weir 552.

Acts punishable.

5305. The acts punishable under this section may conceivably amount to mischief within the meaning of section 425. But it is not on that account punishable under the more general provisions of that section. For, being an act committed in respect of a document of the description here mentioned, law prescribes a special penalty, which alone must be resorted to. So where the accused tore up a promissory note delivered to him by the complainant who had come to demand payment, and the Magistrate convicted him under section 426, it was held that the offence being one specially provided for in this section, and being as such exclusively triable by the Court of Session, the Magistrate had no jurisdiction in the case.(14)

5306. This section is applicable to such acts as the tearing up of a *pattah*(15) or a paper containing a statement of account between the accused and the prosecutor.(16) So a document may be defaced by rendering the writing illegible by erasing or spilling ink over it. So the document may be made unavailable for the purpose for which it was intended by secreting it. Secretion implies concealment, and there are various modes of secreting a document, as by falsely giving out that it is lost, stolen or destroyed, or by otherwise causing its disappearance from the custody of a person who was interested in upholding it. The question whether the secretion was made fraudulently or dishonestly must depend upon the nature of the document and the purpose its secretion was calculated to serve. For instance, a person interested in defeating the claims of a legatee may suppress a will—a person prejudiced by an adoption may suppress an authority legalizing it. It has been stated before, that the fact the document is inoperative for want of stamp, consideration or registration is immaterial; it is equally immaterial that the document was duly registered and the act of the accused failed to achieve the purpose for which it was committed, for an act is fraudulent if it is done with intent to defraud irrespective of the consequence.

5307. This is a highly penal section subjecting the offender to the maximum penalty of life-long transportation. All its essential constituents must, therefore, be strictly proved. A person who destroys or secretes a document is not necessarily guilty of this offence, because he may have done it under a claim of right. For example, a person in custody of a document is not bound to produce it unless he is legally compellable to do so. If, therefore, he declines to produce whenever called upon, he could not be proceeded against under this section as a matter of course, unless his act was both manifestly illegal and fraudulent.

Session. Pres. Mag. or Mag. of 1st class. Non-cog. Warrant. Bailable. Not comp.

Falsification of Accounts.

477-A. Whoever being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book,

(14) *Madurai (In re)*, 12 M. 54.
(15) *Nittar Mundle*, 3 W. R. 38.
(16) *Ramaswami*, 12 M. 148 (154).

paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.

[*Valuable security*—s. 30. *Omission*—s. 33. *Abets*—s. 107 *Clerk or servant*—s. 381 (§§ 4167-4168). *Intent to defraud*—s. 463.]

Synopsis.

(1) *Analogous Law* (5308-5310).
(2) *Procedure and Practice* (5311).
(3) *Proof* (5312).
(4) *Form of Charge* (5313).
(5) *Falsification of Accounts* (5314).
(6) *Clerk, Officer or Servant* (5315-5317).
(7) *Falsification by Act or Omission* (5318-5320).
(8) "*Intent to defraud*" (5319-5320).

5308. Analogous Law.—This section is new, and was added by the Indian Criminal Law Amendment Act, 1895,[17] in consequence of a glaring defect in law noticed in an unreported Calcutta case[18] in which the accused was shown to have defrauded a bank to the extent of three lakhs of rupees, but he had, nevertheless, to be acquitted because it was not proved that the three lakhs had been abstracted upon any one particular occasion or in any particular sums. This section was consequently enacted to meet such cases, and to make the falsification of books and accounts punishable even though there is no evidence to prove misappropriation of any specific sum on any particular occasion.[19]

5309. The section is drawn from the English Statute,[20] the provisions of which run as follows:—

"S. 1. That if any clerk, officer or servant, or any person employed or acting in the capacity of a clerk, officer or servant, shall wilfully and with intent to defraud,

(17) Act III of 1895, s. 4.
(18) *Shama Churn Sen*, Cal., unrep.
(19) Law Member's Speech, Proceedings Legislative Council, Gazette of India, Pt. 6, dated 31st March 1894, p. 152.
(20) Falsification of Accounts Act, 1875 (38 & 39 Vict., c. 24), s. 1.

destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding five years, or to be imprisoned with or without hard labour for any term not exceeding two years.

"S. 2. It shall be sufficient in any indictment under this Act to allege a general intent to defraud without naming any particular person intended to be defrauded."

5310. The falsification of accounts as such, is not forgery, but it may assume such a form as to amount to forgery.(21)

It has been held in England that a person residing in Paris, and omitting from his daily account receipts of certain sums which he sent daily to his employers in London could be indicted in England.(22) So where the accused who was the principal store-keeper at Antigua purchased certain stores in England at a nominal price agreed upon between him and the seller which price he charged to the Government in his returns to the Navy Office and by collusion with the seller the latter made to him an allowance, by which the Government were defrauded to a large amount and whereupon he was convicted in England, it was held that the English Courts had jurisdiction holding that "it appeared that the several false charges made by the defendant by which he had defrauded the Government had been in the several returns made by him from Antigua to the Navy Office in London. There was thereby an offence committed in London where such false returns where received, and where the fraud had been completed by their having been there allowed, upon which the jurisdiction of the Court attached."(23)

It may be added that this offence is extraditable both in England(24) as well as in this country.(25)

5311. Procedure and Practice.—This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Court Session, Presidency Magistrate or a first class Magistrate.(1) This section enables the prosecutor to frame a general charge about the falsification of accounts, but it does not purport to override the provisions of section 234 of the Procedure Code, nor its terms enlarged by the amendment of section 222,(2) of the Procedure Code which applies only to criminal breach of trust or dishonest misappropriation of property.(3) Consequently, while it is legal to charge a series of false entries in an account as a single

(21) *Arton*, (1896) 1 Q. B. 509 (517).
(22) *Per* Lord Alberston, C. J., in *Oliphant*, (1905) 2 K. B. 67 (73).
(23) *Munton*. 1 Esq. 62; 8 R. R. 556.
(24) *Arton*, (No. 2), (1896) 1 Q. B. 509, 517.
(25) Indian Extradition Act, Sch. I.
(1) Before the amendment of the Criminal Procedure Code by Act XVIII of 1923 this offence was exclusively triable by the Court of session. A Magistrate first class who started an inquiry into this offence was competent to try the case where the amending Act came into force before the accused was charged. Since pending proceedings were not saved by the amendment; *Rajib Lochan*, 28 C. W. N. 998.
(2) *Shama Churn Sen*, Cal. unrep
(3) *Matilal Lahiri*, 26 C. 60.

offence,[4] it is illegal to combine with such a charge three specific defalcations constituting offences under s. 409.[5] In other words, while it is legal to charge all false entries, whether they relate to a single or several of the defalcations, in a single charge, if it is proposed to charge for the defalcations separately no more than three can be tried together, and in that case it is not legal to combine three defalcations with three false entries as distinct offences, on the ground that they really amount to the same offence. For other points relating to procedure reference must be made to the last paragraph.

5312. Proof.—The points requiring proof are:—

(1) That the accused was a clerk, officer, or servant, or acted in any such capacity.

(2) That he destroyed, altered, mutilated or falsified the book, paper, writing, valuable security, or account in question.

(3) That such book, paper, etc., belonged to or was in the possession of his employer, or had been received by him for or on behalf of his employer.

(4) That the accused did as in (2) wilfully and fraudulently.

Or, *instead of* (2), *prove*:—

(2) That the accused made or abetted the making of any false entry in, or omitted or altered, or abetted the ommission or alteration of some material particular from or in such book, paper, etc.

5313. Charge.—The charge should conform to what has been said before (§ 5311). It should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the———day of———at———you being a clerk [*or* officer *or* servant, *or* employed or acting in the capacity of a clerk, officer, *or* servant], wilfully and with intent to defraud, destroyed [*or* altered, mutilated *or* falsified] any book to wit—[*or* paper, writing, valuable security, *or* account] which belonged to [*or* was in the possession of] your employer A B, [*or* which was received by you for *or* on behalf of your employer the said A B [*or* you wilfully and with intent to defraud, made *or* abetted the making of any false entry to wit—in (*or* omitted *or* altered the omission *or* alteration of any material from) any such book, etc.,] and that you thereby committed an offence punishable under section 477-A of the Indian Penal Code, and within my cognizance (*or* the cognizance of the court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5314. Falsification of Accounts.—This section is enacted to punish the falsification of accounts by a clerk, officer or servant or one acting as

(4) *Aiyagiri*, (1912) M. W. N. 545, 14 I. C. 603, 13 Cr. L. J. 251. (5) *Kasi Viswanathan*, 30 M. 328 *Raman Behary*, 41 C. 722.

such (§§ 4166-4177). The falsification made punishable is stated to be of any "book, paper, writing, valuable security or account." These must belong to the employer, though it is then immaterial, in whose custody they were at the time of their falsification. The falsification punishable may be effected by (*i*) destruction, (*ii*) alteration, (*iii*) mutilation, or (*iv*) falsification by (*a*) the making of a false entry, (*b*) omission or alteration of a material particular, or (*c*) abetment of (*a*) or (*b*).

Of course, whatever the nature and extent of the falsification, it must not have been due to mere carelessness or negligence, but must be made both wilfully and fraudulently.

5315. Clerk, Officer or Servant.—The words "clerk, officer or servant" have been taken from the English Statute (§ 5309) and they are intended to include not only persons who are legally so appointed but also those who act in that capacity whatever illegality may taint their appointment, or whether they were under any obligation to perform their duties, or were or were not paid for performing them.(6) So it is immaterial by whatever designation the accused was known, as director, partner,(7) manager or secretary, so long as he did perform the duties of a clerk, officer or servant. So where a partner of a firm had been appointed as such to manage the business of the firm, and to write its accounts, he was held to be liable under this section for falsifying them.(8)

5316. The accounts must, however, belong to or be in the possession of his employer, which must be clearly established, for, this section is not intended to punish a person for maintaining incorrect or false accounts, but for maintaining false accounts not his own. Where therefore it appeared that the accounts the accused was maintaining were his own property, he was acquitted although their falsity was proved.(9)

5317. Again, the accused must be shown to have destroyed, altered, mutilated or falsified any book, etc. If he secretes without destroying it, the section would appear to be inapplicable. If the accused is charged for falsifying it, it is not sufficient to show that the cash in hand does not tally with the corresponding entry in the accounts, but that the latter is false. The accused, a rate collector, kept for the overseers a set of books which showed the state of accounts as between the overseers and the parish authorities. In one of these books, called the overseers' receipt and payment book, he made an entry: "25th of March 1898. Balance in hand, £431 10*s.* 5*d.*" That sum was the correct balance, for which the overseers were responsible to the parish, and ought to have been in the possession of the defendant, but was not. He was unable to produce the amount. He was indicted for the falsification of the overseers' receipt and payment book by making the above entry. It was held that the entry in question was not a "false entry" within the meaning of the Act.(10) The alteration of a "paper" mentioned in the section must it appears, be an account paper, *e.g.*, a balance sheet.(11) So where the accused had removed the unused Court fee stamps affixed to applications

(6) *Annasami*, (1901) 1 Weir 554; following *Foulkes*, L. R. 2 C. C. 150.
(7) *Mahamed* v. *Mhd. Idris*, 88 I. C. 189, (1925) S. 328.
(8) *Laloo Ghella*, 6 Bom. L. R. 553.
(9) *Palin*, (1906) 1 K. B. 7.
(10) *Williams*, (1899) 63 J. P. 103.
(11) *Daulat Rai*, (1915) P. R. No. 28, 29 I. C. 105.

and *Vakalatnamas* (powers of attorney) and pasted thereon old used stamps misappropriating their value but had made no alteration in the registers, it was held that no offence under this section had been made out.(12)

5318. Falsification by Act or Omission.—An entry may be falsified by the addition of a new entry as much as by the alteration of an existing entry, or by the omission of an entry which ought to have been, but is not made. The section, however, makes this difference between an entry made, and one altered or omitted, that in the case of an alteration or omission the entry must be material, but even in the case of an addition materiality would probably determine the "intent to defraud." Again, such entries might be either manipulated by the accused himself, or their making might be abetted by him. In either case the accused is equally liable if he intended to defraud by his act or omission, alteration or abetment. So it has been said in an English case that a person may be guilty of making a false entry, although he does not make such entry with his own hands, but fraudulently and wilfully procures it to be made by a third person acting innocently and without any knowledge that the entry is otherwise than true.(13)

The accused was the debt-collector of A. As such he recovered on 22nd February £8 14*s*. 10*d*. on behalf of his employer. His duty was to account to A's cashier, B, for all sums received during the day, which B entered in the cash book. On the day in question he gave B a slip on which he had written. "Sheppard, on account £5," which B credited in his account. He was indicted for abetting the making of a false entry by B, and he was held to have been rightly convicted.(14) In another case the accused was employed by the prosecutors as their assistant at Paris, his duty being to realise bills in Paris, note such payments on slips of paper and send them on to London where they were posted up in the prosecutors' account books. He fraudulently omitted to notify certain payments, and in consequence of which those payments were not entered in the prosecutors' accounts in London. He was held to have been rightly convicted under the Statute for omitting and concurring in omitting these sums from the prosecutors' books in London.(15)

Intent to Defraud.

5319. The term "wilfully" has not been defined in the Code, but it is evidently intended to imply conscious determination as distinguished from ignorant incompetency. It excludes all cases in which the account is ill-kept or incorrect and misleading, but in which there is the absence of an "intent to defraud." These words are taken from the English Statute, but they are also used in section 25 in defining "fraudulently." That term has, however, been used in a special sense, as already seen. It excludes an act done to conceal a previous fraudulent or dishonest act (§§ 5159-5164), but this section has been enacted to embrace a case not only of falsification accompanying an embezzlement, but also of a falsification made in order to conceal a past fraudulent or dishonest act involving pecuniary loss to the employer;(16) so one which merely secures him priority to which

(12) *Bidhudananda*, 47 C. 71.
(13) *Butt*, 15 Cox 504.
(14) *Per* Coleridge, C. J., in *ib.*
(15) *Oliphant* (1905) 2 K. B. 67.
(16) *Rash Behari Das*, 35 C. 450; following *Annasami*, (1901) 1 Weir 554 (556).

he was not entitled.[17] The accused, a forest clerk, was charged under this section for altering the cash book and his office register so as to show that certain sums received as "compounding fees" had been paid into the Government treasury, though as a matter of fact they had been embezzled by the Forest Guard, whose duty it was to collect them, and upon which he was convicted under this section; but on appeal it was contended for him that since the embezzlement had preceded the alterations, the accused could not be said to have intended to defraud, which pointed to futurity and not to a past fraud, but the Court held the words equally applicable to both. "The effect," they said, "is exactly the same as if a person forged a receipt to conceal the fact of his having retained money instead of paying it into the treasury, and in such a case there would clearly be an intent to deceive."[18]

So in another case it was said that a debtor who forges a release to screen himself from liability to pay the debt cannot but be held guilty of forgery, because he intended by the forgery to cover a dishonest purpose.[19] This view has been followed by a Calcutta Bench in a case in which the accused had made false entries in a chalan, showing payment of moneys into treasury, but which he had, in fact, misappropriated, whereupon he was held to have made himself amenable to this offence.[20] In so holding, the Court did not advert to the accused's liability for forgery, but it is evident that the same expression could not be differently constructed in the two sections, and these cases[21] may then be taken to hold accordingly.

5320. The question of intent to defraud is a question of fact which must be left to the jury. So where the tendency of a summing up was to withdraw from the jury the consideration of the circumstances bearing on the question of intent to defraud, the conviction was quashed.[22]

Of Trade, Property and other Marks.

5321. Topical Introduction.—These sections (ss. 478-489-D) relating to trade and property marks constitute an offence which falls into the general category of cheating, by using false tokens, and which was so regarded by common law. So where the prisoner was indicted for keeping and exposing for sale and selling to one H. A. F., a picture upon which he had unlawfully painted the initials of a well-known artist, it was held to be cheating by use of false token at common law and Cockburn, C. J., in delivering the judgment of the Court of criminal appeal said: "We have carefully examined the authorities, and the result is, that we think if a person in the course of his trade openly and publicly carried on, puts a false mark or token upon an article so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article is sold, and money obtained by means of that false mark or token, that is a cheat at common law."[23] Between an ordinary cheat and the

(17) *Narain Dutt*, 47 A. 948.
(18) *Annasami*, (1901) 1 Weir 554.
(19) *Sabapathy Pillay*, 11 M. 411; *Kotamraju*, 18 M. 90.
(20) *Rash Behari Das*, 35 C. 450.
(21) *Rash Behari Das*, 35 C. 450; following *Lalit Mohan Sarkar*, 22 C. 313 (321); *Annasami*, (1901) 1 Weir 554; *Sabapathy Pillay*, 11 M. 411; *Kotamraju*, 18 M. 90.
(22) *Drewett*, (1905) 69 J. P. 37.
(23) *Class*, 27 L. J. M. C. 541. But the conviction was quashed on account of defective indictment which did not state that the prisoner was able to pass off the picture *by means* of the false initials.

user of a false trade-mark, there is, however, this difference, that while the former achieves his purpose by means of verbal misrepresentation, the latter attains the same by means of visual misrepresentation. The difference between the two classes of cases is then merely the difference of degree, the cardinal principle underlying the two offences being the same.

5322. The rest of this chapter consists of two sets of sections—ss. 478-489 against counterfeiting trade-marks and ss. 489A-489-D against counterfeiting bank and currency notes. Of these the sections relating to trade-marks were objected to as an instance of over-legislation. It was said that in protecting trade and property marks by criminal sanction, criminal law would be overstrained, but this was not the opinion concurred in by the Law Commissioners, who generally approved of the protecting provisions as being made a part of the Criminal Code,[24] and which eventually they were. But though these sections now form a part of the Penal Code, it is so more as a matter of convenience than as of right. For as was observed in a Madras case: "Ordinarily, the infringement of a trade-mark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the Legislature, in its anxiety to protect traders, has allowed a resort to the Criminal Courts to provide a speedy remedy in cases where the aggrieved party is diligent, and does not by his conduct show that the case is not one of urgency. If, therefore, the person aggrieved fails to resort to the Criminal Courts within a year of the offence coming to his knowledge, the law assumes that the case is not one of urgency and it leaves him to his civil remedy by an action for injunction."[25]

5323. These sections, as originally enacted, were recast in 1889, when the present sections were substituted for those thereby repealed.[1] That Act makes other provisions as to the cost of defence or prosecution,[2] the limitation of prosecutions[3] and the consequence of unintentional contravention of ss. 480, 482 or 485.[4] It also enables the Court to order the forfeiture of goods in contravention of s. 482 or 486, 488,[5] and finally it formally extends the chapter on abetment to all the ensuing sections.[6]

The provisions of this Act relating to trade and property marks closely correspond with those of the English Statute[7] relating to Merchandise Marks, which will be referred to in appropriate places.

478. A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade-mark,

Trade-mark.

and for the purposes of this Code the expression "trade-mark" includes any trade-mark which is registered in the register of trade-marks kept under the Patents, Designs and

(24) 2nd Rep., ss. 302-307.
(25) *Ponnusami Tevan*, 22 M. 488.
(1) Act IV of 1889, s. 9.
(2) *Ib.*, s. 14.
(3) *Ib.*, s. 15.
(4) *Ib.*, s. 8.
(5) *Ib.*, s. 9.
(6) *Ib.*, s. 22.
(7) 50 & 51 Vict., c. 28.

Trade-Marks Act, 1883, any trademark which, either with or without registration, is protected by law in any British possession or Foreign State to which the provisions of the one hundred and third section of the Patents, Designs and Trade-Marks Act, 1883, are, under Order in Council, for the time being applicable.

Synopsis.

(1) *Analogous Law* (5324-5327).
(2) *Meaning of Words* (5328).
(3) *What is a trade-mark* (5329-5332).
(4) *Trade Description* (5333).
(5) *General Get-up* (5334-5335).
(6) *Copy-right is not a Trade-mark* (5336).

5324. Analogous Law.—This definition of "trade-mark" corresponds with the following definition of the same term in the English Merchandise Marks Act, 1887,[8] which is identical.

"S. 3. 'Trade-mark' means a trade-mark registered in the register of trade-marks kept under the Patents, Designs and Trade Marks Act, 1883,[9] and includes any trade-marks which, either with or without registration is protected by law in any British Possession or Foreign State to which the Provisions of the Patents, Designs and Trade Marks, Act, 1883, are, under Order in Council, s. 103 for the time being, applicable."

For the purpose of the Patents, Designs and Trade-Marks Act, 1883,[10] a trade-mark must contain the following essential particulars:—

'S. 64 (1) (*a*) A name or an individual or firm printed, impressed, or woven in some particular or distinctive manner; or

" (*b*) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or

" (*c*) A distinctive device, mark, brand, heading, label or ticket.

" (*d*) An invented work or invented words, or

" (*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name."

(2) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade-mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement, and disclaimer shall be entered on the register.

5325. This definition of the word has been formulated only for the purpose of registration under the Statute, but it affords a fair indication of what law implies by a trade-mark. That term, however, is not confined to only such marks as have been registered under the Statute, for a mark, though unregistered, may be equally a trade-mark if it acquires by usage a certain notoriety, the use of which may then be protected, and its infringement would be punishable under the Code, because the term as here defined

(8) 50 & 51 Vict., C. 28, s. 3.
(9) 46 & 47 Vict., c. 57.
(10) As amended by the Act of 1888, (51 & 52 Vict., c. 50, s. 10 (1).

is wider, though it *includes* a trade-mark which is either registered or protected, by the Statutes specified in clause 2.[11]

5326. The reference in the second clause of this section to s. 103 of the Patents, Designs and Trade-Marks Act, 1883, would include international arrangements for the protection of inventions, designs and trade-marks which it empowers the King to make by an order in Council. This section enables His Majesty to protect by executive action, British Patents in foreign countries and foreign patents in the British Empire.

5327. In India there is no system of registration of trade-marks, nor is there any provision for a statutory title to a trade mark, so that the rights of parties setting up rival claims to the ownership of a trade-mark, is determined in accordance with the principles of the common law of England.[12] A Trade Mark under this chapter would then comprise:—

(1) A trade Mark registered under the English Patents, Designs and Trade-Marks Act, 1883.

(2) Protected by His Majesty's order in Council under s. 103 of the said Statute.

(3) Other trade-marks not so registered or protected, title to which must be proved by exclusive user.

5328. Meaning of Words.—"*The expression includes any trade-mark*": The word "includes" is important, and signifies that the term is not confined to only registered or protected marks, which are trade-marks by enumeration, though they may not be *used* to "denote that goods are the manufacture or merchandise of a particular person." Marks denoting this are, however, trade-marks whether they are or are not registered or protected.

5329. What is a Trade-mark?—This section defines a trade-mark to mean "a mark used for denoting that goods are the manufacture or merchandise of a particular person." This is the general definition of the term and a mark which conforms to it is a trade mark, whether it is or is not registered or protected. The section, however, defines registered and protected marks to be *included* in the term—which are, therefore, trade-marks, because they are so declared by Statute irrespective of their use to denote goods of a particular person. Registered or protected trade-marks thus possess an advantage over other marks, inasmuch as the Court will take judicial cognizance of their being trade-marks on proof of their registration or protection under the Trade Marks Act. In other cases the fact must be established by proof that it is a mark appropriated and exclusively used by one person to denote that certain goods are his manufacture or merchandise. As such it may include even a property-mark defined in the next section, but which is rather used to bear a somewhat different significance as will be seen in the sequel.

5330. Generally speaking, a trade-mark is some symbol, consisting of a picture label, word or words, which is applied or attached to a trader's

(11) *Nil Money Nag*, 19 C. W. N. 957, 30 I. C. 1007, 16 Cr. L. J. 719.

(12) *British American Tobacco Co.* v. *Mahbub Buksh*, 38 C. 110; *Hanuah* v. *Jagannath & Co.*, 42 C. 262.

goods, so as to distinguish them from the similar goods of other traders, and to identify them as his goods, or as those of his successors in the business in which they are produced or put forward for sale. So where the words "The National Bank of India" were found to be stamped upon gold bars with the view to inform the public that the bars were the merchandise of the Bank, imported, sold and guaranteed by it, they were held to become the trade-mark of the Bank and the accused who imitated it was convicted under ss. 482 and 420.(13) The same view was taken in another case in which the complainants who were dealers in hand-made sugar, stamped their bags with the name of their firm the imitation of which was punishable under s. 482.(14)

A trade-mark may or may not be registered; if it is registered or protected it is a trade-mark though it may not be used as such, but otherwise a mark ceases to be a trade-mark if it is not *used* for denoting that the goods are the manufacture or the merchandise of a particular person. A bank called the Chartered Mercantile Bank of India, London and China, used to import from England gold bars impressed with the name of that bank, and other words denoting the touch of gold and the names of the London bullion brokers, which impression obtained currency in the market. That bank stopped business in 1893 and was succeeded by the Mercantile Bank of India, who prosecuted the accused for possessing a die which made an impression similar to the impression on the gold bars imported by the Chartered Bank, whereupon he was convicted, under sections 485 and 486 of the Code, but on appeal the Court held that the prosecution having failed to give any evidence of their *using* the mark, or that they had acquired any exclusive right to use it from their predecessors, the Chartered Bank, the accused could not be convicted of this offence.(15)

5331. "The right to a trade-mark," observed Lord Cranworth, "is a right closely resembling, though not exactly the same as copyright. The word 'property' when used with respect to an author's right to the production of his brain, is used in a sense very different from what is meant by it when applied to a house or a watch. It means no more than that the author has the sole right of printing or otherwise multiplying copies of his work. The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured. If the word 'property' is aptly used with reference to copyright, I see no reason for doubting that it may be with equal propriety applied to trade-marks. But I further think that the right to a trade-mark may, in general, treating it as property, or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark had been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise where the trade-mark consists merely of the name of the manufacturer. When he dies, those who succeed him (grandchildren or married daughters, for instance), though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark, and they would be protected, because, according to the usages of trade, they would be understood as meaning no more by the use of their

(13) *Lakumal*, 8 S. L. R. 199, 27 I. C. 902.

(14) *Latif Miyam*, 39 A. 123.

(15) *Anookool Chunder Nundy*, 27 C. 776.

grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory were sold, and assigned to a purchaser. The question in every such case must be, whether the purchaser in continuing the use of the original trade-mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade mark. In such a case I see nothing to make it improper for the purchaser to use the old trade-mark, as the mark would, in such a case, indicate only that the goods so marked were made at the manufactory which he had purchased."(16) "The fundamental rule is, that one man has no right to put off his goods for sale, as the goods of a rival trader, and he can not, therefore, be allowed to use names, marks, letters or other *indicia*, by which he may induce purchaser to believe that the goods which he is selling are the manufacture of another person. A man may mark his own manufacture, either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself, and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description. That is, what I apprehend is usually meant by a trade-mark, just as the broad arrow has been adopted to mark Government stores, a mark having no meaning in itself, but adopted by and appropriated to the Government."(17)

5332. A trade-mark may then comprise any name, real or fancy name, such as Holloway's pills, American Leather Cloth Co.,(18) Pear's soap or Howgua's mixture,(19) Perri's Medicated Mexican balm,(20) Stone ale,(21) Coleman's mustard,(22) John Bull brand,(23) Bovril,(24) or the like. But the question whether a certain word is or is not a trade-mark, is simplified by the section which defines it to include only marks which are registered or protected under the Patents, Designs and Trade-Marks Act.

5333. Trade Description. A trade-mark must be distinguished from what is merely a trade-description, such for example, (*a*) as to the number, quantity, measure, gauge or weight of any goods; or (*b*) as to the place or country in which they were made; or (*c*) as to the mode of manufacturing or producing them; or (*d*) as to the material of which they are composed; or (*e*) as their being the subject of an existing patent privilege or copyright, and the use of any figure, word, or mark which according to the custom of the trade is commonly taken to be an indication of any of the other matters.(25) A "false trade-description" means a trade-description which is false in material respect as regards the goods to which it is applied, and includes every alteration of a trade-description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade-description is a

(16) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523 (534, 535).

(17) *Ib.*, p. 538; following *per* Lord Langdale in *Perry* v. *Truefitt*, 6 Beav. 66.

(18) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523.

(19) *Pidding* v. *How*, 8 Sim, 477.

(20) *Perry* v. *Truefitt*, 6 Beav. 66.

(21) *Thompson* v. *Montgomery*, (1891) A. C. 217.

(22) *Coleman's Trade Mark application (No. 2)*, (1894) 2 Ch. 115.

(23) *Paine & Co.'s Trade Mark*, (1893) 2 Ch. 567.

(24) *In re Trade-Mark No. 58, 405; "Bovril,"* (1896) 2 Ch. 600.

(25) Merchandise Marks Act. 1887 (50 & 51 Vict., c. 28), s. 3; Indian Merchandise Marks Act (IV of 1889), s. 2.

trade-mark or part of a trade-mark, does not prevent such trade-description from being a false-trade-description.(1) Now while the using of a false trade-mark is punishable under the Code, the using of a false trade-description is only punishable under the provisions of section 6 of the Indian Merchandise Marks Act, 1889. The distinction between the two is not often well marked, but nevertheless it has to be made, if only for the purpose of meting out the appropriate penalties.

5334. General Get-up.—Besides trade-description one trader may generally imitate the get-up of the wares of another trader, and if the imitation is so close as to be reasonably calculated to deceive intending purchasers mistaking the goods for the goods of another, the Court will restrain the imitator by injunction from selling his goods under a get-up, which is the colourable imitation of another's goods, but the former cannot be proceeded against under these sections, because the get-up does not constitute a trade-mark within the meaning of this section.(2)

5335. It was so held in a case in which the prosecutor, who had for many years carried on business as a vendor of ground coffee, sold it in round tin boxes containing a pound each. The label affixed to these boxes consisted of an orange-coloured paper band, upon which was printed the prosecutor's signature. It also contained a picture of a railway engine and truck. The accused sold coffee in similar boxes bearing a similar band coloured, however, pink but bearing his signature in imitation of that of the prosecutor. It further contained the picture of a steamer instead of a railway engine. It was held that the get up of the two boxes was undoubtedly similar, but that it did not constitute the prosecutor's trade-mark; the facsimile of his signature did, but then the accused's tins bore the facsimile of his own signature, and there was therefore no infringement of his trade-mark.(3)

The same principle ran through another case in which the parties were rival importers of fish hooks imported by them in packets bearing the labels of two fishes crossed with their heads and tails pointing upwards. The prosecutor claimed exclusive trade-mark in the design, on the ground that they had received wide reputation and were known as "mach marka" ("fish marked"), but it was held that the popular description of a commodity did not constitute a trade-mark, and that the device of the two fishes did not constitute a trade-mark or trade-description calling in the penalties of the Code or the Merchandise Marks Act. At the same time the Court was not prepared to say that the prosecutor would not obtain redress if he resorted to a civil proceeding.(4) So in another case in which the defendant was found to have sold brandy in bottles of the same size and shape as used by the plaintiff, and bearing a similar label printed in gold on white ground and encircled by a wreath of vine leaves and grapes,

(1) Merchandise Marks Act, 1887 (50 & 51 Vict., c 28), s. 3; Indian Merchandise Marks Act (IV of 1889), s. 2.

(2) *Stephen Abkyun* v. *Petley*, (1903) 10 Bur. L. R. 84; *Narumal* v. *Bombay Co.*, 8 S. L. R. 39, 25 I. C. 998.

(3) *Stephen Abkyun* v. *Petley*, (1903) 10 Bur. L. R. 84.

(4) *Bakaullah Mallik*, 31 C. 411. This view would appear to be in conflict with that taken by Lord Cranworth in *Seixo* v. *Provezende*, L. R. 1 Ch. 192; and Sir Charles Hall, V. C. in *Cope* v. *Evans*, L. R. 18 Eq. 138 (148).

but containing in the centre thereof the defendant's instead of the plaintiff's name, it was held that there was unquestionably imitation of the get-up, but no infringement of any trade mark.(5) But in another case in which Calvert & Co. prosecuted the accused for counterfeiting the get-up of their tooth powder boxes, it was broadly laid down that the trade-mark as here defined "included the whole design on the top of the box and the black label pasted round the side" but for which no authority is cited, and the point is rather assumed than discussed.(6)

5336. Copyright is Not a Trade-mark.—Although it is conceivable that books may be described as goods being the subject of trade, still it does not necessarily follow that their title is a trade-mark capable of protection by means of penalties reserved for infringement of a trade-mark. The prosecutor was the descendant of an astrologer by name Chandu, who flourished some three hundred years back, and in whose name a calendar called "Shrichandu Panchang" was annually issused from Jodhpur. The accused brought out a rival calendar also calling it by the same name, whereupon he was prosecuted under section 482 for pirating the prosecutor's trade-mark, but the Court threw out his complaint, holding that the prosecutor's title to the name did not constitute a trade-mark, inasmuch as the phraseology used in this section did not appear to contemplate books.

As Fulton, J., observed: "The word 'manufacture' is not a term usually applied to books, but even if it may correctly be applied to the whole process by which books are prepared, it certainly seems impossible to apply it to that portion of the process known as authorship which, though most important, is ineffectual without printing and publication. Similarly, it cannot be argued successfully that these calendars were the merchandise of the descendants of Shri Chandu and it is not alleged that they were ever sold by them. We must construe section 478 in its ordinary grammatical sense,and if this test be applied, it will, I think, be found that the definition of trade-mark is not sufficiently elastic to protect the rights of authors. Copyright Acts and the general civil law may or may not be sufficient to protect them, but however this may be, we cannot distort the language of the Penal Code so as to bring within its provisions literary piracy, as alleged in this complaint."(7)

479. A mark used for denoting that moveable property belongs to a particular person is called a property-mark.

Property-mark.

Synopsis.

(1) *Analogous Law* (5337).
(2) *What is a Property-mark* (5338-5340).
(3) *Moveable Property* (5339).
(4) "*Belonging to a Particular Person*" (5340).

(5) *Hennessy & Co.* v. *Keatin*, (1908) 8 Ir. R. 43; O. A. 24 T. L. R. 534.
(6) *Nilmoney Nag* v. *Durga*, 19 C. W. N. 957, 30 I. C. 1007.
(7) *Radha Krishna* v. *Kissonlal*, 3 Bom. L. R. 883 (1886).

5337. Analogous Law.—The distinction between "trade-mark" and property-mark" is peculiar to this Code; it is non-existent in English law. But the distinction here observed is important, because its infringement entails the penalty prescribed in section 481 and a property-mark, unlike a trade-mark, need not be either rigistered or protected, so as to entitle the owner to proceed against persons falsely using it.

5338. What is a Property-mark?—A trade-mark is a mark for denoting that goods are the manufacture or merchandise of a particular person. A property mark is a mark used for denoting that moveable property *belongs* to a particular person. The one refers to ownership of a symbol: the other to rights in property. But both the trade and property-marks have the same purpose in view, namely the protection of one's goods against their fraudulent imitation by another, and both may be used by the manufacturer as well as the merchant. For example, the Singer Manufacturing Co., are known to make both sewing machines as well as bicycles, and it is conceivable that they might make motor cars, swords and cutlery as well. Now they have distinctive marks for each of their goods which is their trade-mark, but they may choose to designate all their goods as "Singer's make" to distinguish them from similar goods manufactured by other makers, in which case the expression "Singer's make" would become their property-mark entitled to protection under this section.

So again, a merchant may stamp his wares with his own name or with any device, though they may not bear any recognized trade-mark, in which case the impression would be his property-mark within the meaning of this section. The National Bank of India imported from England, for sale in India, bars of gold, of uniform touch, weight and size, with the words "National Bank of India" "impressed thereon in Guzerati, as "Nasranna Bank" which on account of their uniform quality obtained a special value in the market. The accused placed on the market similar bars of gold marked "Nasranna Bank," whereupon he was prosecuted under section 481; and the question was whether the National Bank had any property-mark in the bars. It was contended for the accused that the term was flexible being intended to denote a mark impressed to denote that a certain thing was one's own property, and that the moment it ceased to belong to the owner by whom the mark had been impressed, the property-mark ceased to be so; or in other words the property-mark ceased with the ownership of goods. But as the Court remarked: "This interpretation assumes that a property-mark put upon any article by any person to denote his ownership is confined to that article and no other property belonging to him. But I think that a property-mark is intended to denote ownership over all moveable property belonging to him whether it is all of one kind or different kinds. So long as the person owns moveable properties, his property-mark which has been or may be impressed upon them remains his, though any particular article out of it may after such impression pass out of his hands and cease to be his."(8)

(8) *Dabyabhai*, 6 Bom. L. R. 513 (515).

Moveable Property.

5339. Property-mark must, however, relate to moveable property, which is here used collectively as denoting goods of a person. The term is, moreover, wide enough to include one class or species of properties belonging to a single owner. So in the case last cited, though the National Bank may have impressed a large number of bars with their distinctive property-mark, the fact that some of them were sold, and replaced by others bearing the same mark, would not in any way affect the Bank's right to the property-mark which, like the trade-mark, acquires all the essential attributes of property so as to be capable of assignment(9) and protection.

"Belonging to a Particular Person."

5340. Ordinarily, a property-mark is used for the same purpose as a trade-mark, and the expression "belonging to a particular person" does not necessarily imply his ownership. For instance, suppose that the gold bars imported by the National Bank were tested by a firm of assayers of repute, say A B, who impressed thereon their name as indicating that the gold was of a certain uniform quality, and these bars were then further impressed by the National Bank would not A B's impression on the bars be as much a property-mark as that of the National Bank has been held to be?

For a further commentary on the meaning of this term *see* s. 481.

Using a false Trade-Mark.

480. Whoever marks any goods or any case, package or other receptacle containing goods or uses any case, package or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade-mark.

Synopsis.

(1) *Analogous Law* (5341-5345).
(2) *What is using a False Trade-mark* (5346-5347).
(3) *There must be an Infringement of a Trade-mark* (5348-5349).
(4) *Right Depends Upon User* (5350).
(5) *Right Lost by Abandonment* (5351).
(6) *Manner "reasonably calculated to deceive"* (5352-5353).
(7) *True Test Stated* (5354-5355).
(8) *Truth is No Justification* (5356-5358).
(9) *Coincident Similarity Expected* (5359).

(9) *Anookool Chunder Nundy*, 27 C. 776.

5341. Analogous Law—This and the next section define the offence of using a false trade or property mark, for which s. 482 prescribes the penalty. It will be observed that while section 478 restricts "trade-mark" to a mark used, or registered or protected under the Trade Marks Act, this section defines the offence more generally, by including therein all marks whether in use, protected or registered or not—the essence of the offence being imitation so as to practise deception.

5342. The phrase "marks any goods or any case, package or other receptacle containing goods, or uses any case, etc," is evidently used in the same sense as the English phrase "apply a trade-mark or mark or trade-description to goods" which are explained to bear the following meaning:—

"S. 5. (1) A person shall be deemed to apply a trade-mark or mark or trade-description to goods who (*a*) applies it to the goods themselves; or (*b*) applies it to any covering, label, reel or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or (*c*) places, encloses or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade-mark or trade-description has been applied; or (*d*) uses a trade-mark or mark of trade-description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade-mark or mark or trade description."(10)

5343. The mark here referred to must be on "any case, package or other receptacle." But these words would evidently include also a "covering," which in the two Acts is defined to include "any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper."(11) But evidently the marking of such case or covers would be complete, whether the mark "is woven, impressed or otherwise worked into or annexed or affixed to the goods or any covering label, reel or other thing." In such a case the term used in the two Acts(12) is "apply."

5344. The word "goods" includes any article of merchandise including books,(13) and is thus defined in the Merchandise Marks Act 1889.(14)

"2. (4) 'Goods' means anything which is the subject of trade or manufacture.'

5345. This is practically the same as the corresponding definition in the English Statute, in which the term is defined to mean "anything which is the subject of trade, manufacture, or merchandise."(15)

5346. What is Using a False Trade-mark?—A person is said to use a false trade-mark, if he *marks* any goods or marks or uses any case, package or other receptacle with any mark thereon "in a manner reasonably calculated to cause it to be believed" that the goods so marked or contained in any such receptacle are the manufacture or

(10) Merchandise Marks Act, 1887 (50 & 51 Vict., c. 28), s. 5; adapted in the Indian Merchandise Marks Act, 1889 (IV of 1889), s. 5.
(11) *Ib.*, s. 5.
(12) *Ib.*, s. 5.
(13) *Kanai Das Bairagi* v. *Radhashyam Basack*, 26 C. 232; followed *per* Fulton, J., in *Radhakrishna* v. *Kisson Lal*, 3 Bom. L. R. 883.
(14) Act IV of 1889, s. 2; 50 & 51 Vict. c. 28.
(15) 50 & 51 Vict., c. 28 s. 3 (1).

merchandise of a person whose manufacture or merchandise they are not. Law thus protects not only the manufacturer but also the merchant or importer who sells goods made by another under his own trade-mark.(16) A person who marks goods or their covering with another's trade mark may be either the manufacturer or a merchant who may mark similar or inferior goods with a reputed brand, in the hope of passing them off as goods, for which there is a readier sale. Such person commits the double offence of defrauding the manufacturer and cheating the buyer.

5347. But the particular mischief provided against here is that in which there is the counterfeiting of another's trade-mark, and which postulates (*i*) that what was counterfeited was a trade-mark within the meaning of that term as used in section 478, and (*ii*) that the accused counterfeited it by making use of it, (*iii*) in a manner calculated to deceive.

(1) There must be an Infringement of a Trade-mark.

5348. The first question has been already considered. It presupposes the existence of a legal right in another the infringement of which law deems it necessary to punish. If then there was no trade-mark to which anybody had a right, its use by another person would not be punishable under this section. To be punishable, it must be a device used by one upon goods similar to those of the other which bore a similar trade-mark. No one has an absolute right to any particular trade-mark, and the fact that a certain mark was registered by one for a certain class of goods, does not prevent another from adopting it for other goods, provided that it is different, though it may belong to the same class.

5349. The plaintiff Eno had for several years used the words "Fruit Salt" as his trade-mark for a saline aperient. The defendant applied to register "Fruit Salt" as his trade-mark for a baking powder. Eno supposed, and it was found that the defendant had adopted those words from "Eno's Fruit Salt," and Kay, J., refused him permission to register the trade mark as one calculated to deceive the public into a belief that the baking powder contained "Eno's Fruit Salt" as one of its ingredients, but this judgment was reversed on appeal by the majority of the Judges who held that since the name was applied to a totally different thing, the plaintiff had no right to complain. As Lindley, L. J., remarked: "He has sought to obtain the benefit of the words, although not the benefit of the trade."(17) Against this judgment there was, however, another appeal to the House of Lords where again the Judges differed, but the majority of the Court agreed in restoring the judgment of Kay, J., which was consequently restored.(18) A different view was, however, taken where the plaintiff used "Neostyle" as a trade-mark for a duplicating machine, and the defendant used the word to designate their paper used for the "Neostyle" duplicator.(19)

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(16) *Latif*, 39 A. 123.

(17) *Dunn's Trade Marks*, 41 Ch. D. 439 (451); reversed O. A. *Eno* v. *Dunn*, 15 App. Cas. 252.

(18) *Eno* v. *Dunn*, 15 App. Cas. 252, *Per* Lords Watson, Herschell and Macnaghten (*contra* Lords Halsbury, L. C., and Lord Morris).

(19) *Neostyle Manufactring Co.* v. *Ellam's Duplicate Co.*, (1904) 21 R. P. C. 589.

There is, indeed, no objection to two persons adopting the same trade-mark, provided that it is not done with intent to deceive, nor is it in fact calculated to deceive. So the Court allowed two rival companies to use "Dunlop" as their "trade-mark," when there was enough to distinguish one company from the other—as where one called itself the "Dunlop Motor Company" and the other adopted the name of "Dunlop Pneumatic Tyre Co."[20] In this case the decision turned on the fact that the business of the two companies, though similar, was not identical. But if such had been the case the plaintiff should have certainly obtained an injunction, as did Brooks, the maker of cycle saddles, which bore the mark "Brooks," and who had as such gained wide popularity and in infringement of whose right the defendant placed on the market similar saddles marked also "Brooks," and which was held to be clearly an infringement of the plaintiff's trade-mark.[21] The same view was taken in another case in which the defendant entered upon the scene with his "Valentine Extract Company" which had been the plaintiff's trade-mark for many years, and who also traded in meat extracts, which were popularly known by the name of "Valentine."[22] It may be that the names are not the same but similar, but if they are calculated to deceive, the Court will restrain their use by an injunction. So where the plaintiff who had for many years stamped his goods, such as tobacco pipes, cigar and cigarette holders, with the letters "G. B. D." plain cut and enclosed in an oval ring he was held entitled to restrain the defendant who imitated his trade-mark but varied the plaintiff's initials to "J. B. D." which was held to be insufficient to prevent deception.[23]

Right depends upon User.

535o. The plaintiff described their belting as "Camel hair belting," though they had latterly added "Reddaway's" by way of caution, but it was held to be no reason to entitle the defendant to describe his belting as "Camel hair belting."[24] So where A used a trade-mark for his galvanized iron sheets, the leading features of which were a rising sun and the words "Sun brand" impressed below, it did not perevent B from using the same mark for iron generally and for rolled drawn and galvanized wire and strand.[25] The fact that A had registered his mark for such class of goods is immaterial, if he did not in fact use it, as it has been said that user is the life of a trade-mark, and non-user the death of it.[1]

So Bacon, V. C., observed: "If, then, they never did manufacture iron wire, would it be a reasonable construction of the Statute to say that, because a man manufactures only one out of a class of goods, he shall be able, by registering a trade-mark applicable to all the class, to

(20) *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, (1907) A. C. 430: followed in *Waring Gillow, Ltd.* v. *Gillow & Gillow Ltd.*, (1917) 33 R. P. C. 173, 32 T. L. R. 389.

(21) *Brooks & Co., Ltd.* v. *The Norfolk Cycle Co.*, (1899) R. P. C. 523.

(22) *Valentine Meat Juice Co.* v. *Valentine Extract Co.*, (1900) 83 L. T. 259.

(23) *Ruchon* v. *M'Colgan*, (1901) R. P. C. 262.

(24) *Reddaway* v. *Banham*, (1896) A. C. 199; the same question similarly decided in *John Smidt* v. *Reddaway & Co.*, 32 C. 401 (410).

(25) *Braby & Co.'s Application*, 21 Ch. D. 223.

(1) *Per* Chitty, J., in *Monson & Co.* v. *Boehm*, 26 Ch. D. 398 (406).

exclude the manufacture, of any of the other twelve articles of manufacture, and prevent another person who has adopted a trade-mark in connection with any of those articles from designating his particular goods by that mark? That would be a most unreasonable construction of the Act of Parliament."(2) This view was affirmed on appeal,(3) Cotton, L. J., observing: "Even if a trade-mark can be registered which is not in actual use, it ought to be restricted to those goods in connection with which it is going to be used. In my opinion it is not the intention of the Act that a man registering a trade-mark for the entire class, and yet only using it for one article in that class, can claim for himself the exclusive right to use it for every article in the class."(4)

Right lost by Abandonment.

5351. But where a person had not only registered his mark but made use of it, mere suspension of its use without abandonment was not sufficient to destroy the right.(5) The plaintiff used to manufacture soap for export to the Colonies, which bore the registered trade mark of a Kangaroo with the word "The Colonial" enclosed in an oval frame. He had, however, ceased to manufacture the soap for several years, when the defendant put upon the market soap bearing a similar trade-mark. The plaintiff sued for an injunction and the question was, whether the fact of non-user disentitled him to it. It was held that though mere non-user for a sufficient time is good evidence of abandonment, it is abandonment and not non-user that deprives a man of his right to a trade-mark.(6) And the question of abandonment is a question of fact. Indeed, the Court may allow two identical trade-marks to be registered for the same article, and it, therefore, follows that the fact that one person has established his right to a trade-mark does not negative the possibility of another person possessing a similar right.

In the case last cited the plaintiff was a registered owner of the trade-mark he used on his soap made for export to the Colonies. The defendant coincidentally hit upon a similar trade-mark which he used on his soap also sent out to the Colonies. The two marks were identical, but the defendant was shown not to have imitated the mark of the plaintiff's who had, however, stopped his manufacture of the soap since five years. The plaintiff sued for an injunction but the Court refused it and allowed the defendant to register his trade-mark, though it was identical with that of the plaintiff on the ground that both parties had used it independently, and each party claimed it *bona fide*.(7) But this was probably an extreme case, and one in which the plaintiff's objection to the defendant's use of his trade-mark was sentimental as he had ceased to do the same business since five years. The case is nevertheless instructive, as it shows that mere similarity of device is by no means conclusive to establish a case for injunction, much less for a prosecution under the Code.

(2) *Edwards* v. *Dennis*, 30 Ch. D. 454 (463).
(3) *Ib.*, p. 473.
(4) *Ib.*, p. 474; followed *per* North, J. in *Hart* v. *Colley*, 44 Ch. D. 193 (199).
(5) *Crossby* v. *Lightowler*, L. R. 2 Ch. 478.
(6) *Monson & Co.*, v. *Boehm*, 26 Ch. D. 398 (400).
(7) *Monson & Co.* v. *Boehm*, 26 Ch D. 407, 408.

Manner "reasonably calculated to deceive."

5352. That question depends upon knowledge that another person has the right to a similar trade-mark, and the use of a similar mark to pass off one's goods as the goods of another. This is the essence of the crime. The use of a similar mark by one upon goods resembling the goods of another is a mute representation that the former were the same as the latter. Knowledge of the previous use of a similar trade-mark by another is therefore essential. But there may be such knowledge and yet his act may not be criminal, though it may afford sufficient ground for an injunction. This must depend upon a variety of circumstances.

For instance, suppose a person were to use empty bottles of a celebrated perfume and filling therein inferior liquid, sell the stuff as the original perfume, could there be any doubt but that the false trade-mark was used "in a manner reasonably calculated to cause it to be believed that the goods contained in such receptacles" were the goods of another person whose goods in fact they were not. On the other hand, where the resemblance between the real and the alleged imitation, though considerable, is not sufficiently close to enable the Court to hold that the one was the base imitation of the other, the Court will stay its hand and refer parties to the Civil Court. The question is one of degree. Where, for instance, the trade-mark used by the accused was a crescent encircling a crown over the letters A. M. R., and the one used by the complainant was a crescent encircling a star over the letters A. G. M., the Court threw out the complaint for this offence holding it to be a case for damages in the Civil Court.(8)

The prosecutors, the Holland-Bombay Trading Company used to import white shirtings bearing the mark "H.B.T.C. 40000," a label with a design of one lion and a snake and an oval stamp containing the words "Sole Importers, Holland-Bombay Trading Company, Limited," and a buff heading. The accused had in their possession for purposes of sale some packages of white shirtings bearing the mark "H.P.F.C. 40000," a label with two lions and two snakes and an oval stamp containing the words "Sole Importers, Holland Export Company," and a buff heading. The initial letters H. B. T. C., in the complainant's and H. P. F. C., in the accused's marks were printed in similar types and were similar in size and colour. The colour and size of the labels as also the colour, size and type of the oval stamps in both were similar. The complainants having established their right to their trade-mark, it was held that the accused had used a false trade-mark within the meaning of this section, and were liable to conviction under sections 482 and 486.(9)

5353. Such would have been the view taken of the defendant in the following case, which was however instituted on the civil side for an injunction. The plaintiffs, the Anglo Swiss Condensed Milk Company, had been since 1867 carrying on business as makers and vendors of condensed milk and other dairy products. Their trade-mark was the

(8) *Rasool Khan*, (1912) M. W. N. 85; following *Surja Prasad* v. *Mohabir*, 11 C. W. N. 887; *Bahaullah*, 31 C. 411; *Dowlat Ram*, 32 C. 431.

(9) *Holland-Bombay Trading Co.* v. *Buktear Mull*, 8 C. W. N. 421.

portrait of a woman with a pail on her head, held by her left hand, and another pail in her right hand, above which were the words "Milk-Maid" and underneath being the words "Trade Mark." The defendants put on the market condensed milk contained in tins similar to those of the plaintiffs, which had pasted on them the figure of a half length milk-maid in conjunction with the words "Dairy-Maid" and "Registered Trade Mark." The condensed milk was stated to be that of the Anglo-Danish Milk Company, but which was only an alias for the defendant, whereupon Kay, J., said: "The defendant, with full knowledge of all that, chose to put upon his tins of condensed milk, which are exactly the same size, shape and form as the plaintiff's tins of condensed milk, labels with the words which I have just read. It is very likely that a tradesman who buys the defendant's tins of milk to sell again may know perfectly well the distinction between them and the plaintiff's, but are they or are they not calculated to deceive people who know the plaintiff's condensed milk by the terms "Milk-Maid" or "Dairy-Maid" brand, and who go to retail shops and inquire for it in that way? I have not the faintest doubt about it. It is not only calculated to deceive, but there seems to be no reasonable doubt whatever why the defendant should have done that which he has done except with the design and intention of committing a direct fraud upon the plaintiffs, and to enable him to acquire some of their custom and to pass off his goods as and for those of the plaintiffs. To my mind the evidence proves that there was a direct intention to commit a fraud."(10)

True Test Stated.

5354. This case is instructive, for it shows that the similarity need not be sufficient to deceive the connoisseur but if it is sufficient to deceive a casual customer it "is reasonably calculated" to deceive within the meaning of this section. It was so held in a case in which the accused was charged with having sold cigars in boxes labelled with a trade-mark alleged to be a counterfeit presentment of the complainant's registered label. The Magistrate acquitted the accused holding that other firms had sold cigars of the "Sirdar" brand overlooking the other facts contended for, namely, that two labels were calculated to lead purchasers to believe that the cigars sold in the accused's boxes were those made by the prosecutor. The case was consequently remanded for the trial, the Court observing: "The Magistrate should bear in mind that he has to consider the general effect of the labels and how the labels would be likely to strike the incautious or unwary purchasers such as are to be found more particularly in the mofussil. It must also be borne in mind that many of the purchasers would be unable to read what is on the labels, but would be attracted by the general effect of the label."(11)

5355. This was also the view propounded by Lord Selborne, L. C., in which the plaintiffs were shown to have exported to Bombay, Turkey red yarn or twist with a label affixed to the inner covering of each bundle, and also affixed in a conspicuous manner to the wrappers of the samples intended to be shown to customers. The device on the label consisted of two elephants in the upper corners of

(10) *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454 (458, 459).

(11) *Nallaga* v. *Rangasami*, (1895) 1 Weir 556 (557).

a green and gold ticket with a drooping cloth or banner suspended between them and a certain inscription thereon. Goods bearing this label were commonly known in Bombay as "*be hathi*" which in the Guzerathi language means "Two Elephants." Orders were placed with the defendants for Turkey red yarn or twist with instructions that the labels thereon were to be of the same colour and equal in size to those of the plaintiffs. The defendants whose label hithertofore had been the Ganpati figure, changed it, by associating therewith two elephants in the two upper corners with a drooping cloth or banner suspended between them, on which were inscribed the words "Prime Turkey red." The difference between the two tickets was material and apparent, but nevertheless it was held to be a clear infringement of the plaintiff's trade-mark.

As Lord Selborne, L. C., observed: "But although the mere appearance of these two tickets could not lead any one to mistake one of them for the other, it might easily happen that they might both be taken by natives of Aden or of India unable to read and understand the English language, as equally symbolical of the plaintiff's goods. To such persons, or at least to many of them, even if they took notice of the differences between the two labels, it might probably appear that these were only differences of ornamentation, posture, and other accessories, leaving the distinctive and characteristic symbol substantially unchanged. Such variations might not unreasonably be supposed to have been made by the owners of the plaintiff's trade-mark themselves for reasons of their own; especially as it was a common practice in those markets for the same traders (the plaintiffs among others) to affix to their inner packages, sometimes one form of mark, and sometimes another, for reasons more material to themselves than to the ultimate consumer....It is true that deception in fact is not in this case proved; but there is a large body of trustworthy evidence to the effect that such deception would be liable, and very likely to occur, at all events with the more ignorant class of consumers, particularly in the upcountry districts, and with this evidence my own judgment concurs. Nor am I able to conceive any satisfactory explanation, under all the circumstances of this case, of the adoption by the defendants of that particular device—two elephants at the upper corners of the ticket with a cloth or banner suspended between them—knowing as they did the plaintiff's ticket, knowing also the character and circumstances of the markets, and entering as they did upon this particular branch of trade with the direct object of competing with and underselling the plaintiffs, unless it was because they had a desire and intention to approach to the plaintiff's trade-mark as nearly as they possibly could. For such desire and intention no motive can be suggested, except that of getting some part of the benefit of the good-will and reputation of the plaintiff's trade."(12)

Truth is No Justification.

5356. The same view was enunciated by Lord Cranworth, L. C., in another case in which the plaintiff, Baron do Seixo a Portuguese nobleman, exported port wine from his quinta or estate bearing the follow-

(12) *Johnson* v. *Orr Ewing*, 7 App. Cas. 219 (225, 226).

ing marks: the figures of a crown and eagle with the letters "B.S." (meaning Barao or Baron de Seixo) on the head of the cask, and a crown with the word Seixo and the year of the vintage, at the bung-hole. The plaintiff claimed that his wine was known in the London market as "Crown Seixo" and that it had as such acquired a great reputation. He complained against the defendants of the infringement of his trade-mark. The latter were also three Portuguese, one of them a Baron, and they had put on the market 100 pipes of port marked on the head of the casks with the figure of a crown, and the letters "C.B." and the words "Seixo de Cima" (meaning "Upper Seixo") and the date of the vintage, and at the bung-hole a Crown with the letters "C.B." the words "Seixo de Cima" and the year 1861. They defended this mark on the ground that they had rented a quinta adjoining the plaintiff's which they believed was known as the "Quinta do Seixo"; they contended that the word "Seixo" meant stony or pebbly and that other quintas were so called. The Crown they said was a coronet which one of the defendants had the right to use; and "C.B." meant "Caldas Brothers." Attention was also called to the apparent difference between the two labels, which was conceded, but it was held not to be the question, or not the sole question to be considered.

"The principle on which relief is given in these cases is that one man cannot offer his goods for sale representing them to be the manufacture of a rival trader....It is obvious that, in these cases, questions of considerable nicety may arise as to whether the mark adopted by one trader is or is not the same as that previously used by another trader complaining of its illegal use, and it is hardly necessary to say that, in order to entitle a party to relief, it is by no means necessary that there should be absolute identity; what degree of resemblance is necessary from the nature of things, is a matter incapable of definition *a priori*. All that Courts of Justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival, as that ordinary purchasers purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use."(13) And then his Lordship added: "I do not consider the actual physical resemblance of the two marks to be the sole question for consideration If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device."(14)

5357. The question that the defendant could justify individual use of the symbols was no answer to the claim, "for that did not justify them in adopting a device or brand the probable effect of which would be to lead the public, when purchasing their wine, to suppose that they are purchasing wine produced from the vineyards, not of the defendants, but of the plaintiff."(15) This is obvious. For if an article was

(13 *Seixo* v. *Provesende*, L. R. 1 Ch. 192 (196).

(14) *Ib.* pp. 196, 197.

(15) *Ib.* pp. 197, 198.

well known in the market as the manufacture of "Smith" another person, though Smith by name,(16) was not entitled to place a similar article on the market under the same name, and the fact that his description was truthful is no defence to an injury done to another person's business, for *sic uteri tuo ut alienum non loedas.*(17) The plaintiff was a corset maker and his initials "C.B." were stamped on all corsets made by him. The defendants also made corsets and stamped their initials as "C. B. & Co.," "C.B." being also their initials. "C.B." was printed by them in larger type than "& Co.," and it was in evidence that the plaintiff's corsets had obtained wide notoriety as "C.B." corsets. It was held that the plaintiff was entitled to restrain the defendants from stamping their corsets with the initials "C. B. & Co." It was added that the fact that the plaintiff held certain registered trade-marks, in relation to one of which he had disclaimed the exclusive right to the letters "C. B." did not preclude him from preventing the use of the letters "C.B." by his rival in the trade.(18)

The case is, of course, worse where the defendant adopts a new name so as to be able to stamp his goods with the well-known mark of another trader.(19) On this point the rule is that while as a general rule a person is at liberty to assume any name he pleases, he must not do so to perpetrate fraud, and the Court would interfere if a particular name were affixed with the view of making a dishonest reputation which was likely to cause damage to another, or which would, even apart from damage, have the tendency to mislead.(20) The plaintiff was the proprietor of "Holloway's Pills." The defendant who had some years ago bought a drysalter's business from a man named Holloway, began to use that name in connection with his pills. The plaintiff was held entitled to restrain him from using the name of Holloway in connection with pills.(21)

5358. But in such a case the fact that one Smith has chosen to call his goods by his own name would not preclude the second Smith from calling his goods by his right name, provided that he takes sufficient care to state that he is a different Smith to his namesake whose similar goods are also on the market. Such may be the case by adopting an obviously different trade-mark or by a change in the size, shape or colour of the receptacle, or by a clearly worded notice printed in a conspicuous place so that it might be seen by all caring to handle the goods. This was the *ratio decidendi* of Jessel, M. R., in a case in which the Singer Manufacturing Company complained of the infringement of their trade-mark "Singer" printed on all their sewing machines by the defendants who placed on the markets sewing machines which they

(16) *Jamieson & Co.* v. *Jamieson*, (1898) 14 T. L. R. 160.

(17) "Use your own property in such a manner as not to injure that of another."

(18) *Beyer* v. *Bard*, (1898) 25 R. 1142; 35 Sc. L. R. 913. To the same effect, *Jameson* v. *Dublin Distillers Co.*, (1900) 1 Ir. R. 43, in which the plaintiff restrained the defendant from selling whisky as "W. Jamieson's Whisky," their own whisky being well known in the trade as "Jamieson's Whisky."

(19) *Pinet* (F.) *et cie* v. *Maison Louis Pinet, Ltd.*, [1898] Ch. 179.

(20) *Nicholson & Co.* v. *Buchanan*, (1902) 19 R. P. C. 321.

(21) *Holloway* v. *Clent*, (1903) R. P. C. 525; to the same effect, *Cash, Ltd.* v. *Cash*, (1902) T. L. R. 299.

described as "our sewing machines" but upon which they placed their distinctive trade-mark surrounded by the words "Newton Wilson & Co, Manufacturers 144, High Holborn," whereupon Jessel, M.R., held that since the defendant's trade-mark was different and round which was printed their names, which could only mean that they were the manufacturers, and they so described themselves in their catalogue and from all of which it could not be said that persons with ordinary sights and ordinary minds ran any chance of being misled. The plaintiff's suit for injunction was consequently refused,[22] and that decision was affirmed on appeal.[23] It may be added, that the case would have resulted differently if the defendants had placed the word "Singer" on their machines.[24]

Coincident Similarity Excepted.

5359. The plaintiff who carried on business as Jamieson & Co., at Aberdeen, as a manufacturer of harness composition, sued the defendant, George Jamieson who was also a manufacturer of harness composition at Aberdeen. It appeared that there were two other manufacturers of harness composition named Jamieson at Aberdeen, one being Peter Jamieson, who was prior in date to the others. The receptacles used by all of them were similar, though they were common to the trade. It was held that the distinctive features of the plaintiff's tins were the signature "Jamieson & Co.," and the trade-mark, and the defendant's goods had no similarity to the plaintiff's goods except in features that were common to the trade and that he had not passed off his goods as those of the plaintiffs. A man is not bound to use extra precautions to avoid confusion between his goods and those of other persons in the trade, if such confusion arises solely from similarity of his own name with theirs, and from the use of features common to the trade; but such a case must be distinguished from the case where the name of a particular trader has in the market, come to denote his goods.[25]

5360. Nor, again, is it any defence that the quality of the defendant's goods was the same; for the rule is not intended solely for the protection of the purchaser, but of the trader as well, and the question of quality is no answer to him.[1]

5361. From this discussion it is evident that the question whether one mark was calculated to deceive, then depends not only upon the nature, extent and position of the similarity, but upon other circumstances, which have all to be taken into consideration, and upon the consideration of which depends the question of infringement no less than the question of criminality.

(22) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434 (444, 445) C. A. 451. It may be noted that on exactly similar circumstances the Scotch Courts came to a different conclusion and issued an injunction against the defendants; *Singer Co.* v. *Kimball*, 11 Court of Sess. Cas. (3rd Ser.) 267, cited in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434 (449).

(23) *Ib.*, *per* James, L. J., *arguendo*, p. 449, citing *Wolberspoon* v. *Currie*, L. R. 5 H. L. 508. To the same effect, *Dunlop Pneumatic Tyre Co.* v. *Dunlop Lubricating Co.* (1899) R. P. C. 12.

(24) *Jamieson & Co.*, v. *Jameson*, (1898) 14 T. L. R. 160.

(25) *Ib.*

(1) *Starey* v. *Chilworth Gunpowder Co.* 24 Q. B. D. 90.

481. Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property-mark.

Using a false property-mark.

[*Property-mark*—s. 479.]

Synopsis.

Analogous Law (5362).

5362. Analogous Law.—This question what constitutes a "property-mark" has been before considered (§ 5338). The present section merely defines the phrase "using a false property-mark" and as such its language is identical with that used in the last section to the commentary on which reference should be made for further information.

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Comp. with Court's sanction.

482. Whoever uses any false trade-mark or any false property-mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both.

Punishment for using a false trade-mark or property-mark.

[*Trade mark*—s. 478. *Property mark*—s. 479. *Using false trade-mark*—s. 480. *Using false property-mark*—s. 481.]

Synopsis.

(1) *Analogous Law* (5363-5365).
(2) *Procedure and Practice* (5366-5369).
(3) *When Criminal Proceedings are Improper* (5368).
(4) *Proof* (5370).
(5) *Form of Charge* (5371).
(6) *Principle* (5372-5373).
(7) *Meaning of Words* (5374).
(8) *Fraudulent Use of False Trade-mark* (5375-5382).
(9) *Quality Immaterial* (5378).
(10) *What is Using Trade-mark* (5379).
(11) *Reasonably Calculated* (5380-5381).
(12) *Proximity of Business* (5382).
(13) *Possible Defences* (5383-5385).

5363. Analogus Law.—This section prescribes punishment for using a false trade or property mark. But a person may use a false trade-description as distinct from a false trade mark in which case the act is not a Code offence though it is punishable under the following provision of the Merchandise Marks Act.[2]

(2) Act IV of 1889; *Kanchi Dorassamy* (*In re*), 7 M. L. T. 309, 6 I. C. 683; *Anath Nath Dey*, 40 C. 281.

"6. If a person applies false trade-description to goods, he shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, and in the case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Penalty for applying a false trade-description.

"7. If a person sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade-description is applied, he shall, unless he proves—

Penalty for selling goods to which a false trade-description is applied.

"(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-description, and

"(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods, or things, or

"(*c*) that otherwise he had acted innocently,

"be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both."

5364. The provisions of this section are modified by sections 8 and 9 of the Merchandise Marks Act which run as follows:—

"8. Where a person is accused under section 482 of the Indian Penal Code, of using a false trade-mark or property-mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in section 480 or section 481 of that Code, as the case may be, or under section 6 of this Act of applying to goods any false trade-description, or under section 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade-mark or property-mark and proves—

Unintentional contradiction of the law relating to marks and descriptions.

"(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to apply trade-marks or property-marks or trade-descriptions, or, as the case may be, to make dies, plates or other instruments for making or being used in making trade-marks or property-marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and

"(*b*) that he took reasonable precaution against committing the offence charged, and

"(*c*) that he had at the time of commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

"(*d*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied,

"he shall be acquitted.

"9. When a person is convicted under section 482 of the Indian Penal Code of using a false trade-mark, or under section 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture any goods or things with a counterfeit trade-mark applied thereto, or under section 487 or section 488 of that Code of making, or making use of a false trade-mark, or under section 6 or section 7 of this Act of applying a false trade-description to goods, or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture any goods or things to which a false trade-description is

Forfeiture of goods.

applied or is acquitted on proof of the matter or matters specified in section 486 or section 7 or section 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and goods by means of, or in relation to which the offence has been committed, or but for such proof as aforesaid, would have been committed.

"(2) When a forfeiture is directed on conviction and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

"(3) When a forfeiture is directed on an acquittal and the goods or things are of value exceeding fifty rupees an appeal against the forfeiture may be preferred within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentence of the Court which directed the forfeiture."

5365. The same Act makes further provision for the punishment of a person for abetment in India of acts done out of British India in any place in British India in which he may be found.[3]

5366. Procedure and Practice.—A prosecution for an offence under this section must be instituted within three years of the commission of the offence, or one year of its discovery by the prosecutor whichever period first expires.[4] This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable, and compoundable with the permission of the Court and is triable by the Presidency Magistrate or Magistrate of the first or second class.

5367. The ordinary procedure applicable to offences under the Code has been in some particulars modified by the special provisions of the Merchandise Marks Act[5] which authorizes the Court to order forfeiture of the goods on a conviction had under this section. It has also power to order the payment of costs of the prosecution or defence according to the result of the trial and the conduct of the parties, which may be recovered as fine.[6] In awarding costs the Court will, it is conceived, be guided by the general principles which regulate the subject in civil proceedings.

When Criminal Proceedings are Improper.

5368. It will be observed that an infringement of one's trademark by another in a manner calculated to deceive gives rise to a liability which may be enforced either by a prosecution under the Code, or by a civil suit for an injunction and damages. The evidence required in each case is the same, and though beyond prescribing a rule of limitation for the institution of criminal proceedings, the Legislature has given no indication of when the party aggrieved should be entitled to resort to one proceeding rather than another, yet it is evident that the dual remedies to which the aggrieved party becomes entitled cannot be resorted to at his sole discretion. It would seem that the first and foremost thing that the Criminal Court has to see is that a party coming to it for redress does so promptly. If there was any undue delay it will refer the complainant to the Civil Court, rather than allow its process to be abused by dilatory proceedings. So it was observed in Madras: "Ordinarily, the infringement of a trade-mark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the Legislature,

(3) Act IV of 1889, s. 22.
(4) S. 15. Merchandise Marks (Act IV of 1889).
(5) Act IV of 1889, ss. 8 and 9.
(6) *Ib; s.* 14; *Ganpat*, 16 Bom. L. R. 78.

in its anxiety to protect traders, has allowed resort to the Criminal Courts to provide a speedy remedy in cases where the aggrieved party is diligent, and does not by his conduct show that the case is not one of urgency."[7] But apart from laches and delay, the nature of the dispute may be one more suitable for adjudication by the Civil rather than the Criminal Court.

As Maclean, C.J., observed: "It seems to me that when a case of this class is brought into a Criminal Court, if the Magistrate is of opinion that there is a *bona fide* dispute as to whether the complainant has any trade-mark at all, or whether the accused is or is not entitled to use the mark he is using....he should not deal with the matter as a criminal matter, but leave it to the complainant to maintain, if he can, in a Civil Court the right which he claims. If after the decision of the Civil Court it be found that he has a trade-mark, the case could then be properly brought into a Criminal Court under the section to which I have referred."[8] So where the accused has reason to deny that the prosecution has any exclusive right to the trade-mark,[9] or that the trade-mark claimed could at all be a trade-mark within the meaning of section 478,[10] or where the case originally started for infringement of a trade-mark drifted later on into use of a trade name which the accused has used for several years,[11] the case was held to be a fit one for trial by the Civil Court.

5369. The Merchandise Marks Act also provides for the acquittal of the accused on his proving that his contravention of the law relating to marks and descriptions was unintentional (§§ 5360-5361). It would be observed, that contrary to the general view of crime adopted in the Penal Code, these sections provide for the punishment of the accused on the mere proof of infringement of a person's trade-mark coupled with the fact that such infringement is calculated to deceive which is then sufficient to establish a *prima facie* case for conviction, on a presumption made that the infringement was intended to defraud, it being then on the accused to prove that he had acted without such intention.

5370. Proof.—The points requiring proof are:—

(1) That the prosecutor had a right to a trade-mark.[12]

(2) That the trade-mark of the accused was similar to it.

(3) That it was marked or used in a manner reasonably calculated to cause it to be believed that the goods or receptacle so marked are the manufacture of the prosecutor.

(4) That the goods were not in fact his manufacture.

5371. Charge.—The charge should run thus:—

(7) *Ruppell* v. *Ponnusami*, 22 M. 488.
(8) *Dowlat Ram*, 32 C. 431; *Anath Nath Dey*, 40 C. 281.
(9) *Doulat Ram*, 32 C. 431.
(10) *Bakaulla Malik*, 31 C. 411.
(11) *Anath Nath Dey*, 40 C. 281.
(12) Use for six years sufficient; *Lakhan Chanda*, (1925) C. 149.

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you used a certain trade-mark (*or* property-mark), to wit——to denote that certain goods were the maunfacture of A B, whose manufacture they were not (*or* were the property of A B whose property they were not) in a manner reasonably calculated to cause it to be believed that such goods were the manufacture (*or* property) of A B; and that you thereby committed an offence punishable under section 482 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5372. Principle.—The offences in this series commencing with that here described take a line of their own as regards proof and punishment. They are really civil delicts which have been constituted offences by the Statute in order to facilitate prompt disposal of cases. At the same time cases may arise when the fraud has been so cunningly plotted and so audaciously persisted in as to justify the awarding of condign punishment. The offences relating to the infringement of trade and property marks have a dual purpose in view. In the first place they are designed to protect the consumer against a deception being practised on him by palming off on him goods different to those he believed himself to be buying. In the second place they protect the trader himself by preventing the imitation of his goods and thus cause him loss by destroying his credit. Where the first object is manifest it is clearly a code offence,[13] where it is not so manifest, the act may still be punishable under the Merchandise Marks, or be a case for redress in the Civil Court[14] (§ 5368).

5373. In ordinary offences under the Code the burden of proving *mens rea* or criminal intent is on the prosecution, and it lies on it to prove all the elements necessary to bring the offence home to the accused.[15] But in these quasi crimes law presumes fraudulent intent from an imitation which is reasonably calculated to deceive. The proof of fraudulent intent is unnecessary[16] (§ 5369). At the same time the presumption it creates is rebuttable and may be rebutted by the accused who may prove that he had acted innocently, and that he had no such intent (§§ 5363-5365). The intent to defraud is thus still an essential element of the offence, but the Code makes a departure from the ordinary rule by inferring it from the fact of imitation. The question, therefore, affects proof but not the principle.

5374. Meaning of Words—"*Whoever*" includes a body corporate.[17]

5375. Fraudulent Use of False Trade-mark.—All the essential elements that go to constitute this offence have been the subject of a previous discussion (§§ 5346-5361). This section merely prescribes a

(13) *Ganpat*, 16 Bom. L. R. 78, 24 I. C. 834.
(14) *Kanchi Doraisamy*, 7 M. L. T. 309; 6 I. C. 683.
(15) General Introduction, §§ 51, 52.
(16) *Seena Haniff & Co.* v. *Lipton, Ltd.*, 7 Bur. L. T. 116, 23 I. C. 689.
(17) *Ib.*

penalty for an act described in the two preceding sections which practically define the offence. Their immediate purport is to define what is using a *false* trade or property mark. According to the definition there given a trade-mark is false if (*a*) it is an imitation of an existing trade-mark, and (*b*) it is used in a manner calculated to deceive purchasers of the goods, upon which it is placed, into a belief that the goods are the goods of the owner of the first trade-mark. Consequently, a person may as much commit this offence by using his own trade-mark on goods which are not his manufacture as one who copies that trade-mark and under its colour offers spurious goods. The gravamen of the offence is fraud, but it is fraud practised on the public by visual and not verbal representation. If the representation made is verbal the offence may conceivably be cheating, but it is not the offence here described. This offence is mainly directed against fraudulent traders who impose on the public by selling them goods which the public purchase judging from their appearance as the goods of a maker whose goods they intend to purchase. It may be that besides the deception practised by the close imitation of the trade-mark by which the character and quality of goods are customarily known in the market, the trader verbally induces a purchaser by making a false representation, he may be guilty both of this offence as well as of cheating. On the other hand, it is just conceivable, that in making such representation he may have been himself deceived, in which case he may claim exoneration on the grounds set out in section 8 of the Merchandise Marks Act.[18] These are, however, exceptional cases.

5376. In a normal case, the trader who uses a false trade-mark is either the manufacturer or the seller of goods who wishes to draw custom of a well-known rival in the same line. For this purpose he imitates the design, shape and colour of the former's trade-mark. But being well aware of the risk, he avoids too close an imitation. But at the same time he copies enough of the leading features of the original so as to give his counterfeit wares the appearance of the original article. He does not intend to deceive the expert middleman but the consumer, and the sole test in such cases therefore is not whether a cautious purchaser would be deceived, but whether an incautious purchaser is likely to be imposed upon. (§§ 5352-5355). For this purpose regard must be had to the class of people among whom the goods are sold, the means of identification in vogue among them and the probability of their mistake. (§§ 5354-5355). It is not, however, necessary that some one in fact should have been deceived, for all that sections 480 and 481 require is that the goods must be reasonably calculated to cause such deception.[19] Indeed, the fact that some one in particular was actually deceived is immaterial, for it may be that he was an unreasonable man, and it does not necessarily follow that because some one was deceived by the trade-mark it was *reasonably* calculated to deceive him.[20]

5377. But in some cases the necessity of actual deception is insisted on. So Giffard, L. J., said: "The first thing to be observed

(18) Act IV of 1889.
(19) *Braham* v. *Beachim*, 7 Ch. D. 848; *Jay* v. *Ladler*, 40 Ch. D. 649
v. *Dean*, 13 Ch. D. 512 (516).
(20) *Civil Service Supply Association*

in cases of this description is, that it would not be safe for any plaintiff to come into Court until he could prove instances of persons having been actually deceived, for the Court would have to try a hypothetical case, and a number of people would be brought forward by the defendant to say, and probably truly, that the thing done would never have deceived them, and in their opinion was not calculated to deceive."[21] This was, however, said to account for the delay which had been pleaded against the plaintiff, and it does not appear to be a pre-requisite of a proceeding taken to protect one's right to a trade-mark. As Lord Herschell said: "The eye must be the judge in such a case as this, and the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other."[22] The comparison must, however, be made from the stand-point of the likely purchasers, having regard to their class, character and the degree of observation and intelligence, so that the imitation of the plaintiff's mark cannot be justified by showing either that the device or inscription on the counterfeit mark is ambiguous and capable of being understood by different persons in different ways, or, that a person who carefully and intelligently examined and studied it might not be misled,[23] which must be judged by having regard to the closeness of the imitation, and the nature of the goods sold under each trade-mark and the reputation in which it is held in the market.

Quality Immaterial.

5378. Ordinarily, the counterfeit goods are not of the same quality as those imitated. But this is not necessary, for Lord Coleridge, C.J., said of the English Statute: "The Act is directed against the abuse of trade-marks, and the putting off on a purchaser of, not a bad article, but an article different from that which he intends to purchase and believes that he is purchasing."[24] In this case, the respondents who were manufacturers of gunpowder, entered into a contract with the Government to supply powder. Owing to an accident they were unable to manufacture the powder themselves, and in order to carry out their contract they bought German powder, and put it into barrels supplied by the Government, and labelled them with their own trade-mark. The powder was as good in quality as of the respondent's own manufacture contracted for, but no indication was given that it was of German manufacture. It was held that they were guilty of using a false trade-mark; "They changed the barrels in which their own powder was contained, and put their own name on the labels. This was a false description used in order to save their contract and avoid the penalties, and any loss which they might incur through the Government buying in against them. They broke the contract in using their trade-mark, and there was an intent to defraud, for, what they did was done in order to save their contract, and to make the Government believe that they had an article which they had not."[25]

(21) *Lee* v. *Haley*, L. R. 5 Ch. 155 (160).

(22) *Hecla Founary Co.* v. *Walker Hunter & Co.*, 14 App. Cas. 550 (555).

(23) *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15 (18).

(24) *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90 (96).

(25) *Ib.*, p. 96.

What is a Using Trade-mark.

5379. The phrase "whoever uses" is wide, but it is qualified by the false trade or property mark, so that only a person who actually marks or applies the mark is liable for this offence. The tradesman who merely sells goods bearing a false trade-mark is not liable under this section, though he may be under section 486, nor is a person who uses a receptacle bearing the genuine trade-mark for fraudulent purposes, for he does not use a counterfeit mark though he may be offering for sale counterfeit goods, and may be as such liable. A and B were two rival manufacturers of mineral waters. B obtained possession of empty bottles, the property of A, and moulded with A's name, and filled therein water of his own manufacture which he sold to his customers. It was held that B was guilty of selling goods under a false description. The Magistrate found that B had no intent to defraud, but Lord Coleridge, C. J., held an intent to defraud the purchasers not a necessary ingredient of the offence.(1) It is certainly not the part of the definition of this offence, though its existence is implied and inferred from the fact of imitation. So it was observed by Lord Hatherley, L. C., that where a person actually copies the design of another, it is natural to suppose that it was done in order to attract his customer. It is not however necessary, nor indeed is it the case, that there should be an exact resemblance between the original and the counterfeit, and where the imitation is not of itself suggestive of fraudulent intent it may be inferred from the fact that the counterfeit was "reasonably calculated" to pass for the original.(2)

"Reasonably Calculated."

5380. But how is this to be decided? The evidence of a witness or two, that they were in fact deceived, is obviously insufficient, for it may be their own fault that they were deceived.(3) But such evidence is admissible,(4) though it is by no means conclusive. The evidence of experts, that is to say tradesmen who have occasion to handle such goods is entitled to greater weight.(5) But the question of reasonable likelihood is not a pure question of fact, and it is, moreover, contingent upon other questions. If, for example, A accuses B of the infringement of his trade-mark, the Court will have to try at least the following issues:—

(*i*) Was the mark infringed, a trade-mark?

(*ii*) Was it exclusively the property of A?

(*iii*) Was it used by him?

(*iv*) Did B use A's trade-mark?

(*v*) Was it used in a manner reasonably calculated to deceive the public?

(*vi*) Did it have in fact that effect?

(1) *Wood* v. *Burgess*, 24 Q. B. D. 162 (164).

(2) *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508 (512). The text is not founded upon any actual words used by Lord Hatherley, L. C.

(3) *Civil Service Supply Association, Ltd.* v. *Dean*, 13 Ch. D. 512.

(4) *Ib.*

(5) *Semble, per* Cotton, L. J., in *Lyndon's Trade Mark*, 32 Ch. D. 109 (118).

5381. But these are not all. For there may be issues suggested by the nature of the defence taken. But out of the issues set out, issue (*v*) has been held to raise a question of law.(6) It is rather an inference of law from certain facts which would have to be proved. As Bowen, L. J., said: "It seems to me that a trade-mark is calculated, by its resemblance to another already on the register, to deceive, if in the course of its legitimate use in the trade it is likely to do so. In considering the question whether this result is probable, it seems to me that we must look at the circumstances of the case. We must consider whether blurring is likely to take place: we must consider, in the case of a stamp, whether, having regard to the special class of articles on which the impression is to be made, there is likely to be such indistinctness as is calculated to deceive. It seems to me that in many cases we may be obliged to regard the size of the article upon which the mark is intended to be made or fixed, and the material or the ground work, so to speak, upon which it is to be placed. I think it would not be wrong to consider the probability, if an impression had to be made on a hard substance, of some letters being more likely to take with distinctness than others, or parts of the design being likely to come out with more perfection, while other parts would remain more imperfectly represented. We ought also to have regard to the effect likely to be produced in the particular article by wear and tear. All these seem to be things which a man of common sense and business habits would take into account if he were asking himself the question whether one trade mark is so like another as to be calculated in the probable course of its use in trade, to deceive."(7)

Proximity of Business.

5382. Again, since the object of these provisions is to protect one trader from defrauding another, the place where the counterfeit goods were sold is material. For no one would complain of a tradesman using another's trade-mark in a place where the latter had no business, and where, therefore, the former could not be said to intend to trade upon his reputation. It was so held in a case in which the plaintiffs sold coal having business in Pall Mall (London) carried on under the name of "The Pall Mall Guinea Coal Company." The defendants started a similar business in another street under the same name, and after some time removed it to Pall Mall, when the plaintiff sued for an injunction which Malins, V. C. granted, restricting it, however, to their business in Pall Mall, and this limitation was held to be right on the ground that "in all probability if the same name were used in some other street it would lead to no mistake or deception."(8) So in another case the plaintiff who had a right to the firm—name "Carriage Bazar" was held entitled to restrain the defendant from setting up a shop in the same street and call it the "New Carriage Bazar."(9)

5383. Possible Defences.—These are then the principal elements which constitute this offence. But they are not the only elements to

(6) *Singer Manufacturing Co.* v. *Loog*, 11 Ch. D. 656 (662).

(7) *Per* Bowen, L. J. in *Lyndon's Trade Mark*, 32 Ch. D. 109 (119, 120), following *Worthington & Co.'s Trade Mark*, 14 Ch. D. 8; *Rosing's Application*, 54 L. J. (Ch.) 975.

(8) *Per* Giffard, L. J., in *Lee* v. *Haley*, L. R. 5 Ch. 155 (162).

(9) *Boulnois* v *Peake* 13 Ch. D. 513-*n*.

be considered. For, there remains the defence (*i*) that the accused had acted without intent to defraud. But how is this to be proved. It is obviously a negative proposition upon which his bare statement would be insufficient. At the same time if he had no such intention it should not be difficult to establish it. For instance, he may show that his trade-mark was either registered or protected which would be a sufficient answer, for the procedure prescribed for registration precludes all possibility of an intention to defraud on the part of a person who applies for it. So again, (*ii*) he may show that the similarity was unintentional and not intended, as where he is shown to have been ignorant of the existence of the other trade mark, or being aware of it, it is common use in the trade.(10)

Indeed, words in common use are not fit to be registrated as trade-marks, and (*iii*) the reason for their non-registration is a sufficient justification for their use by the accused. (*iv*) He may, moreover show that though the two trade marks are similar, the goods to which they are applied are not the same. This is always a good defence because no one has or can acquire an absolute monopoly in a trade-mark. It is only protected so long as it is necessary for the carrying on of one's trade, and consequently, the accused could justify his use by showing its abandonment on the part of the prosecutor. So again, (*v*) a trade-mark to which a trader had originally an exclusive right may, in course of time, become *publici juris*, and the exclusive right may be lost. The proper test of this having happened is that the use of the trade-mark by other persons has ceased to deceive the public as to the maker of the article. Such are, for example, "Gladstone bag," "Brougham," "Wellingston Boots," "Worcestershire Sauce," "Harvey's Sauce," "Chlorodyne," and numerous other articles which were at one time proprietary and have since become *publici juris*, and are used both by the trade and the public to designate the shape or quality without distinction of the seller.

But what is the test by which a decision is to be arrived at whether a word which was originally a trade-mark, has become *publici juris*? "I think," observed Sir G. Mellish, L. J., "the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, can be induced from the use of it to believe that he is buying the goods of the original trader, it appeals to me, however hard to some extent it may appear on the trader, yet practically as the right to a trade-mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade-mark, the right to the trade-mark must be gone."(11)

5384. Again, (*vi*) the maxim *Ex turpi causa non oritur actio* is as much applicable to trade marks as to other domains of law. Conse-

(10) *Alexander Pirie & Sons* v. *Goodal*, (1892) 1 Ch. 35 (40).

(11) *Ford* v. *Foster*, L. R. 7 Ch. 611 (628).

quently, "if the trade-mark contains a false representation calculated to deceive the public, a man cannot by using that which is in itself a fraud, obtain—I do not say an exclusive right—but any right at all."[12] So where a person sold under the name of "Mexican Balm" some composition which never came from Mexico, but which was said to be composed from some wonderful herbs to be got only in Mexico, the Court refused to protect his trade-mark against an infringement.[13] The same view prevailed in another case in which the plaintiff sold his tea as "Howqua's Mixture" announcing it to be an extraordinary mixture made up by some great man in China, when in point of fact it was made in England.[14] (*vii*) Then there is the question of delay, and (*viii*) limitation. The object of a criminal prosecution in such cases is to afford the aggrieved party prompt relief if he is sufficiently diligent and does not by his conduct show that the case is not one of urgency.

If, therefore, the person aggrieved fails to resort to the Criminal Courts within a year of the offence coming to his knowledge, the law assumes that the case is not one of urgency, and it leaves him to his civil remedy by an action for injunction.[15] In this case the complainant prosecuted the accused under this section as well as section 486, alleging that they had exclusive right to the use of the word "Bahadur" as applied to cigars which they had sold under that trade-mark since 1886, and that in 1893 or 1894 the accused infringed their right by offering for sale cigars which he designated "Rai Bahadur." The prosecution was started four years later in 1898, and the Court held "it to be barred by the one year's limitation prescribed by section 15 of the Merchandise Marks Act."[16] This view was followed in Burmah, where the accused had been twice before, in 1908 and 1910, prosecuted and acquitted of selling oil in the Burmah Oil Co's. second hand tins, on the ground of limitation. They then filed a third complaint embodying the same grievance. It received a similar fate.[17]

5385. (*viii*) Lastly, he may prove that he had acted "without intent to defraud" either the owner of the trade-mark or his customer. Such a case arose where the accused who sold the oil of the Burmah oil Co. in a Standard Oil Co.'s tin. It appeared that the two companies had agreed to allow its tins to be used by the other, but it was provided that the Burmah Co. must use the Standard Co.'s tins by putting on the caps the word "Victoria." The accused sold eight tins, of which only two bore that word, the remainder being sold with plain caps. The accused proved that these tins were sold at the Burmah Oil Co.'s price and the purchases were informed that the tins contained the oil of the Burmah Oil Co. It was held that he could not be convicted of this offence as he had acted "without intent to defraud"[18] (§§ 5363-5365).

(12) *Per* Sir G. Mellish, L. J. in *Ford* v. *Foster*, L. R. 7 Ch. 611 (631).
(13) *Perry* v. *Truefit*, 6 Beav. 66.
(14) *Pidding* v. *How*, 8 Sim. 477.
(15) *Ruppell* v. *Ponnsami*, 22 M. 488.
(16) *Ib.*
(17) *Mahomed Jewa* v. *Wilson*, 4 Bur. L. T. 83, 10 I. C. 787, 12 Cr. L. J. 246; following *Ruppell* v. *Ponnusami*, 22 M. 488.
(18) *Abdul Rashid*, 16 A. L. J. 476, 46 I. C. 402, 19 Cr. L. J. 722.

483. Whoever counterfeits any trade-mark or property-mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Counterfeiting a trade-mark or property-mark used by another.

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable, Comp. with Court's sanction.

[*Person*—s. 11. *Possession*—s. 27. *Counterfeits*—s. 28.]
Property-mark—s. 472. *Trade-mark*—s. 478.]

Synopsis.

(1) *Analogous Law* (5386).
(2) *Procedure and Practice* (5387).
(3) *Proof* (5388).
(4) *Form of Charge* (5389).
(5) *Counterfeiting a Trade-mark* (5390-5391).

5386. Analogous Law.—This section differs from the last in that the accused in committing this offence goes the length of forging another-man's trade-mark for the purpose of imposition, which accounts for the enhanced punishment.

5387. Procedure and Practice.—No prosecution can be instituted under this section on expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever period first expires.[19] The offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable and compoundable with the permission of the Court and is triable by the Presidency Magistrate or a Magistrate of the first or second class. The costs of the prosecution or defence may be ordered to be paid by the Court at the close of the trial, and such costs would then be recoverable as fine.[20] It has also the power to order forfeiture of goods in accordance with the provisions of section 9 of the Merchandise Marks Act (§ 5362).

5388. Proof.—The points requiring proof are:—

(1) That the mark in question is a trade-mark (section 478) or property-mark (section 479).

(2) That it was so used by the prosecutor or some other person.

(3) That the accused counterfeited it.

5389. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:

"That on or about the——day of——at——you counterfeited a trade-mark or property-mark, Exhibit——used by A B, and that you thereby committed an offence punishable under section 483 of the Indian Penal Code, and within my cognizance.

(19) Merchandise Marks Act (IV of 1889), s. 15.

(20) *Ib.* s. 41.

"And I hereby direct that you be tried on the said charge."

5390. Counterfeiting a trade-mark.—The question what amounts to the counterfeiting of a trade-mark is a question of degree. For, having regard to the use of the term "counterfeiting" in another connexion (§§ 2439-2444), the counterfeit need not be the exact copy of the original. At the same time the two must possess some features in common; otherwise one cannot be called a counterfeit of the other. As used in connexion with trade-mark the term is probably used in a somewhat special sense as implying the exact reproduction of a trade-mark for the purpose of attracting custom. The term has obviously no application to the use of a receptacle bearing the original trade-mark for enclosing goods of another make. Nor would it extend to a trade-mark which is merely a colourable imitation of another, but which otherwise possesses features intended to distinguish it from the original. The question then resolves itself into this: What does the appearance of the two trade-marks suggest? Did the spurious trade-marker intend to impose on the public by the similarity of his design or did he intend to use it as the original?

5391. But this distinction is somewhat too fine; and in practice the prosecution prefers to charge the accused both under section 482 as well as under this section and section 486.

Session. Pres. Mag. or Mag. of 1st class. Non-cog. Summons. Bailable. Not comp.

Counterfeiting a mark used by public servant.

484. Whoever counterfeits any property-mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[*Public Servant*—s. 21. *Counterfeit*—s. 28. *Property-mark*—s. 479.]

Synopsis.

(1) *Analogous Law* (5392).
(2) *Procedure and Practice* (5393).
(3) *Proof* (5394).
(4) *Form of Charge* (5395).
(5) *Counterfeiting Mark of a Public Servant* (5396).

5392. Analogous Law.—This section presents an aggravated form of the offence ordinarily punishable under the last section—the aggravating circumstance being due to the mark being the mark of a public servant. In other respects it generally corresponds with the last two sections.

5393. Procedure and Practice.—This offence is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable

but not compoundable and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first class.

[For other points of practice reference should be made to section 482 (§§ 5367-5369).]

5394. Proof.—The points requiring proof are:—

(1) That the thing in question was a property-mark or some other mark.

(2) That such mark is used by some public servant.

(3) That it was used to denote that the property had been manufactured by a particular person; or at a particular time or place; or that the property was of a particular quality, or had passed through a particular office, or was entitled to some exemption.

(4) That the accused counterfeited it, or that he used the mark as genuine, and in the latter case he knew it to be counterfeit at the time he used it.

5395. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

That on or about the——day of——at——you counterfeited any mark (*or* property-mark) to wit——used by a public servant, to wit——to denote that some property was manufactured by a particular person, to wit——[(*or* at a particular time or place, to wit——) (*or* that the property is of a particular quality, to wit——*or* has passed through a particular office, to wit——) *or* that it is entitled to a certain exemption, to wit——)] [*or* used as genuine a mark, to wit——knowing the same to be counterfeit] and that you thereby committed an offence punishable under section 484 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court.)]

"And I hereby direct that you be tried (by the said Court) on the said charge."

5396. Counterfeiting Mark of a Public Servant.—This section prescribes a penalty for two offences, (*i*) counterfeiting a mark of a public servant, and (*ii*) using such mark. In its terms, this section goes beyond the two previous sections relating to using a false or counterfeit trade or property mark inasmuch as it protects all marks whether trade or property marks so long as they are (*a*) used by a public servant to denote (*b*) that any property has been manufactured by any person, or (*c*) at a particular time and place, or (*d*) that the property is of a particular quality, or (*e*) has passed through a particular office; or (*f*) that it is entitled to any exemption. A mark used for any other purpose is not then within the protection here enacted.

The common instance of a property-mark used by a public servant is the broad arrow which is exclusively used by Government to denote that the article to which it is affixed is the property of Government

Of other marks used by a public servant and falling into the category of those enumerated in this section, there are a large number used by several departments of Government for different purposes. And since the Government of this country is both a manufacturer as well as a merchant it has necessarily to use marks to protect its manufacture and merchandise. In some cases it has to use marks to protect its customs and other duties in which case a person who obtains exemption of such duties by stamping on his goods a false Government mark thereby inducing its officers to pass them duty-free commits this offence. In other respects the ingredients of this offence are the same as of the last section.

Session. Pres. Mag or Mag. of 1st class. Non-cog. Summons. Bailable. Not comp.

Making or possession of any instrument for couterfeiting a trade-mark or property-mark.

485. Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade-mark or property-mark, or has in his possession a trade-mark or property-mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[*Possession*—s. 27. *Counterfeiting*—s. 28. *Trade-mark*—s. 478. *Property-mark*—s. 479.]

Synopsis.

(1) *Analogous Law* (5397-5398).
(2) *Procedure and Practice* (5399).
(3) *Proof* (5400).
(4) *Form of Charge* (5401).
(5) *Possession of Counterfeiting Instrument* (5402-5404).
(6) *Possession of a Trade-mark When Criminal* (5404).

5397. Analogous Law.—This section is the adaptation of sections 235, 256 and 472 relating to possession of instruments for counterfeiting coins, stamps and forging documents. Evidently the Code views the possession of instruments for counterfeiting coins as of the same degree of criminality as this section, though it regards the case of stamps more serious. The underlying principle of the four sections is, however, the same, *viz.*, to punish a preparatory act in order to thwart the greater mischief which it might otherwise lead up to.

5398. The Code does not contain any provision corresponding to the following, which would, however, furnish equally a good defence to a charge under this section:—

"S. 6. Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging a trade-mark, or with falsely applying to goods any trade-mark or any mark so nearly resembling a trade-mark as to be calculated to deceive, or with applying to goods any false trade-

description, or causing any of the things in this section mentioned to be done, and prove—

"(*a*) That in the ordinary course of his business he is employed on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade-marks, or as the case may be, to apply marks or description to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

"(*b*) That he took reasonable precaution against committing the offence charged; and

"(*c*) That he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade-description; and

"(*d*) That he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade-mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence."(21)

5399. Procedure and Practice.—This offence is non-cognizable and summons should, ordinarily, issue in the first instance. It is bailable but not compoundable and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first class. For other points of practice reference should be made to s. 482 (§§ 5367-5369).

5400. Proof.—The points requiring proof are:—

(1) That the accused made or had in his possession the die, plate, or other instrument in question.

(2) That such die, etc., was for the purpose of counterfeiting a trade-mark or property-mark.

Or prove—

(1) That the accused had in his possession the trade-mark or property-mark in question.

(2) That he possessed such trade-mark or property-mark, the former for the purpose of denoting that goods bearing such mark were the manufacture or merchandise of some person, and the latter to denote that such goods belonged to him.

(3) That such goods were not the manufacture or merchandise of that person, or that they did not belong to him.

5401. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you made (*or* had in your possession) a certain die. Exhibit——(*or* plate or instrument, to wit——) for the purpose of counterfeiting the trade-mark (*or* property

(21) (1887) 50 and 51 Vict., c. 28 s. 5.

mark) of A B, for the purpose of denoting that certain goods, to wit—— are the manufacture (*or* merchandise) of the said A B whose manufacture or merchandise they are not [*or* (*in the case of property-mark*) that they belong to the said A B to whom they do not belong] and that you thereby committed an offence punishable under section 485 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court.)

"And I hereby direct that you be tried (by the said Court) on the said charge."

5402. Possession of Counterfeiting Instrument.—The three main questions that this section raises are (*a*) did the accused make, or was he in possession of (*b*) a die, plate or other instrument for counterfeiting a trade-mark or property-mark and (*c*) was his possession for the purpose of counterfeiting another person's trade or property-mark. These questions however presuppose the existence of an exclusive prior right to trade or property-mark in another, the protection of which is the foundation of this offence. This is, indeed, necessarily implied in the word "counterfeiting" which, as elsewhere explained, means the imitation of a genuine thing with the object of passing off one for the other. It is, in fact, the making of a facsimile for the purpose of fraud. The question whether the die, plate or other instrument was a counterfeiting instrument, must depend upon its nature and adaptability for the purpose alleged. In this respect, the present section does not lay down any rule at variance with those enacted in other similar sections (ss. 235, 256, 472). It is also a common ingredient of those offences that the instrument must not only be a counterfeiting instrument but it must be in possession *for the purpose of counterfeiting*. The two concepts appear similar but are in fact materially different, for while counterfeiting instruments might be seen in any museum or old curiousity shop, the keeper of either does not necessarily keep them for the purpose of counterfeiting which is the gist of the crime.

5403. The question how this purpose is to be proved, must depend upon the existence of those circumstances from which criminal intention and knowledge is legitimately inferred. The possession of goods bearing counterfeit marks, their previous sale and the like are amongst such circumstances. So the possession of counterfeit trade labels produced from the die or plate in possession of the accused would inevitably connect one with the other and explain what might otherwise require further explanation.

Possession of a Trade-mark When Criminal.

5404. But this is not the only act the section is intended to punish; for clause 1 refers to possession of a trade-mark or property-mark for the purpose of falsely labelling goods. Here it is not necessary that the trade-mark or property-mark should be counterfeit, or that they should have been in fact used for the purpose of falsely marking goods. If they were, it will be a fact of great evidentiary value as showing the purpose for which the marks were held, but apart from their actual use, a person may be punished for merely possessing them with that object in view. It is not necessary that the possession of the accused should be traced to any fraudulent purpose, for the present is one of

those offences in which law makes an act criminal apart from fraud, though it is justifiable to infer it from the unwarranted use of another person's trade-mark (§§ 5352-5353). And since the legitimate owner of a trade-mark may be guilty of misapplying it, it follows that the fact that the accused had the right to possession of the trade-mark, is not a sufficient answer to this charge, provided that the prosecutor has facts sufficient to bring the offence home to the accused. If, for instance, a person prepares labels bearing his own trade-mark to denote goods not of his make, he may be convicted under this section—for law reprobates the use of false labels, and this section punishes such a preparatory act in the interest of commerce, irrespective of the intention of the offender.

Selling goods marked with a counterfeit trade-mark or property-mark.

486. Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade-mark or property-mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained shall, unless he proves— Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Summons. Bailable. Comp. with Court's sanction.

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he has at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things or

(*c*) that otherwise he had acted innocently, be punished with imprisonment of either description for a term which may extend to one year,or with fine, or with both.

[*Possession*—s. 27. *Counterfeit*—s. 28. *Trade-mark*—s. 478. *Property-mark*—s. 479.]

Synopsis.

(1) *Analogous Law* (5405-5406).
(2) *Procedure and Practice* (5407-5409).
(3) *Proof* (5410).
(4) *Possession of Goods Bearing Counterfeit Trade-mark* (5411-5416).
(5) *Goods with False Trade-mark Excluded* (5411-5413).
(6) *Possession for Trade* (5414).
(7) *What is Sale or Possession* (5415-5417).

5405. Analogous Law.—This section may be said to constitute the abetment of the offence defined in section 482, for while the latter section punishes the user of a false trade or property-mark—who may be either the manufacturer or the wholesale importer or merchant—this section extends its penalty to those who promote the circulation or consumption

of such goods, but for whose co-operation they might not secure the necessary market.

5406. It will be noted that this is once more a section in which criminality is enacted to consist in merely selling, exposing or having in possession for sale, goods apart from intention or knowledge of their bearing counterfeit trade mark. Indeed, the seller of goods impliedly warrants that the goods he is selling bear genuine trade-mark, and so it is now enacted in the Merchandise Marks Act, the provisions of which run as follows:—

Implied warranty on sale of marked goods.

S. 17. On the sale or in the contract for the sale of any goods to which a trade-mark or mark or trade-description has been applied, the sellers shall be deemed to warrant that the mark is a genuine mark and not counterfeit or falsely used, or that the trade-description is not a false trade-description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the seller and delivered at the time of the sale or contract to and accepted by the buyer."

But both this section of the Merchandise Marks Act as well as the present section create only a presumption which is rebuttable and may be rebutted by proof of his innocence.

5407. Procedure and Practice.—This offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable and compoundable with the court's permission and is triable by the Presidency Magistrate, or a Magistrate of the first or second class. For other points of practice reference should be made to section 482 (§§ 5366-5369). This offence is subject to the same limitation as that offence (§ 5367).

5408. It will be observed that this offence is complete as soon as a person is found in possession for sale or trade, any goods bearing a false trade-mark: it is not necessary that the sale should take place within the jurisdiction of the Court.[22] So if the accused has such goods in his possession, which he intends to sell elsewhere, it does not deprive the Court where he had possession, to try him for this offence. So where certain tins of ghee bearing a counterfeit trade-mark were consigned from Etawah to Rangoon and the accused was found in possession of them in Calcutta, it was held that the Magistrate there had jurisdiction to try him there, though the destination of the goods was Rangoon.[23] But, of course, in such a case, the person who sells them at Rangoon would be equally liable to be tried there, so that several Courts may have concurrent jurisdiction to try the same or several persons who offend against its provision.

5409. As the section is worded, criminality is here presumed from the mere fact of sale—apart from intention, dishonesty or fraud—it being then on the accused to establish his innocence on any of the grounds set out in clauses (*a*), (*b*) and (*c*) of the section.[24] Under these clauses two defences are open to the accused; the first being that furnished by clauses (*a*) and (*b*) read together, and the second being that indicated by clause (*c*). The first defence presupposes that the person charged believed the trade-mark in question to be a genuine trade-mark. The

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(22) *Yusif Mahamod* v. *Bansidhur*, 25 C. 639.

(23) *Ib.*

(24) *Holland Bombay Trading Co.* v. *Buktre Mull*, 8 C. W. N. 421.

second defence presupposes that the person charged did not know that the trade-mark in question was the trade-mark of any firm or person.[25]

5410. Proof.—The points requiring proof are:—

(1) That the accused sold, or exposed, or had in his possession for sale, or some purpose of trade or manufacture, the goods or things in question.

(2) That such goods or things bore a trade-mark or property-mark.

(3) That the said trade-mark or property-mark was counterfeit.

Defences.—The above establishes a *prima facie* case of culpability against the accused, who may, however, rebut the charge by proving the following:—

(*a*) That at the time mentioned in (2) he had no reason to suspect the genuineness of the mark; and that he had taken all reasonable precautions against receiving into possession, etc., goods bearing a counterfeit trade-mark.

(*b*) That a demand being made by or on behalf of the prosecutor, he gave all information as to the source of his supply.

(*c*) That he otherwise acted innocently—that is to say either that he did not know that the mark was the trade-mark of any other person or that the latter had ceased using it, or had in fact abandoned it, or that it was a *publici juris* or of common use in the trade, or that its registration misled him, or that the goods covered by the false trade-mark were distinct or indeed any other defence which negatives criminality either by showing up the defects of the prosecution (§ 5383) or establishing the absence of dishonesty and fraud.

5411. Possession of Goods Bearing Counterfeit Trademark.—

Goods with False Trade-mark Excluded.

There is a notable difference between the possession of goods bearing a false trade-mark and those in which the trade-mark used is counterfeit. The user of a false trade-mark is punishable under section 482 but the seller of goods bearing such marks is not made anywhere liable. And the reason for this is not far to seek. For while the distributing middleman against whom this section is directed, might reasonably provide against counterfeit marks, it will be setting up an impossible standard to expect him to judge as to, and decide upon the character of marks which may happen to be a colourable imitation of another with established right to priority and protection.

5412. The section then excludes all such cases, which may, however, be made the subject of redress in a civil proceeding. But while it is so, it may not always be simple to decide whether a label is false or counterfeit, for the difference between the two is merely one of degree though the term "counterfeit" presupposes a much closer imitation of the model than the term "false"; but the object of the two, is the same, namely, to deceive the public into a belief that the spurious is the real trade-mark.

(25) *Ilahi Baksh*, (1897) A. W. N. 99.

And as there is not and there cannot be any rigid test as to the closeness of imitation, cases are not wanting in which a false trade-mark has been treated as a "counterfeit" one entailing on the accused the penalty prescribed by this section. For instance, where the complainant (A) had been for many years importing a certain cloth bearing a certain face plate and the number "K 68," and the accused were charged with having imported similar cloth bearing a somewhat similar face plate and the number "H 68," the Court held the latter to be undoubtedly a counterfeit of the complainant's symbol "K 68" and so rendering him liable to a conviction under this section.(1)

5413. The simplest instance of counterfeit trade-mark is afforded where one forges the trade-mark of another by impressing on goods a facsimile copy of the original trade-mark. Between such imitation and that in which the two trade-marks cannot be said to be the same though they are undoubtedly similar, there is a difference. That the Code does not intend to use the concepts "counterfeit" and "false" interchangeably appears to be evident from the language used in section 480 which defines using a false trade-mark. It has been there pointed out (§ 5378) that a person affixing a trade-mark to which he is legally exclusively entitled, may be guilty of using a *false* trade-mark if he applies it to goods not of his manufacture. But such person could not be said to have used a counterfeit trade-mark, nor would the seller of such goods be liable under this section for selling goods bearing a false trade-mark.

This distinction appears to have been conceded by Woodroffe, J., in a case in which the facts were as follows: The prosecutor (A) had indented for a certain quantity of woollen shawls from Germany, bearing his own trade-mark, but as the consignment arrived too late, he refused to take delivery and the goods were put up to auction and purchased by B who commenced selling them without removing A's trade-mark which he was called upon to do. A prosecuted him both under sections 482 and 486, and he was convicted by the Magistrate, but on revision the conviction was set aside under both the sections as on the facts proved, the goods could not have been held to bear a false or counterfeit trade-mark,(2) because the trade-mark had been put on the shawls with A's permission and it could not be said that in declining to deface the shawls by removing A's labels, there was any deception. The case was indeed the same as if A had himself sold his consignment to B and the latter had then sold them to the public.

5414. The section punishes one for being in possession of goods bearing a counterfeit trade-mark. Such possession implies consciousness of the spurious character of the trade-mark which it is the business of the tradesman to guard against. The section has, of course, no application to persons who are in possession of such goods for purposes other than that of trade or manufacture. Common carriers, wharfingers and purchasers of such goods may, for instance, be in possession of them, but they cannot be prosecuted because their possession may be in the course of, but not for the purpose of, trade.

Possession for Trade.

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(1) *Hargobind* v. *Ralli Brothers, Dass*, 32 C. 969; *Shyou Sheman & Co.* (1902) P. R. 35. v. *Solaman*, 4 R. 16.

(2) *Motilal Premsuk* v. *Kanhai Lal*

These words are intended to restrict the prohibition only to persons who are dealers or sellers of such goods, who are therefore directly responsible for their distribution.

What is Sale or Possession ?

5415. But persons may deal in such goods and yet be not in possession of them. Such are, for instance, commission agents and intermediaries between the manufacturer and the importer who bring about the sale of goods, but who could not be deemed to sell them within the meaning of this section. Nor, indeed, does the mere fact that the goods have been consigned to them for delivery to the purchaser amount to their possession so as to make them liable under this section. Such possession must be evidently actual and not merely symbolical or constructive. Consequently, where the goods were seized on the way, at the instance of the complainant before they could ever reach the accused's place of business, much less pass into his possession, it was held that the accused could not be convicted under this section though the goods were shown to bear counterfeit trade-mark.(3)

5416. The question of possession may present some difficulty in the case of a firm of several partners some of whom are dormant. It has been held in the Punjab that where goods were found in the possession of a firm as against the individual possession of any of its members, and where there was very little credible evidence to show that any particular member of the firm took a special or peculiar share in the transaction, the members should not have been convicted individually, but that they ought to have been charged and convicted as a firm.(4) But this view suggests difficulties, if it is intended to extend liability to one who is merely in constructive possession of such goods.

5417. The position of a person selling goods with a false property-mark is the same, and since books have been held to fall into the category of "goods," it follows that book-seller importing and offering for sale the pirated edition of a book would be held punishable under this section.(5)

Making a false mark upon any receptacle containing goods.

Session. Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Summons. Bailable. Not comp.

487. Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.

[*Person*—s. 11. *Public servant*—s. 21 *Intent to defraud*—s. 25. *Trade-mark*—s. 478.]

(3) *Hargobind* v. *Greaves, Cotton & Co.*, (1902) P. R. No. 32.

(4) *Hargobind* v. *Ralli Brothers*, (1902) P. R. No. 35.

(5) *Kanai Das* v. *Radha Shyam*, 26 C. 232.

Synopsis.

(1) *Analogous Law* (5418).
(2) *Procedure and Practice* (5419).
(3) *Proof* (5420).
(4) *Form of Charge* (5421).
(5) *Principle* (5422).
(6) *Falsely Marking Goods* (5423-5425).
(7) *Defence No Intent to Defraud* (5426).

5418. Analogous Law.—This section is somewhat general and would include many cases of offences otherwise punishable, as for instance, under section 482. The primary object of the section is however different, being to punish persons who smuggle contraband goods without payment of duty by deceiving custom officers by means of a false and misleading trade-mark. So the importation of dutiable goods into a country by evading payment, by falsely labelling them as goods admitted duty free, would be punishable under this section, while one who makes use of such goods would be liable under the provisions of the next section.

5419. Procedure and Practice.—This offence is non-cognizable and summons should, ordinarily, issue in the first instance It is bailable but not compoundable and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first or second class. For other points of practice, see s. 482. (§§ 5366-5369).

5420. Proof.—The points requiring proof are:—

(1) That the accused made some mark upon some case, package or other receptacle containing goods.

(2) That such mark was a false mark.

(3) That he did so in a manner reasonably calculated to deceive a public servant or other person into a belief—

(*a*) That such receptacle contained goods which it did not contain; or

(*b*) that it did not contain goods which it did contain; or

(*c*) that the goods contained in such receptacle were of a nature or quality different from the real nature or quality thereof.

Against which the accused may prove in defence:—

(1) That he had acted without intent to defraud (§§ 5383-5385).

5421. Charge.—The charge under this section or section 488 should run thus:

"I (*name and office of the Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you made (*or* made use of) a false mark, to wit——upon a case, to wit——(*or* package or other receptacle containing goods) in a manner reasonably calculated to cause a public servant, to wit——(*or* any other person, to wit——), to believe that such case contains goods, to wit——which it does not contain [*or* that it does not contain goods which it does contain (*or* that the goods

contained in such receptacle are of a nature or quality different from the real nature or quality thereof)], and that you thereby committed an offence punishable under s. 487 [*or* section 488] of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5422. Principle.—This section is much wider in its terms than section 482 or 486, and punishes the false marking of a case or package for the purpose of deception; such mark may or may not be a trade or property mark, and, of course, it need not be registered or protected. The criminal intent underlying the act is furnished by the mark being made in a manner reasonably calculated to deceive. The marker may be frustrated in his calculation, but it must have been his intention manifested by the nature of the mark and the purpose for which it was made. There is no necessity of proving such intention, but it is presumed from the mark and the manner of using it.

5423. Falsely marking Goods.—Since a "false mark" is wider than a false trade or property-mark and causing an erroneous belief in any person other than a public servant is wider than persons contemplated in sections 480 and 481, it follows that this section might, unless reasonably construed, become a legal purgatory for an act which could not be punished as falling under any of the preceding sections. The section is, of course, intended to meet cases of false marks on packages put on to evade duty. For instance, tea, tobacco and spirits are subject to heavy duty in England. If, therefore, a person were to pack these in cases and mark them as "corn flour" or other article admitted duty-free or subject to smaller duty, he would be clearly punishable under this section. So if an Indian trader were to export rifles beyond the frontier in cases marked "Assam Tea, Orange Pekœ," or say, "Purest Mocha Coffee," he should be held similarly liable. So again, a person may smuggle into British India contraband goods, such as opium, marking the packages as something else, in which case the person, if in British India, might be punished either under this section or the next according to circumstances.

5424. These are obvious instances of the working of this rule. But they do not exhaust the various modes in which such fraud might be perpetrated. For example, this section is powerless to deal with the case of a person who packs tobacco in an old tea tin, bearing the tea dealer's original trade-mark, in which case the offence would be punishable under section 482, though his object was to evade the payment of duty for which this section makes special provision.

5425. Again, the section does not define a "false mark," but it is manifestly intended to denote a mark descriptive of the goods placed on the case or package enclosing them. Such mark must then be both visible as well as misleading, and from its position, nature and design it must be reasonably calculated to deceive. The fact that some one was in fact deceived, may be some evidence of such intention (§§ 5354-5355), but it is neither conclusive nor sufficient (§§ 5380-5381). On the other hand it is not necessary that some one should have been in fact deceived—for the likelihood of deception is all that is necessary, though such

likelihood must be reasonable—that is to say, it must be both natural and probable under the circumstances of the case (§§ 5380-5381).

Defence—No Intent to Defraud.

5426. The section presumes fraud from the falsity of the mark and the manner of using it (§ 5422). But such presumption is rebuttable, and the accused is permitted to rebut it by showing that there was in fact absent from his mind the intention to defraud, which law presumed from the circumstances of his case. Innocence may be thus established by shewing that the accused did not know of the contents of the package—as, where he had been merely accommodating another by carrying it for him, or that the mark was not false, or that it was of itself insufficient to deceive (§§ 5382-5383).

Punishment for making use of any such false mark.

488. Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished, as if he had committed an offence against that section.

Synopsis.

(1) *Analogous Law* (5427).
(2) *Procedure and Practice* (5428).
(3) *Proof* (5429).
(4) *Charge* (5430).
(5) *Making use of a False mark* (5431).

5427. Analogous Law.—The last section punishes the *making* of a false mark upon any case, package or other receptacle containing goods—while this section punishes the *making use* of any such false mark, provided that it was used "in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain, or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof." The difference between the two sections then turns upon the fact that while the last section punishes for falsely *marking* the case, etc., this section punishes for making use of goods so marked (§ 5431).

5428. Procedure and Practice.—This offence is non-cognizable and summons should, ordinarily, issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first or second class. For other points of practice reference should be made to the commentary under section 482.

5429. Proof.—The points requiring proof are:—

(1) That the accused made use of some mark upon some case, package or receptacle containing goods.

(2) and (3) as in s. 486.

5430. Charge.—*See* form under section 487 (§ 5421).

5431. Making Use of a False Mark.—The concept "makes use" in this section is in its sense somewhat different to "uses" which

occurs in s. 482. It is rather intended to mean putting into such use as to be advantageous to the user. Such use must be made in a manner reasonably calculated to deceive a public servant or any other person into a belief that the goods correspond to the mark and so to act upon that belief. It may be that a person both falsely marks the goods and then makes use of it, in which case his offence would be punishable either under section 487 or this section, but not both, for the marking would then be regarded as subservient to its user.

For further commentary, *see* s. 487 (§§ 5422-5426).

Tampering with property-mark with intent to cause injury.

489. Whoever removes, destroys, defaces or adds to any property-mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Summons. Bailable. Not comp.

[*Person*—s. 11. *Injury*—s. 44. *Property-mark*—s. 479.]

Synopsis.

(1) *Analogous Law* (5432).
(2) *Procedure and Practice* (5433).
(3) *Proof* (5434).
(4) *Form of Charge* (5435).
(5) *Tampering with Property-mark* (5436).

5432. Analogous Law.—This section is confined to tampering with only a "property-mark." It has no application to a case of tampering with a trade-mark. And the reason for this is clear. For the obliteration of a trade-mark can profit no one, unless it was made out of mischief or with intent to substitute another trade-mark in which case it will be punishable as such. This secton is evidently intended, to cover cases in which a property-mark, say, a broad arrow on some Government property is removed to facilitate its misappropriation.

5433. Procedure and Practice.—This offence is non-cognizable and sommons should, ordinarily, issue, in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class. For other points of practice reference should be made to section 482 (§§ 5366-5369).

5434. Proof.—The points requiring proof are:—

(1) That the mark in question was a property-mark.

(2) That the accused altered, defaced, destroyed or removed it.

(3) That he did so intending or knowing it to be likely that he may thereby cause injury to any person.

5435. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That on *or* about the——day of——at——you removed (*or* destroyed, defaced *or* added) to a property-mark, to wit——(*describe it*), intending (or knowing it to be likely), that you may thereby cause injury to A B, and that you thereby committed an offence punishable under section 489 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5436. Tampering with Property-mark.—This is the only section under the present group expressly requiring proof of criminal intention or knowledge on the part of the accused. This was obviously necessary in view of the fact that an alteration or removal of a property mark may be as much innocent as done for some ulterior criminal purpose. In such a case the privity of the offender is punishable as the act having been done with intent to cause injury though the injury intended by the offender may be different to that intended by another at whose instance he had removed or defaced the property-mark. A person who steals a gentleman's cutlery or clothes marked with his crest, monogram or initials, may remove the tell-tale marks himself or take them to a Smith for their removal. In the former case his later act would merge in the former offence of theft, but in the latter case the Smith would at least be guilty of this offence if he knew that the property was the proceeds of theft.

Of Currency-Notes and Bank-Notes.

5437. Topical introduction.—These four sections have been added to the Code by the Currency Notes Forgery Act, 1899[6] in order to make better provision for the protection of currency and bank-notes against forgery. The present Code, as orginally enacted, contained no reference to offences relating to paper currency, as no such currency was then in existence in this country. Consequently, offences which would now be punishable under these sections, were formerly dealt with under the general provisions applying to the forgery of valuable securities, section 467 being held to apply for forging a currency-note, section 471, for uttering such notes, and section 472 for being in possession of counterfeit plates. The provisions of section 467 afforded sufficient means dealing both with forgery generally and with forgery of currency-notes. But it was at times difficult to secure a conviction under the other sections. These sections are, therefore, intended to fill in the gap which those sections left in the general law in their applicability to paper currency.

5438. In England, such provisions have existed since the passing of the Forgery Act, 1861,[7] which punished with penal servitude for life "whoever shall forge, or alter, or shall offer, utter, dispose of, or put off knowing the same to be forged or altered" any note of a bank or banker.

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(6) Act XII of 1899, s. 2.

(7) 24 & 25 Vict. c. 98, s. 12, re-enacting 1 Will. IV, c. 66, s. 3: 16 & 17 Vict., c. 23, s. 41; but the Act of 1861 enlarged its terms by extending the penalty to the notes of not only the Banks of England and Ireland as the previous Statutes had done, but also to the notes of other bankers,

As compared to this section the provision made in these sections is far-reaching.

Counterfeiting currency notes or bank-notes.

489-A. Whoever counterfeits or knowingly performs any part of the process of counterfeiting any currency-note, or bank-note shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. Session. Cognizable. Warrant. Not bail. Not comp.

Explanation.—For the purposes of this section and of sections 489-B, 489-C and 489-D, the expression "bank-note" means promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power and intended to be used as equivalent to, or as a substitute for, money.

[*Counterfeiting*—s. 28.]

Synopsis.

(1) *Analogous Law* (5439).
(2) *Procedure and Practice* (5440).
(3) *Proof* (5441).
(4) *Charge* (5442).
(5) *Meaning of Words* (5443).
(6) *Principle* (5444).
(7) *Counterfeiting of Currency and Bank-notes* (5445).

5439. Analogous Law.—The counterfeiting of a note is forgery, and the offence might just as well be punished as such, as indeed, it used to be before the passing of the Currency Notes Forgery Act, 1899. But it will now be wrong to resort to that general section when the Code contains a special provision applicable to such offence. The section is in its wording closely analogous to sections 231 and 255, which relate to the same offence relating to coin and stamps respectively.

5440. Procedure and Practice.—This offence is cognizable and warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and exclusively triable by the Court of Session.

5441. Proof.—The points requiring proof are:—

(1) That accused "counterfeited" or performed any part of the process of counterfeiting.

(2) That what was counterfeited or attempted to be counterfeited was a currency-note or bank-note.

5442. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That you on or about the——day of——at——counterfeited (*or* knowingly performed a part of the process of counterfeiting, to wit——) a

currency-note (*or* a bank-note) of the value of—rupees, and thereby committed an offence punishable under s. 489-A of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5443. Meaning of words.—"*Performs any part of the process of counterfeiting*," *i.e.*, such process as may result in counterfeiting. It excludes a mere act of deception.(8)

5444. Principle.—The Code enacts three sections having the same purpose in view—sections 231, 255, and the present section: of these three sections this section and section 231 (and its derivative s. 232) are intended to protect the currency of the country from debasement, while section 255 which relates to the counterfeiting of a government stamp is intended to protect one source of the public revenue. The act punishable in each case, however, is the counterfeiting or knowingly performing any part of the process of counterfeiting—a phrase which excludes a mere preparation, but includes an attempt at counterfeiting. The Explanation extends the protection of the section to all bank-notes, whether Indian or foreign, and this was necessary, because such notes being payable to bearer on demand take the place of current coin, and as such may be exchanged for money in all countries and which justifies their protection against forgery whatever may be their origin. The offence is thus an international one, for all countries are agreed in hunting down the note-forger.

5445. Counterfeiting of Currency and Bank-notes.—In England all currency-notes are issued by the Banks of England and Ireland. All currency-notes there are, therefore, bank-notes there being no such thing as currency-note, as distinct from a bank-note. But in this respect the rule is just the reverse in this country. For here no bank is empowered to issue currency-notes which are issued only by the Mint under the Currency Departments of the Government of India and the principal Local Governments. The only bank-notes in existence in this country are then what are more appropriately called promissory notes. But in order to merit the protection of this section such notes must be payable to bearer and on demand. It does not matter by what name the instrument is called—if it is negotiable—it comes within the mischief the section is intended to provide against.

A Hundi or a cheque payable to bearer on demand is, thus, a bank-note for the present purpose. Such note must, however, be issued by a banker, for it is only such notes that obtain a wide circulation and are exposed to danger of being counterfeited that call for the special protection here given. The term "counterfeiting" is a concept sufficiently defined and explained elsewhere (§ 282). But the phrase "performs any part of the process of counterfeiting" requires a word by way of explanation. It is, no doubt, used here in the same sense as elsewhere (ss. 231, 255). But it is just as well to add that the process here spoken of must be a process which must be necessary for counterfeiting. Suppose, for instance, a trickster intending to cheat another of his money, were to persuade him to part with it in return for notes which he professed to make and to convince whom of his competency he takes a piece of paper and by a crude contrivance

(8) *Meerza* 10 Bur. L. T. 255, 38 I. O. 746, 18 Cr. L. J. 362.

produces an impression of a note thereupon, could he be said to perform any part of the process of counterfeiting? It is apprehended not, because the process performed was just sufficient to cheat, but no part of it was necessary for the forgery.(9)

For further commentary, *see* ss. 231. 255 and 463.

Using as genuine forged or counterfeit currency notes or bank-notes.

489-B. Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Session. Cognizable. Warrant. Non-bail. Not comp.

[*Person*—s. 11. *Reason to believe*—s. 26 *Counterfeit*—s. 28 *Bank note*—s. 489-A, Expl.]

Synopsis.

(1) *Analogous Law* (5446).
(2) *Procedure and Practice* (5447).
(3) *Proof* (5448).
(4) *Form of Charge* (5449).
(5) *Trafficking in Forged Notes* (5450-5451).
(6) *"Sells, receives, traffics in"* (5451).

5446. Analogous Law.—This section prohibits trafficking in forged notes. Similar offence relating to coins is punishable under sections 239-241, and that relating to stamps under s. 258, but the language used in this section is somewhat different, though the sense is in each case the same.

5447. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

5448. Proof.—The points requiring proof are:—

(1) That the note in question was forged or couterfeited.

(2) That the accused sold to, or bought or received from some person or trafficked in or issued as genuine such note.

(3) That when he did so he knew or had reason to believe note to be forged or counterfeited.

5449. Charge.—The charge should run thus:—

(9) *Meerza*, 10 Bur. L. T. 255, 38 I. C. 746, 18 Cr. L. J. 362.

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you sold to A B [*or* bought from A B or trafficked in (*specify it*)] a forged (*or* counterfeit) currency note, to wit——(*or* bank note), knowing (*or* having reason to believe), the same to be forged (*or* counterfeit) and that you thereby committed an offence punishable under section 489-B of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5450. Trafficking in Forged Notes.—This offence is intended to stop the circulation of forged notes by punishing those who deal in them, "knowing or having reason to believe" them to be forged. This phrase has been the subject of a previous discussion (§§ 339-342), and it must be understood here in the same as used there. It does not cast on the accused the necessity of shewing that he did not know that the note was forged, but places the *onus* on the prosecution who must establish that there was sufficient cause to believe that the note was forged, and whereupon the *onus* shifts on to the accused. Such cause may be furnished by the crudeness of the forgery, so that he who runs can see that the note is forged and not genuine. But this pre-supposes knowledge of the details of the original which may be presumed in one constantly required to handle such notes, but it may not be right to presume it in the case of a rustic who was probably a stranger to paper currency. Even in the case of the former, the strength of the presumption would vary according to the origin of the note. If, for instance, it is of the currency of the country the presumption would be as natural as it would be strong, but it would diminish as the note was of a foreign country or bank, so that if such note rarely happens to be the medium of exchange in this country, the accused could not be expected to discriminate between the original and the counterfeit.

"Sells, Receives, Traffics."

5451. Next, the transactions reprobated are sale, purchase, receipt and trafficking in such notes. Consequently, if a forger makes the present of a forged note to another, the former could not be punished nor the latter, unless he received it with at least reasonable belief in its forgery. But he who sells a forged note profits by it if he sells it with the same knowledge or belief; for whether he had acquired it for value or for nothing, he knew it to be forged and his selling it as true amounts to cheating by false visual representation which is the gist of the offence of forgery. The counterpart sale is purchase and a person who purchases such a note with the same knowledge or belief must of necessity do it for the purpose of putting it in circulation. Such a person is held liable whether he purchases it for value or "receives" it otherwise, since his object is in each case presumed to be the same.

A necessary exception to the rule is furnished by a detective purchasing or receiving such note from the forger or his accomplice with a view to bring him to justice. His case may, however, be said to be

covered by the general exceptions,[10] but which would not save a mere collector of curios, though justice would not be overstrained if he is not classed as a receiver within the meaning of this section.[11] It is really intended to punish those who make and those who knowingly circulate forged notes. Consequently, persons who traffic in them are punishable here though it may be difficult to bring home to them any individual instance of the purchase or sale of such notes. The phrase "traffic in" implies dealing in a commodity as a matter of trade, so that a trafficker in such notes is a trader in them, whether his trade consists in importing or exporting such notes or of exchanging or selling them. The phrase has been used in the same sense in s. 371 (§ 3935). The seller of forged notes is punishable under this section even though the sale be to the buyer apprised of their forgery. The offence is directed against traffic in false notes and all that is necessary is that the accused must know of their falsity and so knowing use them.[12]

Possession of forged or counterfeit currency notes or bank notes.

489-C. Whoever has in his possession any forged or counterfeit currency-note or bank-note knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine shall be punished with imprisonment of either description for a term which may extend to seven years or with fine, or with both.

Session. Cognizable. Warrant. Bailable. Not comp.

[*Reason to believe*—s. 26. *Possession*—s. 27. *Counterfeit*—s. 28.] *Forged*—s. 463.]

Synopsis.

(1) *Analogous Law* (5452).
(2) *Procedure and Practice* (5453).
(3) *Proof* (5454).
(4) *Form of Charge* (5455).
(5) *Criminal Possession of Forged Notes* (5456).

5452. Analogous Law.—This section carries criminality as regards forged notes a step further by punishing their possession when it is accompanied by an intention to use them as genuine. In this respect this section is analogous to sections 242 and 243 relating to coins and s. 259 relating to stamps.

5453. Procedure and Practice.—This offence is cognizable and warrant should, ordinarily, issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session.

(10) S. 79.
(11) This is the necessary effect of the next section which punishes possession of such notes only when the possessor intends to use them as genuine.
(12) *Bhika Ram*, 7 L. 80.

5454. Proof.—The points requiring proof are:—

(1) That the note in question was forged or counterfeited.

(2) That the accused was in possession of it.

(3) That at the time of his possession he knew it to be forged or had reason to believe it to be so.

(4) That he intended to use it as genuine. or that it might be used as genuine.

5455.—Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the- day of——at——you had in your possession a forged (*or* counterfeit)currency note(*or* bank note), to wit- knowing (*or* having reason to believe) the same to be forged (*or* counterfeit) and intending to use the same as genuine or that it may be used as genuine, and that you thereby committed an offence punishable under section 489-C of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5456. Criminal Possession of Forged Notes.—The term "possession" as used in criminal law bears a sense at variance from its sense in civil law. But its meaning here as elsewhere in the Code is the same. As elsewhere observed, possession implies exclusive control, and such control must then be established over the notes which must of course, be forged or counterfeited. But though a note may be forged and its possession traced to the accused, the two other essential elements which make that possession criminal are knowledge or reasonable belief that the note was forged, and its possession with the intention of foisting it on the public. Such intention, relating as it does to a future conduct could only be proved by collateral circumstances, such as that the accused had palmed off such notes before, or that he was in possession of such and similar notes in such large numbers that his possession for any other purpose is inexplicable.

The subject has been already discussed before in connection with similar offences relating to coins and stamps (§§ 2511-2583), to which, reference should be made for further information, if necessary.

Session. Cognizable. Warrant. Not bail. Not comp.

Making or possessing instrument or materials for forging or counterfeiting currency notes or bank notes.

489-D. Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used for forging or counterfeiting any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description

for a term which may extend to ten years, and shall also be liable to fine.

[*Reason to believe*—s, 26. *Counterfeiting*—s. 28 *Forging*—s. 463.]

Synopsis.

(1) *Analogous Law* (5457).
(2) *Procedure and Practice* (5458).
(3) *Proof* (5459).
(4) *Form of Charge* (5460).
(5) *Making and Sale of Forging Instruments* (5461).

5457. Analogous Law.—This offence is the same as is made punishable under sections 233 and 234, relating to coins, 256 and 257 relating to stamps, and section 485 relating to trade-marks. It should, moreover, be compared with section 489-A, which is intended to arrest a similar act directed to forging a note. These sections then prohibit preparatory acts from three stages:—

First, by punishing the making or attempting to make a counterfeiting instrument (ss. 233, 234, 257, 289-D).

Secondly, by punishing the purchase or sale of such an instrument (*ib.*)

Thirdly, by punishing for being in possession of it (*ib.*).

Other sections, similarly, punish other more progressive acts such as making use of such instrument for the purpose of counterfeiting and performing any part of the process of counterfeiting or the like.

It will be thus seen that in matters relating to currency and stamps the penal provisions of the Code have been pushed to the extreme verge beyond which it is impossible to extend them. But since such remote acts must be proved to have been done with the knowledge or belief that they are subservient to a contemplated forgery, there is not any undue extension of the doctrine of criminal liability—though as the act is further remote from the objective the connecting links between the two must be necessarily continuous and strong.

5458. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

5459. Proof.—The points requiring proof are:—

(1) That the thing in question was a machinery, instrument or material, necessary for or used in forging or counterfeiting a currency note or bank note.

(2) That the accused—

(*a*) made it, or

(*b*) performed any part of the process of making it, or

(*c*) bought it, or

(*d*) sold it, or

(*e*) disposed of it, or

(*f*) had it in his possession.

(3) That the accused knew or had reason to believe that it was intended to be used for forging or counterfeiting any currency or bank note.

5460. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you made (*or* performed any part of the process of making, *or* bought *or* sold *or* disposed of, *or* had in your possession) an instrument (*or* material), to wit——for the purpose of being used (*or* knowing or having reason to believe that it is intended to be used) for forging (*or* counterfeiting) a currency note, to wit——(*or* a bank note, to wit——) and that you thereby committed an offence punishable under section 489-D of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5461. Making and Sale of Forging Instruments.—As has been observed before (§§ 5275-5282), this section does not penalize the making and selling of a machinery, instrument or material, which *may* be used for forgery or counterfeiting, but only penalizes it when the accused makes or sells it knowing or having reason to believe that it is intended to be so used, the burden of proving which is on the prosecution.[13] The reason for this qualification is obvious, for machineries and instruments in ordinary use, such as printing presses and copying machines may be used for forgery, but their manufacture and sale could not be punished unless the maker or vendor makes or sells them on purpose so that they may be used for forgery, in which case; his knowledge of the criminal purpose renders his act one of abetment for which this section prescribes a special penalty.

The question whether the machinery or instruments in respect of which the charge is made is adapted for the purpose of counterfeiting, is a question of fact which is the duty of the prosecution to prove, if necessary, by expert evidence. The evidence must shew that the instruments are such as will produce spurious notes as may in circulation ordinarily impose upon the word. It is not necessary that the resemblance is perfect, but it must be sufficient to deceive people of ordinary intelligence who are familiar with currency notes.[14] "There may of course, be cases, where though the ultimate object of the possessor may clearly be counterfeiting, the particular articles found are of such rude or imperfect nature as to indicate unmistakeably that the work was only in an experimental stage, and that they could

(13) *Abdul Rahman*, 21 M. L. J. 766, 11 I. C. 241, 12 Cr. L. J. 377. (14) *Ib.*

not be intended for utilization in the preparations of finished counterfeit.[15] Where therefore the accused was found to have collected materials and was acquiring knowledge for the purpose of counterfeiting notes, but the instruments he had collected were incapable of making even passable notes, he was convicted of this offence but on appeal to a Bench of the High Court the two Judges differed, and the case being laid before a third Judge he was acquitted. Of course, it is not necessary that for the purpose of this section the accused must be shown to be in possession of a complete outfit for counterfeiting. All that is necessary is that the instruments found must be a part of that outfit.

For further commentary, *see* s. 234 *et seq.*

(15) *Abdul Rahman*, 21 M. L. J. 766, 11 I. C. 241, 12 Cr. L. J. 377; following *Tirumala*, 1 Weir 219.

CHAPTER XIX.[16]

OF THE CRIMINAL BREACH OF CONTRACT OF SERVICE.

5462. Topical Introduction.—These exceptional provisions of the Indian Penal Code have no prototype in the criminal law of Europe. They were, however dictated by considerations which gave rise to a special enactment called the Workman's Breach of Contract Act, 1859,[17] the provisions of which were somewhat more general than of the three following sections, the enactment of which was thus justified by the authors of the Code:

"We agree with the great body of jurists in thinking that, in general, a mere breach of contract ought not to be an offence, but only to be the subject of a civil action.

"To this general rule there are, however, some exceptions. Some breaches of the contract are very likely to cause evil such as no damages, or only very high damages can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damage can be obtained. Such breaches of contract are, we conceive, proper subjects for penal legislation.

"In England it would be unnecessary to provide a punishment for a stage-coachman who should however maliciously or dishonestly, drive on leaving behind a passenger whom he is bound to carry. The evil inflicted is seldom very serious; the country is everywhere well inhabited; the roads are secure. The means of conveyance can easily be obtained, and damages sufficient to compensate for any inconvenience or expense which may have been suffered, can easily be recovered from the coach proprietors. But the mode of performing journeys and the state of society in this country are widely different. It is often necessary for travellers of the upper classes, even for English ladies, ignorant perhaps of the native languages, and with young children at their breasts, to perform journeys of many miles over uninhabited wastes, and through jungles in which it is dangerous to linger for a moment, in palanquins borne by persons of the lowest class. If as sometimes happens, these persons should, in a solitary place, set down the palanquin and run away, it is difficult to conceive a more distressing situation than that in which their employer would be left. None but very high damages would be any reparation for such a wrong. But the class of people by whom alone such a wrong is at all likely to be committed can pay no damages. The whole property of all the delinquents would probably not cover the expense of prosecuting them civilly. It, therefore, appears to us that breaches of contract of this description may, with strict propriety, be treated as crimes.

(16) Sections 490 and 492 have been repealed with effect from 1st April 1926.

(17) Act XIII of 1859 (Repealed by Act III of 1925).

"The law which we have framed on this subject applies, it will be perceived, only to cases in which the contract with the bearers is lawful. The traveller, therefore, who resorts to the highly culpable, though we fear, too common practice of unlawfully compelling persons against their will to carry his palanquin or his baggage will not be protected by it. If they quit him, it is what they have a legal right to do, nor will they be punishable, whatever may be the consequence of their desertion.

"Another species of contract which ought, we conceive, to be guarded by a penal sanction is that by which seamen are bound to their employers. The insubordination of seamen during a voyage often produces fatal consequences. Their desertion in port may cause evils such as very large damages for which it would not be worth while to sue. If ship in the Hugli, at a critical time of the year, is compelled by the desertion of some of the crew to put off its voyage for a fortnight, it would be mere mockery to tell the owners that they may sue the runaways for damages in the Supreme Court. We also think that the persons who contract to take care of infants, of the sick and of the helpless, lay themselves under an obligation of a very peculiar kind and may with propriety be punished if they omit to discharge their duty. The misery and distress which their neglect may cause is such as the largest pecuniary payment would not repair; they generally come from the lower ranks of life, and would be unable to pay anything. We therefore propose to add to this class of contracts the sanction of the penal law."

"Here we are inclined to stop. We have, indeed, been urged to go further, and to punish as a criminal every menial servant who, before the expiration of the term for which he is hired, quits his employer. But it does not appear to us that in the existing state of the market for that description of labour in India, good masters are in much danger of being voluntarily deserted by their menial servants, or that the loss or inconvenience occasioned by the sudden departure of a cook, a groom, a *hur karu* or a *khidmutgar*, would often be of a very serious description. We are generally apprehensive that by making these petty breaches of contracts offences, we should give not protection to good masters, but means of oppression to bad ones."[18]

Repeal of Sections 490, 492.

5463. Sections 490 and 492 have since been repealed by the Workmen's Breach of Contract (Repealing) Act, 1925 with effect from 1st April 1926.[19] A Bill[20] to repeal them was introduced by the Home Member in the Legislative Assembly on the 15th September 1924, when he justified it on the following grounds: "An enactment of this kind has been considered for some time to be out of place in the general law of the country, although it is possible that it may be wanted in some out the way places. And if that be the case, it should be provided for by the local legislatures and not by the general law. The reason why the repeal is not being effected at once and is going

(18) Note P. Reprint, pp. 170, 171.
(19) *See* s. 2, Act III of 1925.
(20) Bill No. 29 of 1924, published in the Gazette of India, Pt. V, dated 20th September 1924, p. 139.

to be effected on the 1st April 1926, is that notice must be given in order that the local legislatures may have time to enact anything that may be necessary and also employers and employees may have time to consider their own position when the law is gone."[21]

490. [*Repealed by the Workmen's Breach of Contract (Repealing) Act.*][22]

Pres. Mag or Mag. of 1st or 2nd class. (S.198 or P. C.) Non-cog. Summons. Bailable. Comp. Summary.

Breach of contract to attend on and supply wants of helpless person.

491. Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

[*Voluntary*—s. 39.]

(1) *Analogous Law* (5464-5465).
(2) *Procedure and Practice* (5466).
(3) *Deserting a Helpless Person* (5467-5469).
(4) *Desertion must be Voluntary* (5468).
(5) *Curators, Hospital Servants excluded* (5469).

5464. Analogous Law.—This section remains as it was originally drawn as clause 465, but the scope of which the Law Commissioners proposed to extend in the following words: "We are not prepared to punish as a criminal every menial servant who quits his employer, without a certain notice upon the expiration of the term for which he is hired under ordinary circumstances. But we conceive that this clause may be improved in one respect. It seems, as it stands, not to be applicable to any but those servants who have contracted specially to attend upon the sick, insane, etc., but we think it should be made to apply to servants who are, or ought to be in attendance upon a sick or insane master, though they may have only contracted with him in the ordinary way, while he was of sound body and mind, and to servants whether engaged specifically for the purpose or not, who by the lawful command of their employers have been ordered to take care of young children and have not objected to do so."[23] But this would have surely carried the doctrine of criminality to the region of altruism, which, outside Utopia, would not be held to constitute even an actionable wrong much less a crime. The Legislature, of course, could not introduce such a dangerous innovation, and the section was consequently passed unamended as suggested.

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(21) 4 Debates, dated 15th September 1924, pp. 3424, 3425.
(22) S. 2, Act III of 1925.
(23) 2nd Rep., § 329.

5465. These provisions must be regarded as supplementary to section 1 of the Workman's Criminal Breach of Contract Act, under which any artificer, workman or labourer receiving an advance from his employer for doing any work, is liable to be convicted and sentenced to rigorous imprisonment for the maximum period of three months, unless he had lawful or reasonable excuse for not performing the work.[24] This Act is, however, in the first instance only applicable to the presidency towns, though the local Government have power to extend its operation to other territories within their jurisdiction.[25]

5466. Procedure and Proof.—No Court can take cognizance of this offence except upon a complaint made by some person aggrieved by such offence.[1] It is, therefore, non-cognizable and summons should ordinarily issue in the first instance. It is both bailable and compoundable, and is triable by the Presidency Magistrate, or a Magistrate of the first or second class, and may be tried summarily.

The points requiring proof are:—

(1) That the accused entered into a contract to attend on, or supply the wants of a person.

(2) That such contract was legal.

(3) That such person was then helpless or incapable of providing for his own safety or of supplying his own wants.

(4) That such helplessness or incapacity arose from—

(*a*) youth; or

(*b*) unsoundness of mind; or

(*c*) disease; or

(*d*) bodily weakness.

(5) That accused omitted to attend on such person, or to supply his wants.

(6) That he did so voluntarily.

5467. Deserting a Helpless Person.—This section has no reference to a traveller, but refers to one who is helpless or incapable of taking care of himself, to look after whom the accused was employed, and who after accepting the engagement deserts the person "voluntarily." The servant liable under this section must, again, be not a general servant, but one who is specially retained for the supervision of the helpless person. Such an engagement may be made with a general domestic servant, but for such an engagement his general duties do not make him amenable to this section. The accused was employed by the prosecutor, as his ordinary cook. One day while the former's wife was seriously ill, the cook absented himself, whereupon he was prosecuted

(24) Act XIII of 1859, s. 112.
(25) *Ib.*, s. 5.

(1) S. 198, Cr. P. C.

had pleaded guilty, holding that the prosecutor had not proved that the accused was under any special agreement to look after the meals of the prosecutor's wife during her illness.(2) But this finding was reduced to an *obiter* in view of the finding that the accused had lawful excuse for leaving as his own child was ill and though he absented himself in the morning he sent in a substitute in the evening and in the meantime other cooks were easily available.

All the same it is evident that a cook—or for that matter any general servant—is under no legal obligation to attend on his sick or insane employer unless he was specially retained for the purpose or consents to the change of duties. It may be a question whether infants' wet and dry nurses, who are specially retained to supply their wants, would fall within this section for absenting themselves from duty without excuse, as where they leave with the object of coercing their employer to increase their wages, or otherwise submit to their terms. It is submitted that the section is wide enough to punish such recalcitration. The fact that the attendant was not in sole charge of the disabled person does not, of course, matter, though it will, probably, be admitted in mitigation of the sentence. The words "who is helpless or incapable of providing for his own safety or of supplying his own wants" must then be read to define the extent of helplessness or incapacity, and not the result of the servant's desertion, which is punishable independently of the result upon the helpless or incapacited person.

Desertion must be Voluntary.

5468. But the servant's desertion must have been "voluntary." Indeed, desertion is by no means necessary—for the offence would be complete, if the servant being employed to attend on or to supply the want of a person, voluntarily omits to attend on him or to supply his wants, though he may not actually withdraw himself from the service of his employer. The term "voluntarily" has been defined in section 39 (§§ 339-342), and as the term is understood in the Code, it means a wilful omission to attend on the person. Such wilfulness may arise from any cause. But it must arise from something more than mere carelessness or negligence. It must be an omission of which the accused is conscious, though he may not advert to the consequence. Such a case may be supposed of a thievish attendant who starves his insane employer, feeding himself on his master's victuals, or one who being required to keep watch by a sick bed leaves the room and goes off to sleep elsewhere. The omission must be voluntary, but its duration is not stated. Consequently, even delay to supply the wants of a person may expose the servant to the penalties of this section.

Curators, Hospital Servants Excluded.

5469. Lastly, it is not necessary that the legal contract must take the shape of service. For there are persons, such as curators of a lunatic, doctors and compounders in the hospital who may render themselves liable to the penalties of this section if agreeing to look after their patients they are guilty of voluntary omission. But since such

(2) *Solomon*, (1887) B. U. C. 354.

obligation must arise from a contract they could not be punished for a mere dereliction of their ordinary duties, though they may enjoin the same attendance and care.

492. [*Repealed by the Workmen's Breach of Contract (Repealing) Act.*][3]

(3) S. 2, Act III of 1925.

CHAPTER XX

OF OFFENCES RELATING TO MARRIAGE

5470. Topical Introduction.—This Chapter consisting of six sections (ss. 493-498) penalizes conjugal infidelity and other offences connected therewith in a manner materially different from the English law. This was conceded by the first commissioners who said: "As this is a part of the law in which the English inhabitants of India are peculiarly interested, which we have framed on principles widely different from those in which the English law on the same subject is framed, we think it necessary to offer some explanations."(4) Before considering these explanations, it would probably be useful to state that this Chapter punishes four principal offences relating to marriage, these being cohabitation obtained by fraudulently inducing a belief in the woman that she is the accused's wife (s. 493), allied to which is the mock marriage punishable under s. 496. The offence of bigamy is provided against in sections 494 and 495, but those provisions had to be made necessarily elastic so as to provide for the diverse customs of the various races inhabiting the Peninsula. The third offence of adultery is a departure from the English Law, under which adultery is not a crime, but merely a misconduct against which the aggrieved party has no redress against the adulterer or adulteress except in damages awarded in a suit for divorce or a judicial separation. The offence of seduction of a married woman is one closely cognate to the offence of adultery, so that, really speaking there are only three offences constituted in this chapter. And of these the first punishable under section 493 was constituted an offence in spite of the trend of the English cases which held such connection not to amount to a rape.(5) But this view has since been overruled by the Criminal Law Amendment Act, 1885,(6) which now expressly declares such act to amount to rape (§§ 4004-4006). Such a case is clearly contemplated by s. 375, cl. 4, and the question in such cases may arise whether the offence is one to be disposed of under this section, or whether it is one which amounts to rape (§§ 4004-4006).

5471. The offence of bigamy punishable under sections 494 and 495 materially differs from the corresponding rule of English Law, under which monogamy being the universal practice, the rule is simpler But under these sections the criminality of the second or subsequent marriage depends upon the practice of the caste or race to which the accused belongs. If polygamy or polyandry was sanctioned by usage, one could not be convicted for doing an act in conformity with custom —nor could law enforce monogamy upon a people with the same assurance as the abolition of *Suttee* since the one is by no means as revolting

(4) Note Q., Reprint, p. 171.

(5) *Saunders*, 8 C. & P. 265; *Barrow*, L. R. 1 C. C. R. 156; *Williams*, 8 C. & P. 286; *Clark*, Dears C. C. 397; *Middleton*, 12 L. J. M. C. 84; *contra* in *Dee*, L. R. Ir. 468.

(6) 48 & 49 Vict., c. 69, s. 4.

as the other. In this view it might appear somewhat anomalous that the Code constitutes adultery an offence when it tolerates polygamy and polyandry. But as has been elsewhere seen, adultery was always an offence in this country, and its recognition by the Code is by no means an innovation. Moreover, it is an offence which if not avenged by, is apt to lead to sharp reprisals occasioning disturbance and breach of peace which it is the duty of law to prevent. The Law Commissioners, however, viewed the offence from the humanitarian stand-point, but there is a school of thought which considers it a fallacious view holding that the punishment of the act is inconsistent with personal liberty. The subject will have to be again considered presently.(7)

493. Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Session. Non-cog. s. 198, Cr. P. C. Warrant. Not bail. Not comp.

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.

[*Man*—s. 10. *Woman*—*s.* 10.]

Synopsis.

(1) *Analogous Law* (5472).
(2) *Procedure and Practice* (5473).
(3) *Proof* (5474).
(4) *Form of Charge* (5475).
(5) *Principle* (5476).
(6) *Cohabitation by Deceitful Assurance of Marriage* (5477-5479).
(7) "*Cohabit or have Sexual Intercourse*" (5479).

5472. Analogous Law.—The act here punishable may also be punished as rape.(8) It is, indeed, now so punishable under English Law. The conflict between s. 375, cl. 4, and this section has not as yet attracted the notice of the Courts of this country. The section has, in fact, remained a dead letter as no reported case appears to have been decided under it.

5473. Procedure and Practice.—No Court shall take cognizance of an offence under this section, except upon a complaint made by some person aggrieved by such offence.(9) The offence is, therefore, non-cognizable and warrant should, ordinarily, issue in the 1st instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session. This offence is non-cognizable, but the offence of rape falling under clause 4 of s. 375 is not, and it may be a question when an offence is rape and not this offence. Probably a single act would be treated as rape, while cohabitation for some time would more appropriately be treated as an offence falling under this section.

(7) S. 497.
(8) S. 375, "*Fourthly.*"
(9) S. 198, Cr. P. C.

5474. Proof.—The points requiring proof are:—

(1) That the accused cohabited with the prosecutrix.

(2) That he was not legally married to her.

(3) That she had consented to the cohabition believing that she had been lawfully married to him.

(4) That such belief in her was induced by deceit on the part of the accused.

5475. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you deceitfully caused a certain woman, to wit—who was not lawfully married to you, to believe that she was lawfully married to you, and, in that belief, she cohabited or had sexual intercourse with you; and that you thereby committed an offence punishable under s. 493 of the Indian Penal Cod,e and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5476. Principle.—The commission of the offence here described is only possible when the woman is at least fourteen years of age. If she is below that age, her consent is immaterial, and cohabitation with her is rape. If she is above that age the accused may induce her to believe him as her lawfully married husband. Such mistake is quite possible in a country favouring infant marriages, and where after marriage girls do not cease to reside with their parents. Again, such deception may be caused by the man going through the ceremony of marriage which he knows does not bind him. Such a possibility is not unusual in this country, where the bewildering admixture of races and customs, religions and castes makes the question of marriage at once an intricate and uncertain problem. But the section is not intended to punish one for contracting a marriage which turns out to be illegal. It only punishes a man for obtaining the body of a woman by deceitfully assuring her that he had acquired that right by *jus maritii*. Such a case presupposes at least three things: (*a*) knowledge on his part that the marriage, if any contracted, does not bind the parties; and (*b*) belief in her that it is a binding marriage, (*c*) such belief being due to the man's deceitful assurance or act.

5477. Cohabitation by Deceitful Assurance of Marriage.—A man may cohabit with a woman under a variety of circumstances, amongst others, under a promise of marriage intending never to fulfil his promise, in which case his conduct is as egregious as when he obtains access to her by falsely inducing her to believe that he is her lawful husband. But law does not punish one, as it does the other act, because the assurance in the one case still leaves the woman the option to refuse, which she cannot do in the other case (§ 3997). There was, however, deceit in both the cases, though the deceit in the one

case related to a future act, while deceit in the other case referred to an act alleged to be past. Now such deceit may be caused by going through a mock ceremony of marriage which has no binding effect in law. Suppose, for instance, that a Mahomedan were, in hope of a rich dowry, to personate a Hindu and obtain the hand of a rich landholder's daughter in marriage, which the latter, of course, believed to be binding upon both, but which the former knew to be a deception and a snare. He would be clearly guilty of an offence described in s. 496, and if he cohabits with the woman he pretended to marry he would be then guilty of this offence. So again, a man may deceive the woman by making her believe that the ceremony he was undergoing with her constituted a valid marriage, though, in fact, it was wholly insufficient. This offence is thus a species of cheating, but in which the false representation takes the form of mock-marriage.

5478. Of course, the section only punishes an act where such deception is practised before she consents to have sexual intercourse with him. If, therefore, a man marry a woman in the *bona fide* belief that the marriage is effective, and afterwards discovers some flaw rendering it inoperative, after which he continues to cohabit with her, he could not be said to have had sexual intercourse after causing belief in her marriage by deceit. In one sense it would be so, because any sexual intercourse had with her after the man is made aware of the invalidity of her marriage, would answer all the requirements of this section, but it scarcely appears to have been its intention. If that were indeed the case the accused would have to be punished separately for each individual act of intercourse, which is, of course, absurd.

"Cohabit" or "have sexual intercourse."

5479. It would seem that one essential distinguishing feature of this offence as compared to s. 496 is that the accused cohabits or has sexual intercourse with the woman. The collocation of the two terms "cohabit" and "have sexual intercourse" would at the first blush, seem to suggest that the former is used in a sense distinct from the latter. But it is not so, for though the word "cohabit"(10) literally means no more than "to live together," still the word has come to mean cohabitation as husband and wife, and accompanied by sexual intercourse.

Marrying again during the lifetime of husband or wife.

494. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Session. Pres. Mag or Mag. of 1st class. Non-cog. (s. 98, Cr. P. C.) Warrant. Bailable. Comp. with Court's sanction.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,

(10) Lat. *co*, with, and *habito*, to dwell—lit., to live together.

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

Synopsis.

(1) *Analogous Law* (5480-5484).
(2) *Personal Marriage Laws* (5483).
(3) *Procedure and Practice* (5485-5487).
(4) *Proof* (5488).
(5) *Form of Charge* (5489).
(6) *Principle* (5490).
(7) *Criminal* (5491-5492).
(8) *Second Marriage When Void* (5493-5496).
(9) *Where Both Parties are Christians* (5493).
(10) *Law as to Form and Essentials of Marriage* (5494).
(11) *Form and Essentials distinguished* (5495-5498).
(12) *Christian Marriages Contracted Abroad* (5499-5500).
(13) *Marriage of Christian to Non-Christian* (5501-5503).
(14) *Christian and Non-Christian Marriage in Christian Country* (5504-5506).
(15) *Removal of Disability on Change of domicile* (5507).
(16) *Indian Converts* (5508-5510).
(17) *Position of Hindu Converts* (5509).
(18) *Presumption of Polygamy* (5510).
(19) *Ceremonial, an Index of the Obligation Implied* (5511-5512).
(20) *Marriage of Hindu and Mahomedan Apostates* (5513-5514).
(21) *Status of Indian Converts* (5515).
(22) *Dissolution of Native Converts Marriage* (5516).
(23) *Mahomedan Law* (5517).
(24) *Proof of Marriage* (5518).
(25) *Christian Marriage* (5518).
(26) *Christian Marriages in India* (5520-5523).
(27) *Jewish Marriage* (5524).
(28) *Foreign Marriage* (5525).
(29) *Parsis* (5526).
(30) *Buddhist* (5527).
(31) *Mahomedan Marriage* (5528-5532).
(32) *Muta Marriage* (5531).
(33) *Apostacy Dissolves the Marriage* (5532).
(34) *Hindu Marriage* (5533).
(35) *Inter-caste Marriages* (5534-5535).
(36) *Hindu Divorce* (5536-5537).
(37) *Invalidity of Marriage Due to First Marriage* (5538).
(38) *Exceptions to Criminality* (5539-5542).
(39) *Absence of Seven Years* (5543-5546).
(40) *Bona Fide Belief in Death Whether a Defence* (5547-5548).
(41) *Mistaken Belief* (5548).

5480. Analogous Law.—This section punishes the offence of what is known in English Law as "bigamy," but that term is clearly inapplicable to the offence here described, for it assumes a second marriage necessarily illegal, but which, having regard to the customs of the people in the Orient, is not necessarily the case. The English rule against bigamy is, therefore, wholly inapplicable to a non-Christian Asiatic of whatever persuasion. It will, however, apply to Christians amongst whom monogamy is the rule and bigamy both a sin and a crime.

The provisions of the English Statute[11] against bigamy run thus:—

S. 57. Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years.

5481. It will be observed that this section does not use the term "bigamy," which, though now used to designate the offence, is a misnomer, since its root meaning[12] implies no more than that the man was married twice, and *not* having a plurality of wives at the same time.[13] According to the canonists, "bigamy" consisted in marrying two virgins successively one after the death of the other, or in once marrying a widow.[14] But whatever may be the correct meaning of the term, it is unquestionable that the solecism has now come to signify the offence punishable under the Statute last cited, and in a modified form under this section. But since that term has not obtained the same currency in this country, there may perhaps be yet time to call the offence by its true designation of "criminal polygamy."

5482. The question of criminality under this section is a somewhat vexed question, and depends upon the personal law, usage and custom of the person as regards matrimony. For instance, since polygamy is permitted by law in the case of Hindu and Mahomedan males, this section has no application to them, though since Hindu and Mahomedan women are not permitted the same liberty, but are restricted to monogamy, their marriage to another husband during the lifetime of their first or former husband would expose them to the penalty of this section. But since polyandry is customary in certain parts of Southern India, *e.g.*, Malabar, the women there would stand on the same footing as Hindu and Mahomedan men elsewhere. On the other hand, since Christianity, Buddhism and the Zoroastrian faiths sanction only monogamous intercourse, polygamy by a husband or wife during the lifetime of the other would constitute such offence.

Personal Marriage Laws.

5483. The Hindu and Mahomedan marriages are not generally the subject of any statutory enactment, which, however, regulates the marriages of Christians,[15] and native converts to Christianity,[16] while the

(11) Offences against the Person Act, 1861, (24 & 25 Vict., c. 100), s. 57.

(12) From *bi*, twice, and Gr *gamos*, marriage—lit., "twice-married."

(13) So Blackstone says: "Another felonious offence, with regard to this holy state of matrimony, is what our law corruptly calls 'bigamy,' which properly signifies 'being twice married,' but with us is used synonymous to 'polygamy,' or having a plurality of wives at once'"; 4 Black 163, citing 3 Inst. 88.

(14) Bac. Abridg., title "Bigamy."

(15) Act XV of 1872.

(16) Act XXI of 1866.

Parsi Marriages and divorce are the subject of another enactment.[17] The Civil Marriage Act, 1872, [18] as amended by Act XXX of 1923, further provides for the solemnization of marriages between parties when neither of them professes the Christian, the Jewish, the Hindu or the Mahomedan. or the Parsi or the Buddhist, or the Sikh or the Jain religion[19]; or between persons who profess the Hindu, the Buddhist the Sikh or the Jain religion. The Indian Divorce Act[20] enables a person to obtain divorce if either party thereto is a Christian,[21] on the ground of his wife's adultery, but if the petitioner be the wife, then on any of the following grounds: (*i*) conversion of her husband from Christianity to some other faith, and marriage with another woman; (*ii*) his being guilty of incestuous adultery; or (*iii*) of bigamy with adultery; (*iv*) marriage with another woman with adultery; (*v*) rape; (*vi*) sodomy; (*vii*) bestiality; (*viii*) adultery, or desertion for at least two years.[22]

In all such cases the validity of a marriage must be judged with reference to the enactment under which it was contracted or by which it is regulated. In other cases appeal must be made to the personal laws of the parties or to usage or custom, and in the last resort to the legal presumption arising from cohabitation and reputation, but such presumption is insufficient to establish marriage in a case arising under this section, or section 495, 497 and 498.[23] This discrimination is justified by the higher degree of certainty required in a criminal proceeding, in which the strict proof of every material point is insisted on.[24] But the requirmments of the law would be probably satisfied if it is proved by the evidence of a person who was present at the performance of the ceremony which according to the rites and custom of the caste constituted a binding marriage.

5484. These are simple cases, but in a country passing through a state of transition other questions arise. There are, for example, the case of conversion before and after marriage, apostacy and the like, questions which will have to be presently considered, but which further complicate the question as to the status acquired by the ceremony of marriage, the legitimacy of the issue, and the commission of this offence.

5485. Procedure and Practice.—This offence is one of those of which no Court is competent to take cognizance, except upon a complaint made by some person aggrieved by such offence.[25] Such person is, of course, in the first place, the wife, or the husband in derogation of whose married rights the second marriage was contracted. The offence is, therefore, non-cognizable, but warrant should, ordinarily, issue in the first instance. It is bailable and compoundable with the permission of the Court, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. Before the pass-

(17) Act XV of 1865.
(18) Act III of 1872.
(19) *Ib.*, s. 2.
(20) Act IV of 1869.
(21) *Ib.*, s. 2, as amended by s. 2, Act XXX of 1927.
(22) Act IV of 1869, s. 10.
(23) Indian Evidence Act (I of 1872) s. 50 *proviso; Pitambur Singh*, 5 C. 566, F. B.
(24) *Kallu*, 5 A. 233.
(25) S. 198, Cr. P. C.

ing of the Act amending the Code of Criminal Procedure,[1] this offence was not compoundable and it was accordingly held that once the complainant had launched the prosecution, for this offence, he was incompetent to withdraw from it,[2] but the Courts had found this provision too inelastic with the result that the legislature has now enabled them to permit withdrawals from the prosecution.

5486. The Procedure Code does not indicate as to who should be considered the person aggrieved for the present purpose. But it is obvious that the word "aggrieved" is intended to refer to a persons who is injured by the second marriage. And it is evident that such persons may be several, and not only the one primarily affected by the marriage. For instance, if the wife contracts a second marriage during the lifetime of her husband, the latter[3] as well as the second husband would be persons so "aggrieved,"[4] though the latter's brother could not under the unamended law be put in the same class,[5] though the husband might be himself a lunatic, and therefore incapable of vindicating himself.[6] It is however now possible that where the person aggrieved is a purdanashin or is a minor, idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his or her behalf.[7] In order to legalize the initiation of proceedings for this offence it is not necessary that he should complain specifically of this offence, or under this section. He may have, for instance, written his complaint at the suggestion of the Police Superintendent,[8] or he may have merely complained that the accused had taken or kept his wife, but that would not prevent the Court from charging the accused under this section if he finds an offence under that section established by evidence.[9]

5487. As to the venue for this offence, it is provided by the English Statute[10] that "such offence may be dealt with, inquired of, tried, determined and punished in any country or place in England or Ireland, where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that country or place," and this would probably, be the rule in this country.[11] This offence was before the Act of 1923 amending the Code of Criminal Procedure, triable exclusively by the Court of Session. Where therefore the Magistrate had in the course of his enquiry examined witnesses for the defence and discharged the accused it was held that its legal effect was an acquittal.[12]

5488. Proof.—The points requiring proof are:—

(1) Act XVIII of 1923.
(2) *Ujjala Bewa*, 1 C. L. R. 523.
(3) *Deputy Legal Remembrancer* v *Sarna Kahni*, 26 C. 336 (337), following *Bai Rukshmoni*, 10 B. 340; *Ujjala Bewa*, 1 C. L. R. 523; *Gudru Subbamma*, 14 I. C. (M.) 204; *Lala*, 32 A. 78.
(4) P. 337.
(5) *Imtiazan*, 25 A. 132.
(6) *Bai Rukshmoni*, 10 B. 340.
(7) S. 198, *proviso*, Cr. P. C., added by Act XVIII of 1923.
(8) *Ruri* (1919) P. R. No. 5, 48 I. C. 493, 20 Cr. L. J. 3.
(9) *Ujjala Bewa*, 1 C. L. R. 523.
(10) 24 & 25 Vict., c. 100, s. 57.
(11) *Cf.* s. 179, Cr. P. C.
(12) *Dal Chand* v. *Ram Lal*, 75 I. C. Oudh 727.

(1) That the accused had already been married.[13]

(2) That such marriage was legal.

(3) That the person with whom he was married was still alive.

(4) That the accused married another person.

(5) That such subsequent marriage was void by reason of its taking place during the life of the first consort.

5489. Charge.—The charge should run thus.

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you having a wife (*or* husband), to wit——living, married again A B, which marriage is void by reason of its taking place during the lifetime of such wife (*or* husband) to wit——, and that you thereby committed an offence punishable under section 494 of the Indian Penal Code, and within the cognizance of the Court of Sessions (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

5490. Principle.—"The Legislature has thought just," says Blackstone, "to make polygamy a felony, by reason of its being so great a violation of the public economy and decency of a well ordered state."[14] In England the offence was viewed in the light of the profanation of a religious ceremony, and was originally considered only of ecclesiastical cognizance till it was constituted a felony by the Statute passed in 1603.[15] This Statute was found to be defective and has been twice amended, but the law on the subject did not satisfy the draftsmen who wrote: "The law of England on the subject of bigamy appears to be in some cases too severe, and in others too lenient. It seems to bear a close analogy to the law of perjury. The English Law on these two subjects has been framed less for the purpose of preventing the profanation of a religious ceremony. It, therefore, makes no distinction between perjury which is intended to destroy the life of the innocent, and perjury which is intended to save the innocent; between bigamy which produces the most frightful suffering to individuals, and bigamy which produces no suffering to individuals at all. We have proceeded on a different principle; while we admit that the profanation of a cermony so important to society as that of marriage is a great evil, we cannot but think that evil immensely aggravated when the profanation is made the means of tricking an innocent woman into the most miserable of all situations. We have therefore proposed that a man who deceives a woman into believing herself his lawful wife when he knows that she is not so, and induces her, under that persuasion, to cohabit with him, should be punished

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(13) Formal proof of marriage is necessary; *Pitambur*, 5 C. 566, F. B.; *Arshed Ali*, 13 C. L. R. 125; *Kallu*, 5 A. 233; *Santok Singh*, (1898) A. W. N. 186; *Dal Singh*, 20 A. 166; *Nazir Khan*, 36 A. 1. It may be proved by one who was present and saw the ceremony performed; *Subbarayan*, 9 M. 9.

(14) 4 Black 163.

(15) 1 James I, c. 11, amended and re-enacted as 9 Geo. IV, c. 31; 24 & 25 Vict., c. 95.

with great severity."[16] But the Draconian severity of the draft section,[17] which these observations were intended to support was not approved by the Legislature which was content to re-enact the English rule adapting it to the racial requirements of this country.

5491. Criminal Polygamy.—The offence of criminal polygamy punishable under this section follows the course of bigamy which has been constituted a felony by statute (§§ 5480-5482). Following that Statute the section enacts a rule as well the three exceptions to which it is subject, the rule being that a person contracting a second marriage during the lifetime of the first married consort is criminal, and the exceptions being in favour of (*i*) those amongst whom such marriages are not void, or (*ii*) those whose first marriage has been declared void by a Court, or (*iii*) those whose consort has not been heard of for at least seven years, and of which fact the person contracting the second marriage informs beforehand the other party to it.

5492. It will be noticed that the section makes no reference to intention, knowledge, fraud or deceit, but constitutes the mere contracting of the second marriage a crime. It is then possible that a person may offend against the rule without being fully conscious of it. But the rule is enacted in the interest of the peace of society (§ 5490), and the *mens rea* is furnished by the knowledge of the voidability of the second marriage necessarily implied in one who contracts it, which might at first appear conflicting and contradictory. Of course, this is the very essence of the crime, for if the second marriage is not void, criminal law cannot puinsh what the civil law does not prevent. The voidability of the second marriage depends upon the validity of the first marriage, and upon the fact that the second marriage was a valid and sufficient marriage, but for the existence of the first marriage. The validity of a marriage depends upon (*i*) the religion of the parties, (*ii*) their domicile, and (*iii*) the performance of ceremonies constituting the marriage. These elements would afford solution to many rulings.

5493. Second Marriage When Void.—The question when the second marriage of a person is void, thus depends upon other questions. In the simplest case of persons both observing monogamy, the second marriage can be void only when the first marriage was valid. If, therefore, the first marriage was for any reason void, though it may not have been avoided, neither party could be punished for contracting a second marriage. So where the first marriage took place within the prohibited degrees of consanguinity or affinity, it will offer no impediment to a second marriage by either party, though it may not have been formally annulled.[18] So where the first marriage was between a Protestant man and a Roman Catholic woman solemnized by a Catholic priest in England, not in accordance with the ritual of the Church of England, and the ceremony was performed in Latin which

(1) Where Both Parties are Christians.

(16) Note Q, Reprint, p. 172.

(17) That section ran thus: "Every man who by deceit causes any woman, who is not lawfully married to him according to the law of marriage under which she lives, to believe that she is lawfully married to him according to that law, and to co-habit with him in that belief, shall be punished with imprisonment of either description for a term which may extend to 14 years, and must not be less than two years, and shall also be liable to fine."

(18) *Chadwick*, 11 Q. B. 173.

the witness did not understand, and could not therefore swear that the ceremony of marriage according to the Church of Rome was read, Willes, C.J., directed an acquittal, though he seemed to be of opinion that if the witnesses could have sworn to the ceremony performed according to the Church of Rome the marriage could have been a good marriage, though the contracting parties belonged to opposing sects.[19] But Lush, J., held in a case that in an indictment for this offence everything must be proved most strictly, and, therefore, where the only evidence given of the first marriage was that the parties had been married in Scotland by a Roman Catholic priest, who had many times previously performed similar ceremonies that, it was insufficient without proof of the law of Scotland as to such marriages.[20]

Law as to form and essentials of Marriage.

5494. The question whether the first marriage was in fact performed is distinct from its validity, which has to be established on a prosecution for this offence. The validity of the first marriage, may, however, depend as much upon the personal laws of the parties as upon the *lex loci contractus*. In England it is enacted that marriages contracted abroad to be valid, must be legal under English law.[21] Consequently, the marriage of a man with the sister of his deceased wife being until recently invalid in England as contrary to God's law,[22] such marriage contracted by Christian British subjects temporarily resident abroad, but really domiciled in this country, though vaild in the former country, and duly celebrated according to the forms required by the law of that country, was held to be absolutely void.[23] In this case arising out of an administration-suit the deceased, W. L. Brook, a British subject permanently resident in England, had been married to one Emily Armitage, the sister of his deceased wife in Denmark according to the rites of the Danish church, where such marriages were legal. The question was whether the issue of such marriage was legal under English Law, which, of course, depended upon the legality of the deceased's marriage with his deceased's wife's sister in Denmark. In support of its legality it was contended that it was a settled rule of international law, that the validity of every contract (and marriage was a contract) depended upon the law of the country in which it was made, from which it followed that a foreign marriage, valid according to the law of a country where it was celebrated was good everywhere.

The soundness of this dictum was conceded,[24] but the Lord Chancellor (Lord Campbell) held it subject to a necessary qualification, and added: But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties

(19) *Lyon's case*, (1738) 1 East P. C. 469.

(20) *Savage*, 13 Cox 178.

(21) Foreign Marriages Act (55 & 56 Vict., c. 23), s. 19, which, however, only justifies the text by prohibiting the solemnization of marriages of British subjects abroad inconsistently with international law or the comity of nations.

(22) So declared by 28 Hen. VIII, c. 7, which declaration was renewed in 28 Hen. VIII, c. 16 and 32 Hen. VIII, c. 38.

(23) *Brook* v. *Brook*, 9 H. L. C. 193.

(24) But in *Sottomayer* v. *De Barros*, L. R. 5 P. 94 (100); this proposition was held to be too wide.

are domiciled at the time of the marriage, in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated."(25) His Lordship, however, added that the marriage would have been a legal one if the parties had *abandoned* their English domicile, and were domiciled in Denmark.(1) This case is then an authority for the following proposition: The forms of entering into the contract of marriage are regulated by the *lex loci contractus*, but the essentials of the contract depend upon the *lex domicilii*.

Form and Essentials Distinguished.

5495. Now this may raise the question as to what is a form and what is an essential of marriage. The learned Lords held that an absolute prohibition on the ground of consanguinity was not merely a form but an essential. But a marriage contracted in England by a French couple who had crossed over specially to evade the parental consent necessary to its validity in France, was held to be valid as the necessity of consent was merely a form prescribed by the Code Napoleon, the non-observance of which did not vitiate the conjugal union.(2) Adverting to this and similar cases Lord Campbell, L. C. said: "If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think, that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another State in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognized as lawful."(3)

5496. But if so, there is a sharp conflict on this point between the English and American law, for in the latter country the validity of such marriages has been affirmed. So the Courts there have upheld a marriage between a Mulatto and a white woman made in Rhode Island, where such marriages are legal, in the State of Massachusetts, where they were at the time of the decision illegal.(4) And, indeed, while the marriage of two French subjects in England without the requisite consent of their parent or guardian has been held to be valid in England it has been held to be invalid in France, but though, according to the *jus gentium*, the English tribunal ought to respect the French law, the former refuse to award a decree of nullity on the basis of the French decree.(5) So while the incestuous marriage of nephew and

(25) *Brook* v. *Brook*, 9 H. L. C. 193 (207, 208); to the same effect, *see* Story's Conflict of Laws, § 113-A; *Harford* v. *Morris*, 2 Hagg Con. Rep. 423, 434; *Warrender* v. *Warrender*, 2 Cl. & F. 488.

(1) *Ib.*, pp. 212, 213.

(2) *Simonin* v. *Mallac*, 29 L. J. P. & M. 97; *Steele* v. *Braddell*, Milw. E. R. (Ir.) 1; *Ogden* v. *Ogden*, (1908) P. 46.

(3) *Brook* v. *Brook*, 9 H. L. C. 193 (220).

(4) *Meadway* v. *Needham*, 16 Mass. R. 157; to the same effect, *Sutton* v. *Warren*, 10 Mete. Mass. R. 451; *Wightman* v. *Wightman*, 4 John Cas. in Ch. 343.

(5) *Simonin* v. *Mallac*, 29 L. J. P. M. & A. 97, cited *Per* Sir R. Phillimore, in *Sottomayer* v. *De Barros*, L. R. 2 P. 81 (87); reversed (C. A.) L. R. 3 P. 1, but on a different point.

aunt contracted in England was upheld in the State of Massachusetts in America,[6] that decision was dissented from by the English House of Lords.[7]

But that decision, again, was animadverted upon by Sir R. Phillimore in a case in which he had to pronounce on the validity of a marriage between first cousins contracted by two Portuguese subjects in England, such marriage being deemed incestuous in Portugal if made without the Papal dispensation, though it is legal in England. He was of opinion that the Court of the place of contract of marriage, is not bound to recognize the incapacities affixed by the law of the domicile on the parties to a contract of marriage, if such capacities do not exist according to the *lex loci contractus*, and to pronounce a marriage otherwise valid, to be null and void by reason of such incapacity.[8] This view was overruled on appeal by Cotton, L. J.,[9] who was of opinion that the personal incapacity to contract a marriage continues to affect a person so long as he is domiciled in the country where the incapacity is recognized, and that, therefore, since the parties' marriage was bad according to the law of Portugal, the Courts in this country were bound to declare its invalidity, and could not do otherwise.[10] But on the case being remitted to the Probate Division for investigating the question of domicile, Sir James Hannen found that the husband's domicile was English, though that of the wife was Portuguese, which raised a new question not disposed of by the Court of appeal, whether a marriage of a foreigner domiciled in England, with a woman subject by the law of her domicile to a personal incapacity not recognized by English law, must be declared invalid by the tribunals of England. And he held that the English Courts were not bound to give effect to an incapacity existing in a foreign State.[11]

5497. As Sir C. Cresswell said in another case: "Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if the subject sustain hardships in consequence of those restrictions, their own nations only must bear the blame. But what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions....? As far as the law of nations is concerned, each must have an equal right to claim respect for its own laws. Both cannot be observed; would it not then be more just, and therefore, more for the interest of all, that the law of that country should prevail, which both are presumed and agree to be bound by? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law as a foreign subject to the benefit of foreign law?"[12]

(6) *Sutton* v. *Warren*, 10 Mete. Mass. Rep. 451.

(7) *Brook* v. *Brook*, 9 H. L. C. 193 (220, 221).

(8) *Sottomayer* v. *De Barros*, L. R. 2 P. 81.

(9) James and Bagally, L. JJ., concurrent.

(10) *Sottomayer* v. *De Barros*, L. R. 3 P. 1 (6, 7), reversing L. R. 2 P. 81.

(11) *Sottomayer* v. *De Barros*, L. R. 5 P. 94 (103).

(12) *Simonin* v. *Mallac*, 2 Sw. & Tr. 67 followed in *Sottomayer* v. *De Barros*, L. R. 5 P. 94 (102, 103).

The Court then cited instances of injustice which any other view would cause. "Suppose, a woman domiciled in North Carolina, with such an amount of colour in her blood as would arise from her great grandmother being a Negress, should marry in this country should we be bound to hold that such a marriage was void?" Or suppose a priest or monk domiciled in a country where the marriage of such a person is prohibited were to come to this country and marry an English woman, could the Court be called on at the instance of the husband to declare that the marriage was null and to give "legal sanction to his repudiation of his wife?"(13) The Court then compared the position of a French couple married in England to evade the law of France as to parental consent necessary to validate a marriage, and the marriage of the parties in which the consent of the Pope could dispense with the prohibition, and added: "If there be a distinction, which I am unable to perceive, why is greater value to be attached by the tribunals of this country to the permission of the Pope than to that of the father?"(14) The Court then finally held the marriage valid and dismissed the wife's petition for the declaration of its nullity.

5498. An attempt has been made to distinguish these cases on the ground that the prohibition in them was local and not general according to the law of Chrsitendom. Such would be marriages between persons in the direct line of consanguinity, or in the collateral line within the degree of brother and sister, both which classes of marriages are by the usage and practice of Christian States and the general current of Christian law and authority, considered as incestuous, unnatural, and destructive of civilized life.(15) The canonists recognized this distinction between an impassable impediment (*impedimentum dirimens*) and those which were removeable by a papal or episcopal dispensation (*impedimentum impediticam*). But the distinction between the two is scarcely radical or easily perceptible. For the marriage of one with the deceased wife's sister was at one time held to be incestuous, and against the law of God (§ 5494), though its legality has now been established by Statute.

Christian Marriages Contracted abroad.

5499. In the case last supposed, both parties were Christians, and both were either British subjects or both were foreigners. But cases may arise, and have arisen where one of the contracting parties may be a non-Christian, or one a British subject and another a foreigner, and the question may then be as to what should be the guiding principle for determining the validity of the first or second marriage. The case, where both parties are foreigners would appear to present no difficulty, for then the validity of their marriage would be solely judged by the same test. For the cases last cited are authorities for the proposition that the sole test in such cases is not the *lex loci contractus*, but the *lex domicilii* has also to be taken into account. And of the two the question of domicile is comparatively more important. For as was pointed out in *Brook's case*,(16)

(13) *Sottomayer* v. *De Barros*, L. R. 5 P. 94 (104).
(14) *Ib.*, 106.
(15) Story's Conflict of Laws, § 114; Griotino on Peace and War (*De Bello et Pace*), 1, 2. c. 5, s. 13, § 2.
(16) *Brook* v. *Brook*, 9 H. L. C. 193.

if the contracting parties had abandoned their English domicile and become established in Denmark then their marriage would have been valid, and so presumably would have been the decision in *Sottomayer's case.*

5500. The same point arose in a case in which the question was, whether an Englishman *A* was validly married to a native of New Zealand *B*. The evidence given was of the husband who swore that he had migrated to New Zealand in 1828 before it became an English Colony, that his marriage with *B* had been solemnized according to the laws, customs and usages of that island, that he had since then lived with *B* as his wife. There was then no minister of any Christian Church in New Zealand, nor any register of marriages. The decision ultimately turned upon the fact that the Court was unable to accept the husband's uncorroborated statement, but Sir W. Pagewood, V. C., intimated his opinion that if these facts had been established, the principles laid down by Lord Stowell,[17] should have applied. Lord Stowell had to deal with a case of a marriage of an Englishman celebrated at the Cape of Good Hope, a year after its surrender to the British, by the Chaplain of the British garrison, under a license from the Commander-in-Chief. The husband was twenty-one and by Dutch law which was the *lex loci contractus* at the Cape, he was not entitled to marry without the consent of his parents till thirty, and in other respects the formalities of the Dutch law were not complied with.

Lord Stowell said: "It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where it is celebrated, is valid everywhere else; but they have not, *e converso*, established that marriages of British subjects, not good according to the law of the place where they are celebrated, are universally, and under all possible circumstances to be regarded as invalid in England. It is therefore, certainly to be advised that the safest course is always to be married according to the law of the country, for then no question can be stirred; but if this cannot be done on account of legal or religious difficulties, the law of the country does not say that its subjects shall not be married abroad. And even in cases where no difficulties of that insuperable magnitude exist, yet, if the contrary practice has been sanctioned by long acquiescence and acceptance of the one country that has silently permitted such marriages, and of the other that has silently accepted them, the Courts of this country, I presume, would not incline to shake their validity upon these large and general theories."

Marriage of Christian to non-Christian.

5501. But these remarks apply to marriages as between Christians, and do not touch the larger question of marriages between a Christian and a non-Christian. This was the view of Lord Brougham in the leading case,[18] in which referring to the *lex loci contractus*, he said: "But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract and the meaning of the parties, that is, the existence of the contract and

(17) *In Ruding* v. *Smith*, 2 Hagg. Cons. R. 371.

(18) *Warrender* v. *Warrender*, 2 Cl. & F. 488 (532).

its construction. If, indeed, there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country, where the legal obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status* from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding that infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere."[19]

Consequently, a Christian being tied to monogamy cannot contract a polygamous marriage either in a Christian country where such marriages are prohibited, or in a non-Christian State where they are permitted. And since the term "marriage" to a Christian means a strictly monogamous marriage that is to say "the voluntary union of one man and one woman to the exclusion of all others,"[20] it follows that an alliance of a Christian with a non-Christian in a non Christian country with the member of a polygamous race is no marriage at all. But it does not thence follow that under no circumstance can a Christian marry a non-Christian. But it does follow that a Christian cannot marry a polygamous person whether a Christian or not, for a marriage which admits of polygamy on either side is no marriage in the special sense, in which it is understood throughout the Christendom.

5502. For instance, it is well known that among a sect of Christians called Mormons polygamy is a part of the doctrine and is customary in Utah where the sect flourishes. The petitioner who was an ordained priest of that faith married the respondent, Miss Hawkins, in the Salt Lake city in the territory of Utah, according to the rites and ceremonies of the Mormons. The petitioner afterwards renounced Mormonism and resumed his domicile in England. The respondent remained a Mormon and married another man in Utah, whereupon the petitioner sued her for divorce, which elicited the question whether the petitioner had been legally married to the respondent, so that the Court could dissolve that marriage; and Lord Penzance held that the petitioner had not been validly married to the respondent, inasmuch as the law of England did not recognize the marriage of two persons with the possibility of pluarlity of husbands or wives. It defines rights and obligations on the assumption of monogamy and it cannot therefore, be appealed to when the very foundation upon which it is built is lacking: "The inconsistencies that would flow from an attempt of this sort are startling enough. Under the provisions of the Divorce Acts the duty of cohabitation is enforced on either party at the request of the other, in a suit for restitution of conjugal rights.

(19) *Warrender* v. *Warrender*, 2 Cl. & F. 488 (531, 532).

(20) *Per* Lord Penzance in *Hyde* v. *Hyde*, L. R. 1 P. & M. 130 (133).

But this duty is never enforced on one party if the other has committed adultery. A Mormon husband, therefore, who had married a second wife would be incapable of this remedy, and this Court could in no way assist him towards procuring the society of his wife if she chose to withdraw from him. And yet by the very terms of his marriage compact, this second marriage was a thing allowed to him, and no cause of complaint in her who had acquiesced in that compact. And as the power of enforcing the duties of marriage would thus be lost so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with a Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further and declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the application of English Law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void as he had a wife living at the time of its celebration; and all this without any act done with which he would be expected to reproach himself or of which either woman would have the slightest right to complain.

5503. "These difficulties may be pursued further in the reflection that if a Mormon had married fifty women in succession, this Court might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life."(21) The principle of this decision was followed by Stirling, J., in a case in which the question arose as to the validity of the marriage of the testator William Bethell, an Englishman, to Tippo, a native of Bechuanaland in South Africa, proved to have been solemnized there in accordance with the religious customs of that tribe, which permitted polygamy. It was proved that Bethell had changed his domicile to Bechuanaland, though not permanently, that he refused to marry Tippo in church, though a minister was available, that he often described Tippo as his girl, but made a certain provision if she remarried, whereupon the Court held that the union of Bethell with Tippo was not marriage according to the law of England, because that marriage did not preclude Bethell from contracting another marriage, and so long as there is this possibility there is not that "voluntary union for life of one man and one woman to the exclusion of all others," which is the only marriage recognized in Christian countries.(22) In this case Bethell was, and remained a Christian even after his marriage to Tippo, and the latter remained a heathen; but if suppose Tippo had become a convert to Christianity, then there could be no question about the legality of

(21) *Hyde* v. *Hyde*, L. R. P. & D. 130 (136, 137).

(22) *Bethell* v. *Hildyard*, 38 Ch. D. 220 (234).

Bethell's marriage. And even if without becoming a Christian, Tippo had belonged to a monogamous creed, even then the legality of her marriage to Bethell could not have been questioned.

Such a case, indeed, arose in England, in which the petitioner Francis Brinkley sued for a declaration of the validity of his marriage[23] with Yasu Tanka, a Japanese lady, celebrated in Japan in 1886, according to the laws in force in that country. The petitioner was an Irishman, a retired officer of the Royal Artillery, having his domicile in Ireland. His petition was opposed by the Attorney-General, but the petitioner having proved that according to the laws of Japan the petitioner could not again marry during the lifetime of his Japanese wife, the Court held it to be a valid marriage.[24] This case is then an authority for holding that the laws of Christendom do not forbid marriage with non-Christian, but they require that the non-Christian shall belong to a sect of which monogamy is an established doctrine. Consequently, there is nothing against a European Christian marrying an Asiatic non-Christian, a Jew or a Parsi, for instance.

Christian and Non-Christian Marriage in Christian Country.

5504. But this does not exhaust all the possible contingencies. For the cases hitherto considered have been of alliances of a Christian with a non-Christian in a non-Christian country. But the same rule does not necessarily extend to such marriage solemnized in a Christian country, for in that case the marriage is held valid on the ground that "of foreign (religious) professions the common law taketh no knowledge."[25] The petitioner was an English Christian lady, who had married the respondent, a Hindu gentleman, belonging to the twice-born caste, in England, where the latter had been to study. A child was born of the marriage after which the husband returned home to India, which was his native country, where he was employed in the Civil Service, and where he contemplated a remarriage into his own caste, whereupon the petitioner sued him for a judicial separation on the ground of desertion. Desertion was proved, but the question of judicial separation depended upon the validity of the marriage. The respondent contended that being a Hindu and under religious disability to marry out of his caste, his marriage to the petitioner was a nullity, but the Court held that whatever religious disability may have attached to the respondent's marriage to the petitioner in India, English Law could take no note of it when the marriage was solemnized on English soil under English Law.

As the learned Judge said: "Whether nationality or domicile be considered, why should another country in which the individual's act towards an inhabitant thereof takes place according to its laws, and has to be adjudicated upon, hold itself bound in its decision to apply the law of the country foreign to it, and to hold that the individual has carried with him a personal law of incapacity not recognized by the law where the act takes place."[1] The Court then went on to add "that a man marrying an English girl domiciled in this country does not carry with him a disability

(23) Under the Legitimacy Declaration Act, 1858 (21 & 22 Vict., c. 93).

(24) *Brinkley* v. *Attorney-General*, L. R. 15 P. 76 (80).

(25) Co. Litt. 132-*b*, cited and followed *per* Sir Gorell Barnes in *Chetti* v. *Chetti*, (1909) P. 67 (74).

(1) *Chetti* v. *Chetti*, (1909), P. 67 (85).

of a personal character imposed by the law of his own country, which would prevent him from entering into a marriage with her in this country, the marriage being one which would be recognized by the law of England as valid between persons domiciled there."[2] The view of Court then was that a religious disability attaching to a foreigner, is only an *impedimentum impedients* and not an *impedimentum dirimens*, a formal and not an essential impediment, similar in fact to the necessity of parental consent in the case of a Frenchman.[3]

5505. One deduction from this decision is that a polygamous Indian contracting marriage with a European Christian in a Christian country, whether in church or at the registry office, becomes bound to monogamy, so that he is afterwards, during the lifetime of his Christian wife and continuance of the marriage, precluded from marrying again upon his return to this country, though such marriage may be in accordance with the rules of his caste, and though his community may refuse to recognize the validity of his first Christian marriage, in consequence of which he may have been even outcasted. Such a person would then offend in the eye of the law by his second marriage, even though he may otherwise earn the commendation of his community.

But the case would have been different if the marriage had been performed in this country and not in Europe, for then the *lex loci* being in favour of polygamy, his first marriage, though contracted in church would be void, and he would be free to marry again and again without incurring the odium of contravening the law. All these points were not considered in the case last cited,[4] which was stated to be unique, though there is another case in which the decision of the Court was given consistently with the same principle.[5] There a Turkish gentleman resident in England as Vice-Consul for Turkey to the English Government, had married an English lady, born in India, in a church according to the rites of the Church of England. Soon after their marriage the couple went to reside in Turkey, but after some time the wife left on a short visit for England, and in her absence the husband obtained a decree of divorce from her in a Turkish Court on the ground that the marriage was not in accordance with Turkish law and was consequently, null and void. The children of this union sued the trustees of the settlement made by the husband, and the Court held the *ex parte* decree obtained in Turkey, to be no bar to the rights of the children who were entitled to the benefit of the settlement made in England.[6]

5506. But in these cases the religious and personal disability was held to have ceased to exist as soon as the person set his foot on English soil. The case would then have been widely different if the husband in the two cases had married the English Christian ladies in India and Turkey respectively. For then the religious disability being tied round their necks, the ceremony of marriage gone through would have been as ineffective to tie the nuptial knot as if they had in fact never gone through that ceremony. But, of course, such disability might be circumvented by the

(2) *Ib.*, p. 87; following *Ogden* v. *Ogden*, (1908) P. 46.
(3) *Ogden* v. *Ogden*, (1908), P. 46; followed in *Chetti* v. *Chetti*, (1909) P. 67 (87).
(4) *Chetti* v. *Chetti*, (1909) P. 67.
(5) *Colliss* v. *Hector*, L. R. 19 Eq. 334.
(6) *Ib.*

person declaring himself a non-Hindu, in which case his marriage, if performed according to the requirements of the Civil Marriages Act,(7) would be valid. So again, it may be that without resorting to the special provisions of that Act, the Christian wife may be converted to the faith of Islam, or join the Arya Samaj or Brahmo faiths, after which her renunciation of her former faith would do away with the impediment which her religion placed upon her.

Removal of Disability on Change of Domicile.

5507. But not only the change of religion, but the change of domicile affects the question of marriage. For example, the marriage with a person's deceased wife's sister was at one time illegal in England, and was declared to be against God's law by Statute (§ 5494). If, therefore, the husband came out to this country in the service of Government, would he have been subject to the same disability during his stay in this country? It has been held not.(8) But there must have been a change of domicile, which for the purpose of marriage must be a permanent change, and not merely a change for a temporary purpose, as in the case of civil servants, missionaries and the like. This question was much considered by the Privy Council in a Colonial appeal from Ceylon,(9) in which the petitioner, an Englishman, resident in Ceylon, while employed in the Colonial Civil Service, sued his wife also then resident there, for a dissolution of his marriage on the ground of her adultery. The District Court awarded him the decree, but the Supreme Court of Ceylon threw out his petition, holding that it had no matrimonial jurisdiction over Englishmen, resident in Ceylon, except where the marriage was contracted in the island. The husband appealed to the Privy Council, and it was contended for him that though the petitioner was not a permanent resident of the island, still his residence there was long enough and of such a degree of permanence as to be recognized as a matrimonial domicile, but Lord Watson who delivered the judgment of the Privy Council, overruled this contention, holding that nothing short of a permanent domicile was required in a locality to give to its Courts matrimonial jurisdiction to pass a decree for divorce a vinculo.

In holding so their Lordships concurred without reservation in the views of Lord Penzance,(10) who had said: "It is the strong inclination of my own opinion that the only fast and satisfactory rule to adopt on this matter of jurisdiction, is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and a woman are held to be man and wife in one country and strangers in

(7) Act XV of 1872.
(8) *Lopez* v. *Lopez*, 12 C. 706, F. B.
(9) *Le Mesurier* v. *Le Mesurier*, (1895) A. C. 517.
(10) In *Wilson* v. *Wilson*, L. R. 2 P. & D. 442.

another."[11] Words to the same effect were used in another case, in which Lopez, L. J., said: "As a general rule, it may be stated that jurisdiction in matters matrimonial depends upon the domicile of the parties to a marriage at the time of the commencement of the proceedings for a divorce. The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England at the commencement of such proceedings, and this independently of the residence of the parties, the allegiance of the parties, the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the matrimonial offence or offences have been committed."[12] Now since the jurisdiction to divorce is a part of the matrimonial jurisdiction of the Court, it follows that the *lex loci* cannot bind parties not subject to local jurisdiction.

5508. Indian Converts.—But the case of native converts to Christianity stands on a different footing. Being natives of India, they are members of a community where polygamy is the rule, monogamy an exception. The fact that they are converts to Christianity does not imply any necessary religious obligation of monogamy. For as observed by Innes, J., a profession of Christianity does not *ipso facto* impose any such obligation, although doubtless the tendency of Christianity is adverse to polygamy.[13] Polygamy as an *offence* exists only by Statute, and the only Statute against polygamy is 9 Geo. IV, c. 74 s. 70, of which, however only applies to persons in India professing the Christian religion at the time of the *second* marriage.[14] Consequently, if a Christian married a Christian woman and then relapsing into Hinduism remarried a Hindu woman, the Statute could not touch him, because he was not a professed Christian, but a professed Hindu at the time of his second marriage, nor indeed, could his second marriage be held to be void for the purpose of the present section, for Hindu law sanctions polygamy and in readmitting a Christian to caste, Hindu law altogether ignores the status which he had just abandoned together with all obligations contracted under it, and consequently, it does not recognise anything as a marriage which was not entered upon by him as a Hindu, and with Hindu forms and ceremonies. Such a person, then could not be convicted of this offence,[15] though he would, of course, be liable for maintaining his Christian wife.[16]

Position of Hindu Converts.

5509. The same question was indirectly involved in a suit instituted for another purpose, which was ultimately disposed of by the Privy Council. There, the parties were residents of Bellary of Hindu origin, but had become converted to Christianity, and the question was whether one of them, a widow, was entitled to a share of the family property or only to maintenance. It was clear that if the parties were governed by Hindu Law she was entitled to no share. Consequently, it was contended for her that in India the status of religion as regards natives is the status of law; that the law was the religion both of Hindus and Mahomedans, and the Hindu law being a law of religion, could not apply to persons who

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(11) *Ib.*, cited *per* Lord Watson in *Le Mesurier* v. *Le Mesurier*, (1895) A. C. 517 (540, 541).

(12) *Goulder* v. *Goulder*, (1892) P. 240.

(13) *Anon*, 3 M. H. C. (App.) 7; *Muthusami* v. *Masilamani*, 33 M. 342; *Antony*, *ib.*, 371.

(14) *Anon*, 3 M. H. C. (App.) 7.

(15) *Ib.*

(16) 4 M. H. C. R. (App.) 3.

were not Hindus, but were Christians, who must be governed by the English law. But these contentions were overruled by Lord Kingsdown, who delivering the judgment of their Lordships, said: "Considering the case, then, with reference to parcenership, what is the position of a member of a Hindu family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family and regarded by them as an outcaste. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Partnership may be put an end to by a severance effected by partition, it must, as their Lordships think, equally be put an end to by severance which the Hindu law recognizes and creates. Their Lordships, therefore, are of opinion, that upon the conversion of a Hindu to Christianity the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion."(17)

Later on their Lordships intimated as their opinion that the change of religion does not necessarily imply the rejection of all old customs, but at the same time custom implies continuance and a custom adhered to in one generation may be abandoned in the next: "If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent on the changeful inclinations, feelings, obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fictio juris* as still the enduring customs of the family? If it be not so as to things which belong to the Jurisdiction of Conscience, is it so as to things of convenience or interest? Surely, in things indifferent in themselves, the tribunals which have a discretion and have no *lex fori* imposed on them, should rather proceed on what actually exists than what has existed, and informing their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.(18)

Presumption of Polygamy.

5510. This precedent is then an authority for the two following propositions: (*i*) that in the case of a Hindu the existence of polygamy would be presumed until the contrary is shown; but (*ii*) in the case of a Hindu or Mahomedan convert to Chritianity, the question whether he still retained the custom of polygamy is a question of fact,—its continuance is not inconsistent with his conversion, but it cannot be presumed, but must be proved. A native convert thus takes an intermediate place between a Hindu and a European Christian, but he has the right to join either the former or the latter, whether he chooses to retain or reject polygamy as a part of his creed. There is, however, a dictum of Wilson, J., in a Full Bench case of the Calcutta Court which points to a different conclusion.

(17) *Abraham* v. *Abraham*, 9 M. I. A. 194 (237, 238).

(18) *Abraham* v. *Abraham*, 9 M. I. A. 194 (243, 244).

In that case the parties were also East Indians, but there was nothing to suggest that they were of Hindu or Mahomedan origin. On the contrary, their names suggested a Portuguese origin.[19] The petitioner A sued B for the restitution of conjugal rights. B pleaded the invalidity of his marriage with A, on the ground that he had been previously married to A's sister since deceased. It was proved that B had formally married A's sister, while she was on her death-bed and with whom he had previously formed an illicit connection. A's sister died in 1871 and the respondent married A in 1877. On hearing B's defence A amended her plaint by claiming either the restitution of conjugal rights or the nullity of her marriage with B, and the question depended upon the status conferred on A by her marriage with B, in view of the fact that she was proved to be B's deceased wife's sister.

The question was referred to the full bench, for whom Wilson, J., delivered the judgment. He held the English common law as well as the statutory prohibition inapplicable to Christians domiciled in India and not of European origin, whom he held to be bound only by the customary law of the class to which they belonged.[20] This is in entire harmony with the view of Innes, J. before referred to.[21] But in distinguishing the judgment of Lord Kingsdown[22] he permitted himself to say: "And we do not suppose the law could permit native converts (if one can imagine their desiring such a thing), to choose for themselves some marriage law wholly repugnant to Christian ideas, converts from Hinduism, for instance, to retain their former right to marry more wives than one, or converts from Mahomedanism their former freedom of divorce."[23] But as to this all that need to be stated here is, that whatever may be the intention of law against polygamy among Christians, there is at present no law prohibiting it, and if Christian converts from polygamous creeds desire to continue polygamy, their conversion to Christianity of itself offers no effective impediment, howmuchsoever distasteful such a course may appear to the more enlightened members of that community.

5511. Ceremonial, an Index of the Obligation Implied.—But whatever may be the law affecting Christian converts, there can be no doubt that no person, whether a convert or a non-domiciled British can throw up the obligations and duties undertaken or implied by his marriage. For instance, if a Christian was married to another Christian in church, that fact is alone sufficient to carry with it a pledge on the part of parties usually implied in such marriages. If, therefore, the parties are resident, but non-domiciled Europeans, monogamy is most certainly one of such pledges. If a domiciled native, whether a Hindu or a Mahomedan, it is as certainly not, whether he was married in church to a Christian or otherwise. But if in the former case, suppose the marriage was solemnised not in church, but in a mosque according to the rites of Islam, could it be doubted that the same pledge can by no means be assumed? Such a marriage may not be, as indeed it is not, a marriage in the Christian sense, but for that very reason it does not imply those obligations which are a recognized part of that marriage. So again, in the latter case, either the marriage of a Christian with a non-Christian contracted in church may or may not

(19) *Lopez* v. *Lopez*, 12 C. 706 (720), F. B.
(20) *Ib.*, p. 731.
(21) 3 M. H. C. R. (App.) 7.
(22) *Abraham* v. *Abraham*, 9 M. I. A. 195.
(23) *Lopez* v. *Lopez*, 12 C. 706 (722), F. B.

be valid, but it could not place on the non-Christian any unusual restriction as to his right of polygamy, any more than if he had been married in his own house according to the rites of his caste. But in either case, if the marriage is valid, it is valid for all time, unless it is legally dissolved. Its obligations cannot be cast off by a mere change of religion, whether the conversion be real or colourable. Nay more, the *status* created by the first marriage cannot be superseded by a second marriage celebrated between the parties according to a different form which ordinarily creates a different status.

5512. The plaintiff in a case, by name Nawab Mirza *alias* Stuart Skinner, married the defendant Badshah Begum *alias* Charlotte Skinner, when they were both Christians in the English form in a church at Meerut. They then reverted to their original faith of Islam and then got remarried according to Mahomedan Law. Charlotte was the daughter of an Englishman, one Martine Blake, of the Bengal Civil Service, by a Mahomedan woman. On the death of Stuart Skinner, she claimed one-third of her husband's estate according to the English law of inheritance, or otherwise Rs. 50,000, which was her dower fixed at her second marriage, and one-eighth of the remaining estate according to Mahomedan law. The defence taken was a divorce which was, however, not proved, so that the only question that remained for decision was the right acquired by the plaintiff under the two marriages with the deceased. The case was finally decided by the Privy Council before whom the question went up as to the legality and effect of the two marriages; but their Lordships had no difficulty in holding that the legal *status* created by the first Christian marriage could not be affected, and remained unaffected by the parties' subsequent marriage according to Mahomedan law. But since Stuart Skinner was a Mahomedan at the time of his death, his widow Charlotte Skinner could only inherit his estate as his widow.

In holding so, Lord Watson, who delivered the judgement of the Privy Council, said: "One of the many peculiar features of this suit arises from the circumstance that in the case of spouses resident in India, their personal status, and what is frequently termed the status of the marriages is not solely dependent upon domicile, but involves the element of religious creed. Whether a change of religion made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance, and it may be of nicety. In the present case that question does not arise for decision, unless it is shown that Stuart Skinner did, in fact, divorce Badshah Begum according to Mahomedan form."(24) Their Lordships, moreover, refrained from expressing any opinion as to the effect of a change of religions by the spouses, their domicile remaining the same, upon the rights of one or other of them which are incidental to marriage.(25) In this case the conversion was merely a reversion to the original faith, and though their Lordships took care to reserve the point, there can be no doubt that if the divorce alleged had been proved, it could not have affected the lady's *status* already created by her former marriage.

(24) *Skinner* v. *Skinner*, 25 C. 537 (546), P. C. (25) *Ib.*, p. 546.

Marriage of Hindu and Mahomedan Apostates.

5513. This was the *ratio decidendi* of another case decided upon the following facts: The accused originally a Hindu and an illegitimate child of Kshatri parents, was duly married according to Hindu rites to another Kshatri by name Dukhi. She then became converted to Mahomedanism and married a Mahomedan by name Quzaffar, whereupon Dukhi prosecuted her for this offence, of which she was convicted. She moved the High Court in revision, urging that her marriage to Dukhi was not valid, as they belonged to different castes and could not have married under Hindu law; that even if her former marriage were valid, it became dissolved under Hindu law by her conversion to another faith, and that in any case her second marriage was not void under Mahomedan law. The first contention was evidently supported on the ground of the accused's illegitimacy which conferred on her no *status*, but the Court held it to be no impediment to the validity of her marriage to a Kshatriya, if other Kshatriyas recognized her, as they had in fact done, as belonging to their caste.

The second contention was sought to be supported by reference to the view of Hindu law expounded in a case,[1] in which it was held that Hindu law regarded an apostate wife as civilly dead, but the Court dissented from it, holding that, that may be so as regards her civil rights, but it found no authority in Hindu law for the position that a degraded person or an apostate is absolved from all civil obligation incurred before degradation or an apostacy. So far as the matrimonial bond was concerned, the Court considered such a view as contrary to the spirit of the Hindu law which regards that bond as absolutely indissoluble.[2] The Court considered the third contention important and not altogether free from difficulty. It was sought to be supported on the authority of Mahomedan law,[3] which lays down that when the wife becomes a convert to the Mussalman faith, and the husband is an unbeliever, the Magistrate is to call upon him to embrace Islam, and if he does so, the woman continues as his wife, but if he refuses, the Magistrate must separate them; and if the wife embrace the Mahomedan faith in a foreign country, and the husband is an unbeliever, separation takes place on the expiration of three months.[4] The Court held that the accused had not complied with the terms of this law, in that she had not given the requisite notice, nor did her conversion to Islam in a foreign country suffice to dissolve her Hindu marriage: "A sacred and solemn relation by marriage cannot, we think, be regarded as terminated simply by the change of faith of either spouse without notice to the other, or the intervention of a Court of Justice."[5] Consequently the Court declined to interfere with her conviction.[6]

5514. In this case, the Court did not consider the question whether her conversion was sincere or merely colourable, made to evade her matri-

(1) So held in *Rahmad Beebee* v. *Rokeya Beebee*, 1 Norton's L. C. on Hindu L., 12.

(2) *Ram Kumari*, 18 C. 264; citing Manu, vv. 156-158, IX, 46, and following *Government of Bombay* v. *Ganga*, 4 B. 330; *Administrator-General of Madras* v. *Anandachari*, 9 M. 466; *Millard*, 10 M. 218.

(3) Hedaya, Bk. 2, c. 5 (Grady's Ed. of Hamilton's Translation, pp. 64, 65); Bailie's Dig., 2nd Ed., pp. 180, 181.

(4) Similar provisions are enacted by Act XXI of 1866.

(5) *Ram Kumari*, 18 C. 264 (271).

(6) *Ram Kumari*, 18 C. 264; *Nandi*, 1 L. 440; *Lazar*, 30 M. 550; *Jamna Devi* v. *Mulraj*, (1907) P. R. No. 49; *Rurri*, (1919) P. R. 5, 48 I. C. 493, 20 Cr. L. J. 3.

monial obligation. If such had been the case, her second marriage would have been void as a fraud on the law. It was evidently the view of the Privy Council in a case in which a Christian widow began to cohabit with another Christian by name John, who had been already married to a Christian wife, who was then alive. John and the widow wished to legalize their connection, and so both turned Mahomedans, and as John became then qualified to contract a polygamous marriage, he married the widow in accordance with Mahomedan law. The High Court at Allahabad expressed doubts of the legality of this marriage, which their Lordships of the Privy Council thought they were well warranted in entertaining.(7)

The same question was viewed from another stand-point in Madras, in a suit for administration of the estate of the deceased A, who was by birth a Brahmin, and had married, according to Hindu law, a girl aged eight years, in 1849. Two years later, he became converted to Christianity, and in 1858 he married a Christian C in a Christian form. The latter marriage was found to be *bona fide*, but nevertheless it was held to be invalid, because the conversion of A to Christianity after his marriage to B did not dissolve that marriage, and so long as that marriage was subsisting, A could not marry C according to the Christian form in church, so that A's marriage with C was invalid in spite of the fact that he had gone through the form of marriage with her.(8) A somewhat converse case is presented by the facts of the following case. The accused, Irisi, by birth a Pariah girl, was during the famine of 1877 baptized to Christianity. She was then an infant. In 1885 Irisi was married to one Sabban in accordance with the form and custom of the Pariahs, to which Sabban, also belonged. A month after her marriage Sabban discarded her alleging that he had been deceived into marrying a Christian, whereupon the Catholic priest Millard married her to a Christian according to the Christian form of marriage. Irisi and Millard were both convicted, the former of this offence, and the latter of abetment and the legality of their conviction depended upon the validity of Irisi's first Pariah marriage; and that depended upon whether Irisi had relapsed into Hinduism at the time of marriage, which the Court held proved on the evidence adduced in the case. Her first marriage being then valid, her second marriage was necessarily void, since that marriage was contracted before her first marriage had been legally dissolved under the Native Converts' Marriage Dissolution Act, 1886,(9) and in that view the Court affirmed the convictions of both the girl and the priest.(10)

Status of Indian Converts.

5515. This case once more confirms the view expressed before as to the difference in *status* between a European Christian and a native convert. The *status* of the former is essentially a Christian *status*, and whether he is permanently domiciled in this country or not, he is presumed to continue to possess that *status, though* it is open to him to change it by avowed conversion to a polygamous faith. On the other hand, the *status* of a native convert is not necessarily a Christian *status*, for it all depends upon circumstances. His conversion to Christianity does not necessarily imply a repudiation of all Pagan Customs, for while professing that

(7) *Skinner* v. *Orde*, 14 M. I. A. 308 (324).

(8) *Administrator-General* v. *Anandachari*, 9 M. 466 (470, 471).

(9) Act XXI of 1866.

(10) *Millard*, 10 M. 218.

religion he may conform to or observe any or all the customs of his Pagan faith, so long as they are not necessarily inconsistent with Christianity. The question as to what customs a native Christian observes is then a question of fact, but it is a fact which the Courts determine having regard to the costume adopted by the family,[11] the change of names, manner and habits of life[12] and in fact other similar acts from which the Court may reasonably infer that the intention of the parties was to copy the faith and mode of living of European Christians, and so become a class apart of what is ordinarily termed "East Indians."

So referring to this distinction Lord Kingsdown said: Their Lordships collect from the evidence that the class known in India as "Native Christians," using that term in its wide and extended sense as embracing all natives converted to Christianity, has subordinate divisions forming again distinct classes, of which some adhere to the Hindu customs and usages, as to property; others retain those customs and usages in a modified form: and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property. Of this latter class are the 'East Indians,' a class well defined in India, the members of which follow in all things, the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privileges of a personal law, which the British subjects in the limited sense of the terms of the jurisdiction of the charters of the Supreme Courts enjoy, in other respects, in the common bond of union in religion, customs, and manners, approach the class of British subjects."[13]

Their Lordships' remarks were, of course, confined to customs regulating the devolution of property, because that was the only question before them, but it is evident that persons entitled to retain customs of one kind are equally entitled to retain customs of another kind, if they are not necessarily inconsistent with the change of faith. So in another case the accused, a Hindu convert to Christianity, married a Christian woman according to the rites of the Roman Catholic religion. He subsequently renounced Christianity and again became a Hindu, marrying a Hindu woman according to the Hindu rites, his Christian wife being then alive. It was held that the accused could not be convicted of bigamy, since the second marriage was not forbidden by Hindu law.[14] But he would have committed this offence if he had married a Hindu woman according to Hindu rites without himself becoming reconverted to Hinduism.[15]

Dissolution of Native Converts, Marriage.

5516. That the change of faith does not necessarily involve a change in the matrimonial *status* is recognized by the very Statute enacted with the professed object of legalizing under certain circumstances, the dissolution of native converts to Christianity.[16] Under that Act a non-Christian native married before his or her con-

(11) *Skinner* v. *Orde*, 14 M. I. A. 309 (324).
(12) *Abraham* v. *Abraham*, 9 M. I. A. 195 (240, 241).
(13) *Ib.*
(14) *Antony*, 33 M. 371; following *Proceedings*, 3 M. H. C. R. (App.) vii.
(15) *Lazar*, 30 M. 550.
(16) Act XXI of 1896, Prefatory words and Preamble.

version to the Christian faith may petition the Court for the dissolution of his or her marriage, and the Court shall thereupon issue notice to the other party to the marriage and call upon him or her to cohabit with the convert. If the respondent declined to cohabit the case shall be adjourned for a year, the parties being in the meantime free to persuade each other to reconsider their position, but if the spouse is after the year still recalcitrant, then the Court may decree the dissolution of their marriage.(17) But the dissolution of the marriage is decreed, not because the marriage becomes void upon a party's conversion to another faith, but because in consequence of such conversion there is desertion and the repudiation of matrimonial obligation by the other party. The procedure enacted by this Act is not unlike that enjoined by the Mahomedan law upon a conversion of a married person to that faith.(18)

5517. Mahomedan Law.—The question whether a person's second marriage is void so as to expose him to the penalty of this section may thus involve reference to the personal law of the party, affected as it may be by the change of religion, the law of domicile, the performance and observance of ceremonies and custom peculiar to each sect of family. For instance, it is a recognized doctrine of Mahomedan law that a Mahomedan minor may on attaining puberty repudiate her marriage by an unauthorized person, *e.g.*, her mother, since the marriage of an infant by any person other than the father or grandfather is voidable at the option of the infant upon attaining puberty, the difference between the Sunni and Shiah scholars on this point being that while the former regard such marriage voidable, but not void, the latter regard them as void till ratified by the minor on attaining puberty.

Hence, where the accused Badal, a Mahomedan woman, was married to the prosecutor one Jai Lal Shaikh when aged five years, by her widowed mother. Jai Lal was in jail when the girl attained puberty, whereupon her mother got her again married to the second accused Puran. On his release from jail Jai Lal induced Badal to return to him, but as she refused, he prosecuted both her and her second husband for this offence and adultery respectively. The Court, however, held her first marriage with the prosecutor not proved, and it further held that even if it had been established the accused could not have been convicted, because on attaining her puberty Badal must be deemed to have repudiated her first marriage by her contracting the second marriage with her co-accused.(19) But here the result would have been different, if Badal had been married in the presence of, or with the consent of her father, though the latter may not have himself given her away in marriage.(20) So, again, Mahomedan law prescribes a period of *iddat*, during which a woman who has lost her first husband cannot re-marry. But the period of such *iddat* may be curtailed by custom recognized as valid and binding on the parties. Where, therefore, B who was the father of A, remarried her within

(17) *Ib.*, ss. 15, 17.
(18) *Ram Kumari*, 18 C. 264.
(19) *Badal Aurat*, 19 C. 79; *Hub Ali*, 21 A. L. J. 187. (1923) A. I. R. (A.) 329 (in which the girl was twice married before her puberty).
(20) *Sheikh Alimuddin*, 10 C. W. N. 982; distinguishing *Badal Aurat*, 19 C. 79.

the period of *iddat* that is, within only three months of the death of A's husband, whereupon A was convicted of this offence and B of abetting her, the Court upheld the conviction applying the general law, to which A and B had not set up any variation by custom.[21] It has been said before that polygamy is permissible to a Mahomedan, but while it is so, it is nevertheless limited to four wives so that his marriage to a fifth wife is illegal even though one of the four be kept partially divorced.[22]

5518. Proof of Marriage.—The validity of a marriage no less than its sufficiency must depend upon the personal law of the parties, and the ceremonious observance recognized by the community as sufficient to constitute marriage. In this respect again, matrimonial law may be divided into Christian and non-Christian laws. To constitute a valid marriage by the common law of England, it must have been celebrated in the presence of a clergyman in holy orders.[23] But this is the ordinary rule only confined to England and Ireland,[24] but it does not extend to the Colonies and England's dependencies.[25] For instance, if the presence of a minister in holy orders is impossible, marriage-tie may be completed otherwise. For, as observed by Willes, J., after an exhaustive examination of the authorities, the presence of the priest was a *sine qua non* to a valid marriage, since it was the duty of the priest to see that the parties were not within the prohibited degrees and not to marry them, if there was that or any other impediment to their marriage.[1] His presence was in later times required as of a trustworthy witness.[2] His presence was thus necessary but not indispensable till it appears to have been so made by the Council of Trent. The necessity of the presence of an ordained minister to solemnize a Christian marriage has been now finally settled in England, in a case in which the husband who was himself a minister in holy orders had married himself to his wife there being no third person present. He had by this marriage a son, who claimed his father's estate. which was opposed by his second son, on the ground that the deceased had not been legally married to the claimant's mother. The legality of the marriage was considered by three Judges, whose judgment was delivered by Willes, J., who upon a review of authorities held the presence of a clergyman by no means necessary for a Christian marriage, though the presence of a minister was ordinarily required to solemnize and witness it.

(1) Christian Marriage.

As was observed by the Lord Chancellor in the leading case:[3] "Marriage is a contract, which ought according to the ancient usage, to be confirmed by the priestly benediction; and, properly speaking, this ought to be given by the proper parochial minister, or some one

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(21) *Bibi (Mt.)* (1882) P. R. No. 43.
(22) *Rabnawaz*, (1875) P. R. No. 43.
(23) *Millis*, 10 Cl. & F. 534; *Beamish* v. *Beamish*, 9 H. L. C. 274.
(24) *Beamish* v. *Beamish* 9 H. L. C. 274 (353).
(25) *Maclean* v. *Cristall*, Perry's Orient Cas. 75.
(1) *Beamish* v. *Beamish*, 9 H. L. C. 274 (314, 315). The judgment of Willes, J., was reversed, but on a different point, *ib.*, pp. 359, 360.
(2) *Ib.*, p. 320.
(3) Millis, 10 Cl. F. 753.

authorised by him according to the rules of the church. Other ceremonies are also to be observed. None of all this, however, is essential to the validity of the marriage." But the essence of marriage is the expression of an agreement by the parties that they shall thereafter live as man and wife, all else is ceremony.(4) "The subsequent giving of the ring and joining of hands, and publication of the fact of marriage by the minister, are in their nature, and are stated to be symbolical and declaratory of a marriage which has already taken place by the consent of the parties. The blessing is as of persons who have already consented together in wedlock, and anciently, as well in England as abroad, the nuptial benedictions were given only at a first marriage, the rest of the service consist of thanksgiving, exhortation and prayer."(5)

5519. The want of a person to give away the bride is not visited by the general law with any consequences.(6) So the omission of the giving of the ring, and the subsequent part of the ceremony is for civil purposes non-essential, so is an omission by the minister to give the proper warning. But the case in which these observations occur was reversed on appeal to the House of Lords, who, however, expressed their dissent only from the conclusion arrived at by Willes, J., and his associate Judges, and this they did reluctantly, both because the result of their finding was to stamp the children of the deceased with the stigma of bastardy as well as because they felt bound by an earlier decision of the same House in which, however, the finding had been arrived at by the majority of six to five.(7) All the same the learned Law Lords guarded themselves by confining their decision only to holding that according to the common law of England and Ireland, a Christian marriage required the presence of a minister of the church to solemnize it, and that since the same person could not be both the bridegroom as well as the minister, the plaintiff's father's marriage was invalid. They, however, declined to say what would have been the law if the plaintiff's father had been married on board a ship by the captain, or in a colony of this country. Indeed, the Council drew their Lordships' attention to a case in which the strict doctrine of the leading precedent(8) was held to be inapplicable,(9) whereupon Lord Cranworth said that in the case before them at least the question was left open.(10) But marriages by necessity have been since recognized, and the maxim, "*Consensus facit matrimonium,*" long understood to be the universal law in Christendom, still expresses the true view of marriage, though such consent must be as decreed by Pope Alexander III *per verba de presenti.*(11)

5520 Christian Marriages in India.—However, whatever may be the common law applicable to England and Ireland, Christian marriages in India are now the subject of a special enactment,(12) which

(4) *Litt.*, s. 39; cited *Beamish* v. *Beamish*, 9 H. L. C. 274 (329, 330).
(5) *Beamish* v. *Beamish*, 9 H. L. C. 274 (330).
(6) *Ib.*, pp. 333, 331.
(7) *Ib.*, pp. 314, 315.
(8) *Millis*, 10 Cl. & F. 534.
(9) *Maclean* v. *Cristall*, Perry's Orient. Cas. 75.
(10) *Beamish* v. *Beamish*, 9 H. L. C. 274 (353).
(11) *Per* Lord Campbell, L. C. in *Beamish* v. *Beamish*, 9 H. L. C. 274 (335).
(12) Act XV of 1872.

prescribes the special procedure for the solemnization of Christian marriages declaring marriages otherwise solemnized as void.[13] Under that Act Christian marriages may be solemnized by (*i*) an ordained minister of the church according to the rites of any denomination to which the minister may belong; (*ii*) by a minister licensed to solemnize marriages; (*iii*) by a person licensed to grant certificates of marriage between native Christians; and (*iv*) by a marriage registrar, who must be a Christian, though in his absence or during his illness his duty may be discharged by the District Magistrate.[14] The time ordinarily fixed for solemnizing marriage is between 6 a.m. and 7 p.m., and the place the church, though exception is permitted in certain cases, as where marriage is solemnized at a different hour under a special license or in a place other than a church, when a church is not within five miles of the place.[15] A notice of an intended marriage to be solemnized by a minister of religion is to be given and affixed in some conspicuous part of the church in which the marriage is to be solemnized.[16] If the intended marriage be by registry, a similar notice must be served on the marriage registrar, who is to affix it to a conspicuous place in his office. When the contracting parties are minors, marriage may be solemnized with the consent of the father, or if he is dead a guardian of the person of the minor.[17]

5521. The minister may solemnize marriage according to such form or ceremony as he thinks fit to adopt, but it should be solemnized in the presence of at least two witnesses.[18] A marriage once solemnized shall not be invalid on account of any misdescription as to the dwelling of the parties, want of consent, or any irregularity as to the notice, certificate, time and place and registration of the marriage.[19] The presence of two witnesses is, however, necessary.

5522. Proof of such marriage may be established by the evidence of persons who were present at its solemnization, or by a certified copy of the marriage register or certificate. In England, marriage is usually proved by the production of the Parish or other register, or a certified extract therefrom. But a marriage celebrated abroad requires a higher degree of proof, for it must then be proved by the evidence of a witness then present, who must be able to describe the ceremony so as to enable the Court to judge whether it would suffice to constitute a marriage in law.[20] He must also be able to identify the parties.[21] Identification by photographs is admitted for the purpose of identification,[22] but it is held insufficient for the present purpose.[23] So where in a divorce-case the petitioner, the husband, showed to a witness a photograph of his wife and asked him if that was not the woman who was seen in a compromising situation with the co-respondent, the Court remarked that it could not allow a photo-

(13) Act XV of 1872, s. 4.
(14) *Ib.*, s. 7.
(15) Act XV of 1872 10, 11.
(16) *Ib.*, s. 12.
(17) *Ib.*, s. 19.
(18) *Ib.*, s. 25.
(19) *Ib.*, s. 77.
(20) *Ib.*, s. 80.
(21) *Allison*, R. & R. 109; *Millis*, 10 Cl. & F. 534.
(22) *Mainwaring*. 26 L. J. M. C. 10; *Simpson*, 15 Cox. 323.
(23) *Tolson*, 4 F. & F. 103.

graph to be shown to a witness for the purpose of identification except under very special circumstances.(24)

And since the onus of proving a previous lawful marriage is on the prosecution, it must be discharged by proof both of the marriage as well as its validity, and this duty cannot be dispensed with merely because the accused admits a prior marriage,(25) because the prosecution cannot rely upon any statement of the accused to fill in a gap in their own case.(1) If any of the parties to the marriage was a minor, evidence must be adduced to show that it had been solemnized with the consent of the father (2) or that the father being dead consent of the guardian of the person had been previously obtained, though if evidence of this is lacking it may be presumed from a subsequent approval. Moreover, the want of consent is now a mere irregularity which does not vitiate a marriage after it is once solemnized.(3)

5523. Christian marriages celebrated abroad are now the subject of a special enactment.(4) This Statute only applies to European British subjects or when one at least of the parties, is a British subject.(5) These provisions allow of a marriage being solemnized before a lay marriage-officer, after notice published as in the case of Christian marriages before considered. It also enables specially empowered captains of a ship (6) and British consul,(7) to solemnize such marriages on the sea and in foreign territory respectively. And in such case the marriage certificate or its copy would be evidence, though not a sufficient evidence to prove it. For it must be proved at least by presumptive evidence of the performance of a ceremony and that it constituted a good marriage according to the law of the place. So where A, a soldier in the British army at St. Domingo, married the widow of another soldier in a chapel, by a person attired as priest, and the service was conducted in French, but interpreted into English, by a person who officiated as clerk, after which the parties cohabited together as man and wife for eleven years, Lord Ellenborough held the marriage sufficiently proved,(8) though the woman afterwards said that she did not know that the person officiating was a priest; for the same answer would probably be given by most persons who are married there.(9) And so the fact that the marriage of a Protestant had been solemnized by a Roman Catholic priest, was no ground for holding it invalid,(10) *a fortiori* where one of them, a Protestant misrepresented himself to be a Roman Catholic.(11)

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(24) *Frith* v. *Frith*, (1896) P. 74; *Naguib*, (1917) 1 K. B. 359.
(25) *Frith* v. *Frith*, (1896) P. 74.
(1) *Truman*, 1 East, P. C. 470; *Flaherty*, 2 C. & K. 782; *Savage*, 13 Cox. 178, dissenting from *Newton*, 2 M. & Rob. 503; s. c. *Sub nom. Simmonsto*, 1 Cox. 30.
(2) *Basanta Kumar*, 26 C. 49.
(3) *Butler*, R. & R. 61; *Morton*, R. & R.19; *James*, R. & R. 17; *Smith* v. *Huson*, 1 Phill. 287.
(4) Christian Marriage Act (XV of 1872), s. 77; to the same effect, Marriage Act, 1823 (4 Geo. 4, c. 76, s. 14); *Birmingham*, 8 B. & C. 29.
(5) Foreign Marriage Act, 1892 (55 & 56 Vict., c. 23).
(6) *Ib.*, s. 1.
(7) *Ib.*, s. 12.
(8) *Ib.*, s. 18.
(9) *Per* Le Blanc, J., in *The Inhabitants of Brampton*, 10 East 282 (291).
(10) *Griffin*, 14 Cox. 308.
(11) *Orgill*, 9 C. & P. 89.

Jewish Marriage.

5524. And if the marriage was solemnized under the Jewish law, evidence must be given of a written contract between the parties,[12] since a marriage between Jews is incomplete without a written contract, witnessed by at least two witnesses.[13]

Foreign Marriage.

5525. In a prosecution for bigamy it lies on the prosecution to prove a previous valid marriage of the accused which constitutes his offence. Where such marriage took place in a foreign country, *e.g.*, Egypt, it is on the prosecution to prove by calling independent evidence the *factum* of marriage and its validity, by the evidence of an expert. The accused, an Egyptian by birth and a Mahomedan by religion, was indicted for bigamy in that he had gone through the ceremony of marriage in England with two English women in 1903 and 1914. The accused examined himself to prove that he had been duly married in Egypt in 1898, which rendered his second marriage of 1903 invalid. The Court did not consider the effect of the prisoner's Egyptian marriage, but held his own evidence insufficient to prove it, holding that a foreign marriage could only be proved by independent evidence of witnesses to the essential ceremonies and of an expert as to its validity.[14]

Parsis.

5526. A marriage between *Parsis* is now governed by the Parsi Marriage and Divorce Act, 1865,[15] the provisions of which are on the subject exhaustive, but which as to the form of celebration generally follows the provisions of the Christian Marriage Act before abstracted. It may be proved by production of the marriage certificate or a certified copy of the entry in the marriage register.[16]

Buddhist.

5527. Since the Buddhist law recognizes polygamy,[17] a Buddhist male can commit no offence in marrying himself to several wives at the same time.

5528. Mahomedan Marriage.—Under Mahomedan law, marriage is a civil contract resembling a sale, and requires the presence of not only the father, but also a *vakil* and a *kazi* who is the officiating priest and reads the *Sigha* or the marriage formula The *Sigha* recited at the marriage of minors is different from that recited at the marriage of adults. The performance of the *akd* is a *sine qua non* without which no marriage is complete.[18] And in the case of the re-marriage of an adult widow, no marriage is legal where the widow has not given audible consent.[19] There is otherwise no specific ceremony enjoined, and no religious rites are, of course, necessary to make a marriage valid. But usage has established a uniform procedure which is as a rule followed in this country. A Mahomedan mar-

(12) *Horn* v. *Noel*, 1 Camp. 61; *Althausen*, 17 Cox. 330; *Nassilskie*, 61 J. P. 520; *Weinberg*, 33 L. J. N. S. 239.
(13) *Nathan* v. *Woolfe*, (1899) T. L. R. 250.
(14) *Naguid*, (1917) 1 K. B. 359.
(15) Act XV of 1865.
(16) Parsi Marriage and Divorce Act (XV of 1865), ss. 6-8.
(17) *Mi Kin Gale* v. *Mi Kin Khan*, (1910) U. B. R. 42, 8 I. C. 1169; *Mi Mc* v. *Kishwe Ma*, 39 C. 492, P. C.
(18) *Badal Aurot*, 19 C. 79; *Bulanda*, (1910) P. W. R. 33, 8 I. C. 94.
(19) *Shabebi* v. *Kamaruddin*, 15 C. W. N. 991.

riage is solemnized in the house of the bride's father, in the presence of the parties and their agents or *vakils*, and the guests invited to witness it. A deed called *kabinnamah* was at one time usually drawn up embodying the contract and the obligations which the husband incurs as to the payment of the dower, custody of the children, and the like. It must be attested by the *walis* or guardians of the parties, and may be attested also by their *vakils* and other witnesses. Such deeds are now becoming rare and have fallen into desuetude in the United Provinces, Bihar and other strongholds of the Indian Islam. Other localities have adopted other local variations, such as the exchange of presents, providing a new robe to the bridegroom, but these are social amenities engrafted upon the simplicity of the Hedaya, which makes marriage depend upon consent expressed by the parties,[20] and in this respect a Mahomedan marriage is indistinguishable from the English marriage as defined by Willes, J. (§§ 5518-5519).

5529. Under Mahomedan law marriage is a civil contract resembling a sale, and as is the case with other contracts, freedom of contract in the contracting parties is one of the essential conditions of its validity. Minority of the bridal pair is no bar to marriage provided the consent of the contracting parties is given by their parents,[21] or other persons duly authorized for the purpose of binding them.[22] But in the latter case the marriage of a Shiah minor who has neither attained puberty nor discretion remains *fazul* or an invalid marriage and can become valid only when the minor gives her consent after attaining puberty and mature understanding to perfect it,[23] while in the case of minors of other sects the marriage itself is valid if it is contracted by the father or paternal grandfather. If consented to by a more distant guardian the minor, immediately upon attaining puberty[24] or completion of her fourteenth year,[25] has the option of cancelling or confirming it;[1] but in this case till it is cancelled or confirmed the marriage remains a good marriage. In the case of a woman married after attaining puberty, it follows that her own consent is essential.[2] Words of proposal and acceptance must either be uttered by their contracting parties in the presence of each other, or they may be uttered by their agents or vakils in each other's presence, and in the presence and hearing of two males or one male or two female witnesses, who must be sane and adult Moslems, the whole transaction being completed at one meeting.[3] Besides the witnesses and the vakils or agents of either party, there must be present a *Kazi* who is the officiating priest and reads the *Sigha*.

5530. A Mahomedan cannot, however, marry a Hindu for has not the Koran declared: "Marry not a woman of the polytheists

(20) 1 *Hedaya*, p. 72.
(21) *Hashan* v. *Khuda Buksh*, (1880) P. R. 70-*n*.
(22) *Sobrati* v. *Jungli*, 2 C. W. N. 245.
(23) *Soulate Begum* v. *Fakhiruddin*, 20 C. 90; *Mulha Jehan* v. *Mahommed*, 26 W. R. 26 P. C.
(24) *Bindi* v. *Mt. Bugli*, (1909) P. R. No. 73, 2 I. C. 814.
(25) *Atkia Begam* v. *Md. Ibrahim*, 36 I. C. 20 P. C.
(1) *Kullan* v. *Mt. Piari*, (1879) P. R. No. 157.
(2) *Bindu* v. *Mt. Bugli*, (1909) P. R. No. 73, 2 I. C. 814; *Sabati Babi* v. *Kamaruddin*, 15 C. W. N. 991.
(3) *Aklemannessa* v. *Mahomed Hatem*, 31 C. 849.

until she embraces Islam."[4] This leaves him however liberty to marry a woman belonging to a monotheistic sect, as a Christian, a Jew [5] or even a Parsi.[6] But in the case of a mixed marriage with a Hindu, the prohibition is personal, so that while the marriage is invalid, the offsprings are not illegitimate. But as polygamy is permitted to Mahomedans the question about the validity of his marriage to a person of different religious persuasion, is scarcely material for the present purpose, except that if the marriage be valid the wife would be liable if she contracts another marriage unless her first marriage with a Mahomedan was invalid or she had been validly divorced by her husband. But the validity of a divorce depends not merely upon the form as on the *lex loci contractus* of the marriage. The applicant, a Mahomedan, sued for a writ of mandamus and a license authorizing him to marry in London an English woman. It appeared that he had married another English woman before, but whom he alleged to have divorced by a deed executed in India. But the Court of appeal held this divorce ineffectual inasmuch as his first marriage being an English marriage could only be divorced by the *lex loci contractus, i.e.*, according to the English law and not according to the law of India (§§ 5541-5542). Consequently, it held the first marriage an impediment to the applicant's second marriage in England.[7]

Muta Marriage.

5531. Mahomeden law recognizes the *muta* or a temporary marriage of which the two essentials are that (*i*) its duration should be definitely fixed by agreement between the parties,[8] and (*ii*) a sum of money must be paid to wife as a dower.[9] As a *nika* stands higher than *muta* the latter might be superseded by the former.[10] But for the purpose of this offence a *muta* is an impediment during its continuance.

Apostacy dissolves the Marriage.

5532. Under Hindu law apostacy does not dissolve the marriage tie (§ 5513), but under Mahomedan law apostacy of the husband has that effect, so that the wife is set free to re-marry. But in order to have that effect the apostacy must be to a non-Islamic religion, and not merely a conversion from one sect to another, *e.g.*, to the Ahmadiya sect.[11] One Azizul Haq and Jaitan, both Mahomedans of the Hanafi school, were husband and wife. Some years after their marriage, the husband Azizul Haq became a Christian, but within a month and a half he reverted to Islam. During this interval the woman Jaitan re-married one Abdul Aziz to whom her father gave her away in marriage. The husband prosecuted the wife for bigamy, and her father and second husband for its abetment. But the High Court quashed the commitment holding that the apostacy of the husband had *ipso facto* dissolved the nuptial tie.[12]

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(4) Sale's Koran.
(5) 1 Hedaya, 85; 1 Fatawa Alamgiri, 398.
(6) Mufatib Sharaya, 274.
(7) *Anwaruddin*, (1917) 1 K. B. 634.
(8) *Shobarat Singh* v. *Jafri Bibi*, 19 C. W. N. 255 P. C.
(9) *Akbar Husain* v. *Shoukhat*, 19 M. L. J. 525, 31 I. C. 657.
(10) *Baqar Mirza* v. *Mehdi Hasan*, 19 O. C. 246.
(11) *Narantakath* v. *Parakkal*, 45 M. 986.
(12) *Abdul Gani* v. *Azizul Haq*, 39 C. 409; followed in *Ghan* v. *Tajji*, (1916) P. L. R. 114.

5533. Hindu Marriage.—The same question necessitates an excursion into the requirements of a Hindu marriage, for which, however, apart from Act XXX of 1923, there is no statutory law, and the ceremonial observances as to which are regulated by the usage of the caste to which the parties belong.(13) Nevertheless the usages of the twice born all over the country conform to certain well defined rules, the deviation from which is seldom permitted. There is, for instance, the betrothal or engagement called *sagai*, the usual ceremony attending which is *faldan* or the exchange of cocoanuts and other presents. This marks an irrevocable step for the girl, for unless the bridegroom dies or refuses to marry, she is not free to get engaged to any other person. After *sagai*, follows the marriage which is completed by the pair walking round a post to the recitation of *mantras* which constitutes the *lagna* or the ceremony of marriage. Under Hindu law the proper person to give away a girl in marriage is her own father and in his absence the mother. But a Hindu marriage is a sacrament, and once duly solemnized cannot be rendered invalid on the ground that it was brought about without the consent of the guardian in marriage or even in contravention of an express order of the Court.(14) It can be avoided for fraud but till it is set aside by a decree of Court it will support a charge for bigamy.(15)

A Hindu marriage is indissoluble except by custom. The caste *panches* cannot release the wife from her tie of marriage by the continued absence of the husband in a foreign country.(16) Apostacy does not dissolve a Hindu marriage without a decree of Court. Hence where a Hindu wife became a convert to Mahomedanism and married a Mahomedan, she was held guilty of this offence, though the Court judged her leniently as she was found to have acted through ignorance of law.(17)

5534. Inter-Caste Marriages.—There is no *Shastric* prohibition against intermarriages of persons of two different castes, though such marriages have fallen into desuetude, but this is only so by custom and not by the force of any positive law. As such the force of prohibition varies in each locality and its pristine rigidity has become greatly relaxed by the march of education; and in the Punjab where caste restrictions have never been so rigid as in the plains of Hindustan, such marriages are, within the limits, quite customary. However, as a rule, they are subject to the rule that a man is competent to marry a woman inferior in caste to his own, but not *vice versa*.(18) But this too does not appear to be an inflexible rule in the Punjab, where the marriage of a Brahmin with a Rajput woman has been as much "upheld"(19) as the marriage of a Jat with a Brahmin woman.(20) So there may be an intermarriage between a Minhas Rajput of the Gujrat district and a woman of the Vaishya caste.(21) Even in the United Provinces a

(13) *Subbarayan*, 9 M. 9.
(14) *Gajjanand*, 2 L. 288; following *Maya Devi* v. *Ramchand*, (1916) P. L. R. 20, 31 I. C. 186.
(15) *Gajjanand*, 2 L. 288.
(16) *Ganga*, 19 Bom. L. R. 56, 39 I. C. 308, 18 Cr. L. J. 468.
(17) *Nandi*, 1 L. 440, (Sentence 3 months' simple imprisonment).
(18) *Nathu* v. *Gokal*, (1893) P. R. No. 57; *Pirthu Singh* v. *Bhola*, (1883) P. R. No. 29.
(19) *Ralla Ram* v. *Assaram*, (1890) P. R. 48.
(20) *Sahib Ditta* v. *Bela*, (1900) P. R. No. 50.
(21) *Khairu* v. *Fakirchand*, (1900) P. R. No. 57.

marriage beween a *Bania* male and a woman born of a Brahmin father and a *Bania* mother, who is recognized by the husband's caste as a *Bania*, has been held to be valid.[22] As a rule intercaste marriages amongst Shudras are quite customary, so that if such marriage is proved, its validity is presumed.[23]

5535. Under Hindu law marriage is a sacrament, and as such indissoluble, without the option of divorce in case of misconduct. And since Hindu men are permitted polygamy while women are strictly confined to monogamy, it follows that while women may be exposed to the risk of this offence, men are by their personal law exempt from its provisions. In this respect Mahomedans and the Asiatics generally share the same immunity, for polygamy is the law of the East as monogamy is the rule of Christendom. But since polyandry is a rare exception confined to narrow tracts it may be generally asserted that this is a section which applies to women of whatever race or religion, though its application to men depends upon his personal law.

Hindu Divorce.

5536. But this is a general statement, and as such it has necessary limitations. For India is a continent and not a country, and its inhabitants differ so much in their religious observances and special usages as to make a general statement regarding them somewhat misleading. For instance while it is undoubtedly the rule that the marriage tie is unseverable amongst the three higher classes, it is equally true that *Sudras*, such as Telis, Kunbis and the like do recognize the custom of divorce, called "*chorchutti*," which, in the eye of the caste, amounts to civil death of the parties, solemnized as such by the giving of what is called the *Marti Jiti* feast. Thus if A a *Sudra* married B, A has the option of divorcing B if she misconducts herself with another and whereupon he gives a feast to the caste in token of his being dead to her, while her paramour gives another feast to symbolize his marriage to her. But here while B by her misconduct might force A to divorce her she could not divorce A of her own free will.

In other words, the right of divorce is the right of the husband and not of the wife, so much so that even if a local custom should be otherwise, the Court will refuse to give effect to it as being opposed to the spirit of Hindu law. Such a case arose in Bombay where it was proved in the case of Talapda Koli caste inhabiting the district and neighourhood of Surat that a woman might leave her first husband whenever she chose and without assigning any reason and contract a second marriage during his lifetime and without his consent; but the Court held such custom opposed to the spirit of Hindu law, so that a second marriage contracted by a Hindu woman of this caste exposed her to the penalties of this section.[24] This view was reaffirmed in another case in which the accused's husband, being a leper, she proposed to remarry and referred the matter to her caste panchayat who declared her first marriage void and sanctioned her second marriage whereupon her former husband prosecuted her for this offence,

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(22) *Madan Gopal*, 34 A. 589.

(23) *Mahantawa* v. *Gangawa*, 33 B. 693 (697), following *Inderun* v. *Ramasamy*, 13 M. I. A. 141; *Fakirganda* v. *Gangi*, 22 B. 277.

(24) *Karsan Goja*, 2 B. H. C. R. 117.

of which she was convicted, the Court holding that her caste people had no authority to declare a marriage void, and that though the accused had acted in the *bona fide* belief that the consent of the caste made her second marriage valid, yet it only mitigated her offence but could not exculpate her.(25)

5537. But the latter finding cannot be readily acceded to. And as to the former, while it is true that the caste cannot create law, it could certainly declare a caste custom, and *error communis facit jus*. The weak point in the defence in the last case was an *ex parte* decision given by the caste to which the husband was no party. If he were present and received what he afterwards claimed his marriage expenses, then it would have been difficult to hold that the accused was still guilty. This was the distinguishing feature in the Madras case in which the Court upheld the decision of the caste given in the presence of both husband and wife, who declared that the parties had been divorced according to the caste usage. It was contended that a custom that dissolves a Hindu marriage must be regarded as immoral, but the Court was unable to fall in with that view and held that there was nothing immoral in a custom which did not ignore marriage as a legal institution, but provided a special mode for its dissolution. The fact that there was money payment did not make the custom immoral, and among the inferior castes similar customs are known to prevail.(1) The soundness of this view cannot be questioned even in Bombay,(2) where the Court has conceded to the husband the right of divorcing his wife for a sufficient reason, if such divorce is permitted by the caste. For instance, such divorce is permitted amongst Rajput Gujarats for the wife's incontinence.(3)

5538. Invalidity of Marriage Due to First Marriage.—This section does not punish for the error of contracting a void second marriage, but only when it is void by reason of its taking place during the life of the first spouse. This can only be the case where the first marriage was monogamous, which under the personal law of the parties precluded the possibility of a second valid marriage. In England it has been held that a marriage which is *voidable* merely, is sufficient to support an indictment for bigamy.(4) So a marriage by a minor in Ireland, without consent, which by the Irish Marriage Act was voidable only within a year, was held to support a conviction for bigamy if it was not avoided.(5) The same rule was held to apply to a marriage voidable for impotence of one of the parties.(6) A marriage is a subsisting marriage even after a decree *nisi* for its dissolution until it is dissolved by the decree absolute.(7)

(25) *Sombhu Raghu*, 1 B. 347; followed *per* West, J., in *Mathura Naikin* v. *Esu Naikin*, 4 B. 545 (569, 570); *Keshav* v. *Bai Gandi*, 39 B. 538; *Bai Ganga*, 19 Bom. L. R. 56, 39 I. C. 308.

(1) *Sankaralingam* v. *Subban Chetti* 17 M. 479 (480). To the same effect, *Tholasingam*, (1896) 1 Weir 568 (569); *Chamia* (*Mt.*), 7 C. L. R. 354; *Jukai* (*Mt.*) 19 C. 627; *Ramji Teli* v. *Ragho Teli*, 12 C. P. L. R. 19.

(2) Pinhey, J., explained want of consent on the part of the husband to be the gist of the ruling in *Government of Bombay* v. *Ganga*, 4 B. 330 (332).

(3) *Umi*, 6 B. 126.

(4) 3 Co. Inst. 88.

(5) *Jacobs*, 2 Mood. C. C. 140.

(6) *A* v. *B*, 27 L. R. Ir. 608.

(7) *Hulse* v. *Hulese*, L. R. 2 P. & D. 259.

The section requires that the second offence should be void by reason of the first, which must then be void or at least voidable. If it is void, there cannot of course be bigamy for the first marriage being a nullity is as good as if it had never taken place. It could not then be any "reason" for invalidating the second marriage. So Lord Hale said: "If a woman marry A, and in the lifetime of A marry B; and after the death of A, and whilst B is alive, she marry C, she cannot be indicted for bigamy in her marriage with C, because her marriage with B was a mere nullity."[8] So the marriage of an idiot or of a lunatic not in a lucid interval is void, because he is deemed in law incapable of entering into such a contract. As was observed by Brett, J., "A marriage is after all a contract, and like other contract, may be set aside for the same reason. So it may be dissolved if it was brought out by coercion, fear, fraud or undue influence."[9] But such marriage is not void but voidable, and, therefore, till it is set aside it will suffice to support a charge of bigamy. But this rule cannot be extended to a Hindu marriage which under Hindu law is a sacrament and indissoluble by whatever fraud it may have been compassed.

5539. Exceptions to Criminality.—Under English Law the charge for bigamy may be rebutted by (*i*) seven years' absence of the spouse or (*ii*) a *bona fide* belief in the spouse's death (*iii*) the dissolution of the first marriage. The section enacts the first and third exceptions and it will have to be seen whether in doing so it is intended to exclude the second exception. The first exception is a natural deduction from the section itself, for since this offence can only be committed so long as the first marriage is valid and subsisting, it follows that if it is legally dissolved by the decree of a Court of competent jurisdiction it can no longer stand in the way of the second marriage. This clause refers to a declaration made only by a Court of comptent jurisdiction from which it has been inferred that the Code does not recognize a similar declaration made by a caste panchayat, so that if a Hindu woman refers to her caste the question of the invalidity of her first marriage by reason of her husband's suffering from incurable leprosy, and the caste permit her to remarry declaring her first marriage null and void, such declaration would go for nothing since a caste punchayat is not "a Court of competent jurisdiction."

This view first taken by Melvill and Nanabhai Haridass, J. J.,[10] was evidently re-affirmed by West, J., who, however, said: "There is, perhaps, some room for doubt, whether, in framing the provisions of the Indian Penal Code as to offences relating to marriage, the conditions of life and the nature of the matrimonial relations amongst the lower castes, were very distinctly kept in view by the Indian Lgislature. But, in so far as the series of cases are instructive, the lesson they teach is that of the gradual subjugation of the sectional rules to the general law of the Hindu community."[11] But as to which it is sufficient to add that the section could have had no such object in view, and that at any rate in recognizing a judicial declaration as an exception it was more drawing on the corresponding rule of

(8) 1 Hale 693; *Wiltshire (Earl)*, 6 Q. B. D. 366.
(9) *Scott* v. *Sevright*, 15 P. D. 21 (24).
(10) *Sambhu Raghu*, 1 B. 347.
(11) *Mathura Naikin* v. *Esu Naikin*, 4 B. 545 (570).

the English law than suppressing any sectional rules of Hindu law. Indeed, that such was not its object may be easily proved by reference to the very clause to which reference was made by the High Court. For if divorce is customary the Court may validly declare the dissolution of marriage, though it has no power to decree a dissolution.[12]

5540. Such declaration presupposes a previous dissolution made in accordance with custom, so that all that the Court can do is to declare the dissolution as a fact though it has no power to create a new jural relation between the parties. So it has been held that while the Court has power to give effect to the decision of a panchayat if it is in accordance with Hindu law or the custom of the caste, it is not bound to recognize all panchayat decision as final. So a Hindu husband does not lose his marital rights by his continued desertion[13] or a mere deprivation of caste which may be temporary, so that if the *panchas* declare a marriage dissolved on that ground the Court will not give effect to such decision.[14] It has already been stated that Hindu law does not prohibit polygamy and that at any rate the prohibition is except under certain circumstances, merely directory and not imperative.[15] Consequently, polygamy can never be a reason for a valid dissolution of a Hindu marriage.

5541. On the other hand, under Mahomedan law marriage is a civil contract, and may at any moment be dissolved by the husband by pronouncing the formula. "I hereby divorce thee," or words to that effect three times in her presence,[16] or even in her absence,[17] if the declaration was intended by him to dissolve the marriage, and on such a divorce, the Court would be justified in granting a similar declaration, and on such a declaration being made the first exception should certainly be a bar to a prosecution for this offence.

In the case of Christians[18] and Parsis,[19] there can be no divorce except under a judicial decree of the Court passed under the Acts providing for it.

5542. Although the clause speaks of the decree of a Court of competent jurisdiction as alone being a sufficient exception, it is likely that a decree passed by a court of incompetent jurisdiction would be just as much a defence if the party acted upon it in good faith and without being aware of that defect.[20]

Clause 3.

5543. Absence of Seven Years.—Another exception here enacted is also borrowed from the English Law under which the present Statute excepts from its operation "any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have known by such person to

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(12) *Mathura (Mt.)* v. *Kalicharan*, 1 C. P. L. R. 18; *Bisheshur* v. *Matagholam*, 2 N. W. P. H. C. R. 300; *Kudomees Dasi* v. *Joteeram*, 3 C. 305.

(13) *Ganga*, 19 Bom. L. R. 56; 39 I. C. 308, 18 Cr. L. J. 468.

(14) *Bisheshur* v. *Matagholam*, 2 N. W. P. H. C. R. 300; *contra* in *Sinammal* v. *Administrator-General*, 8 M. 169.

(15) *Viraswami* v. *Appaswami*, 1 M. H. C. R. 375.

(16) *Hamid Ali* v. *Imtiazan*, 2 A. 71.

(17) *Sherif Saib* v. *Usnabibi*, 6 M. H. C. R. (Civ.) 452; *Vadake* v. *Odakel*, 3 M. 347.

(18) Act IV of 1869.

(19) Act XV of 1865.

(20) S. 79.

be living within that time."[21] This provision is based on antecedent law[22] and the general presumption which absence of this period creates under the following provision of the Indian Evidence Act:—

"108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

5544. As a married person is naturally a person who "would naturally have heard" of his partner, the fact that he does not hear of his existence for a period of seven years creates a presumption that the person is dead, though such a presumption may afterwards be rebutted. But it is a presumption which is natural and upon which most persons act. Consequently, the section declares it to be an exception; but subject to this condition that the real state of facts as to his absent spouse were communicated to the person with whom the second marriage is contracted. This proviso is an improvement on the English rule which does not enjoin the same *uberrima fides* as is here enacted. But under both laws the seven years' absence otherwise exculpates the accused though it may be proved that he had other means readily available to ascertain the truth which he did not avail himself of.[23] In other words, the presumption arising from the seven years' continuous absence, though not irrebuttable, is yet sufficient to negative criminality for this offence,[24] or to put it differently, proof of seven years' absence carries with it the presumption of the accused's previous spouse's death and consequently of his innocence, unless the prosecution then show that in spite of the lapse of those years the accused did in fact know—and not merely that he had the means of ascertaining—that his spouse was alive at some time during the seven years, failing which the accused is entitled to be acquitted.[25]

The fact that he had himself deserted his wife is immaterial for this purpose.[1] The accused's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and had never heard of the first wife, who was, however, shown to have been living seventeen miles from where the defendant resided. He was, however, a poor labourer, and this exception was held to exculpate him.[2] So where on the trial of a woman for bigamy, it appeared that her husband had been absent from her for more than seven years, and there was no evidence that at the time of her second marriage she knew that he was alive, but there was evidence that she had the means of acquiring knowledge of that fact, had she chosen to make use of them, it was held that the facts found, justified an acquittal.[3] But where the prisoner A was shown to have been married to his wife B in 1865, but there was no evidence of the pair having ever separated, or as to when, if they separated, they last saw each other, the Court held this exception inapplicable to

(21) 24 & 25 Vict., c. 100, s. 57.
(22) 1 Hale, 693; 4 Black, 164; 1 East. P. C. 466; *Cullen*, 9 C. & P. 681; *Jones*, C. & M. 614; *Briggs*, 26 L. J. M. C. 7.
(23) *Cullen*, 9 C. & P. 681; *Jones*, Carr. & M. 614; *Briggs*, 26 L. J. M. C. 7; *Curgerwen*, 35 L. J. M. C. 58; *Dane*, 1 F. & F. 328; *Cross*, 1 F. & F. 510; *Twyning*, 2 B. & Ald. 386.
(24) *Curgerwen*, L. R. 1 C. C. 1; *Heaton* 3 F. & F. 819.
(25) *Curgerwen*, L. R. 1 C. C. 1, followed in *Faulkes*, (1903) 19 T. L. R. 250.
(1) *Faulkes*, (1903) 19 T. L. R. 250.
(2) *Jones*, C. & Mar. 614.
(3) *Briggs*, Dears & B. 98.

support the prisoner's second marriage in 1882, the Court holding that there was proof of the existence of a state of things and no evidence of the cessation of that state of things, consequently the presumption was that the existing state continued. That presumption could only have been displaced by evidence, and since no evidence displacing it was forthcoming the prisoner was rightly convicted of this offence.(4)

5545. In order that this exception should avail the prisoner, it is then necessary for him to prove both (*i*) separation as well as (*ii*) continuous absence for at least seven years as also (*iii*) that the prisoner had not heard of such person as being alive within that time; in addition to which, this clause further requires proof of (*iv*) communication of these facts to the other party to the second marriage, *before* it is contracted. This exception merely creates a presumption in favour of the innocence of the accused, it cannot be used to establish his guilt. The prisoner married four women in succession as follows. In 1864 he married his first wife A. Four years later in 1868 he married B, while A was alive, for which he was convicted. He again married C in 1879, and in 1880 he married D, upon which he was again indicted. It was contended for the prisoner that he could not be convicted for his bigamous marriage with D, as his previous marriage to C was void by reason of the existence of B in 1868. But the prosecution contended that since the prisoner's convicton in 1868 only proved that his wife A was alive in 1868, but there was no presumption that a person alive in 1868 was still alive in 1879; on the other hand the presumption rather was that a person not heard of for seven years was dead,(5) but on a case reserved this contention was overruled, Lord Coleridge, C. J., holding that in a prosecution for this offence, there could be no presumption in favour of the discontinuance of life, that the presumption was in favour of its continuance, and that the question whether a person was dead at a given time so as to render a marriage valid, was a question of fact and not of law, and it was on the prosecution to prove all facts necessary to establish the guilt of the prisoner. "The prisoner was only bound to set up the life; it was for the prosecution to prove his guilt."(6) As Hawkins, J., put it: "If she (A) was alive, the prisoner was entitled to be acquitted; if she was dead, he was rightly convicted. There was proof that Ellen (A) was alive in 1868; there was presumption that her life continued. The only evidence to the contrary was that the prisoner presented himself as a bachelor to be married in 1879; whether that would have satisfied the jury that his former wife was then dead, was a question for them to decide, but it was not left to them for decision."(7) And the conviction was therefore quashed.

5546. It is thus evident that while the legislature sanctions a presumption that a person who has not been heard of for seven years is dead, it does not sanction a presumption of the converse proposition that when a person has been seen or heard of within seven years, he must be presumed to be still living. Indeed, the question whether a person was living at any given time, cannot be decided on any ficti-

(4) *Per* Coleridge, C. J., in *Jones*, 11 Q. B. D. 118 (119).
(5) *Lumley*, L. R. 1 C. C. R. 196 (199).
(6) *Wiltshire*, 6 Q. B. D. 366 (369).
(7) *Ib.*, p. 370.

tious rules of law. It is a question of fact, and like any other fact must be established by evidence.

5547. Bona Fide Belief in Death: Whether a Defence.—Again, although the clause presumes innocence from the fact of the spouse's continuous absence for seven years, it does not expressly admit of the other exception permitted in English Law, namely, *bona fide* belief in the former spouse's death at the time of the second marriage. The omission to this reference has led to the divergence of views between the English and Indian cases, for while it has been held in England that even though the seven years have not elapsed before the second marriage, yet if the prisoner, at the time of the second marriage, in good faith and on reasonable grounds, believed that his first wife was dead, he ought to be acquitted,[8] the contrary has been laid down in Bombay in a case[9] already commented upon (§§ 574, 575). In that view in spite of the omission in this section to except a bigamous marriage contracted in *bona fide* belief of the former spouse's death, there is the authority of the general exceptions in favour of the view that a person cannot be convicted of this offence if the second marriage was contracted in the *bona fide* belief of the former spouse's death, even though there may not have been evidence of the spouse's absence for seven years. But in such a case, good faith at least requires that the person contracting the second marriage informs his would-be partner of the fact of his first marriage and of all the circumstances connected therewith.[10]

Again, there cannot be good faith without some inquiry where inquiry would have been the means of eliciting the truth. Consequently, the combined effect of the general exception here foreshadowed and the special exception enacted in the section would appear to be this that if the spouse was continuously absent for a period of seven years and had not been heard of, the other party is free to re-marry, provided that that fact is communicated to his intended partner before their marriage. In that case, the requirement of law is satisfied without inquiry or proof of *bona fide* belief that the other party had in fact died.[11] But where the seven years' continuous absence is not complete, the party may still rely on the general exception, but in that case he must show not only the absence but the fact that he had made inquiries and had reasonable grounds for believing the other party to be dead.

Mistaken Belief.

5548. A mistake of fact is a good defence to a charge under this section. A Mahomedan girl was married by her grand-father to one B. On attaining her puberty she exercised her option and obtained an *ex parte* decree cancelling her marriage. But this decree was afterwards set aside and later on her suit withdrawn. She then went through the form of marriage with one K who was charged under section 494-114 but on his showing that

(8) *Tolson*, 23 Q. B. D. 168; overruling *contra* in *Gibbons*, 12 Cox 237; *Bennett*, 14 Cox 45; following *Turner*, 9 Cox 145; *Horton*, 11 Cox 670; *Moore*, 13 Cox 544; followed in *Karim Baksh* (1918) P. W. R. 31, 46 I. C. 40, 19 Cr. L. J. 680.

(9) *Sambhu* 1 B. 347.

(10) *Enai Bibi*, 4 W. R. 25.

(11) *Muhammad Nissa* (*Mt.*), (1900) P. R. 1.

he had married on the faith of the *ex parte* decree the Court quashed his conviction.(12)

Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.

495. Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Session. Non-cog. (s. 198, Cr. P. C.,) Warrant. Bailable. Not comp.

Synopsis.

(1) *Analogous law* (5549).
(2) *Procedure and Practice* (5550).
(3) *Proof* (5551).
(4) *Principle* (5552).
(5) *Bigamy by Deceit* (5553-5556).
(6) *What is such Concealment* (5555).

5549. Analogous Law.—This offence is the aggravated form of bigamy punishable under the last section, the circumstance of aggravation being the concealment of fact of the previous marriage to the person with whom the second marriage is contracted. The disclosure of this fact is insisted on in the preceding section, and the draftsmen regarded its nondisclosure as a special point of aggravation, which they explained in the following words: "The act which, in the English Law, is designated as bigamy is always an immoral act. But it may be one of the most serious crimes that can be committed. It may be attended with circumstances which may excuse, though they cannot justify it.

"The married man who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife, but in reality his concubine, and the mother of an illegitimate issue, is guilty of one of the most cruel frauds that can be conceived. Such a man we could punish with exemplary severity.

"But suppose that a person arrives from England, and pays attentions to one of his country woman at Calcutta. She refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married she shall be an outcast from society, that nobody in India knows that he has a wife, that he may very likely never fall in with his wife again, and that she is ready to take the risk. The lover accordingly agrees to go through the forms of marriage. It cannot be disputed that there is an immense difference between these two cases."(13) The last section then provides only for a case supposed

(12) S. 79; *Karim Baksh*, (1918) P. W. R. 31, 46 I. C. 40, 19 Cr. L. J. 680; *contra* in *Narantakath* v. *Parakkal*, 45 M. 986.

(13) Note Q, Reprint, pp. 171, 172.

in the last paragraph; the case of non-disclosure would have to be punished under this section.

5550. Procedure and Practice.—No Court shall take cognizance of this offence except upon a complaint made by some person aggrieved by such offence. The brother of the husband of the woman who committed bigamy is not a person so aggrieved[14] (§§ 5485-5487). This offence is non-congnizable, but warrant should ordinarily issue in the first instance. It is bailable but non-compoundable, and is exclusively triable by the Court of Session. For other points of practice calling for notice reference should be made to the last section (§§ 5485-5487).

5551. Proof.—The points requiring proof are the same as those required to prove an offence under section 494 (§5488), in addition to which, prove:

(5) That the accused had before his second marriage concealed from his spouse the fact of his previous marriage.

5552. Principle.—The sole point of difference between this section and the next is the concealment of the accused's previous marriage from the person with whom he goes through the form of the second marriage. It is not necessary that the concealment should have affected the consent given to the second marriage, nor, indeed, is its operation upon the mind of the other at all material, the only point material being that he had concealed the fact of his previous marriage. But this fact could not be lost sight of in awarding punishment. For if the non-disclosure was immaterial it may have been equally unintentional, and if unintentional there was no intention to deceive, and deception is its underlying principle.

5553. Bigamy by Deceit.—This section merely prescribes an enhanced punishment for the offence of bigamy when it is committed by a person who conceals from the other person with whom he contracts the second marriage the fact of his previous marriage. Now since the offence is in essence bigamy it follows that all the elements necessary to constitute that offence must be present here also. For instance, of the two marriages, the previous marriage must have been a valid marriage, and a marriage which was known to be subsisting at the time of the second marriage. If, therefore, the previous marriage was invalid, or had been lawfully dissolved, its non-disclosure is wholly immaterial, for the second marriage being valid, there is no offence of bigamy, and except in a prosecution for bigamy the fact of such non-disclosure is immaterial.

5554. Again, the section punishes for a concealment of the fact of the former marriage, only when that marriage offers an impediment to the validity of the subsequent marriage. Consequently, a person belonging to a polygamous race, such as for instance, a Hindu or a Mahomedan would, ordinarily, be under no obligation to inform the fact of his previous marriage to his subsequent spouse, though in such a case he may incur other penalty for his non-disclosure. Suppose, for instance,

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(14) *Hanuman*, (1908) 11 O. C. 148.

a Mahomedan married man conceals not only the fact of his marriage, but also his caste, from a person in a place where he is unknown and where he contracts a Christian marriage with a Christian woman from whom he conceals both his religion, as well as his previous marriage. His second marriage is, of course, void, and he could not therefore be punished under this section, but it does not thence follow that he may not then be punished for cheating, or under the provisions of the next section.

What is Such Concealment?

5555. The question what amounts to the concealment of the fact of the former marriage is evidently a question of fact. For there may be as much concealment by making a misleading statement as by making no statement at all. For instance, A may say to B to whom he is engaged to contract a second marriage: "I was married to C but I am now a widower;" the fact being that C was still alive, though A had separated from her, and in fact C had not been heard of for seven years. Could A be convicted of this offence? It is clear that his liability under the last section depends upon whether this statement is sufficient to bring his case within the exception to that section. But if it is not, then he may be convicted under that section, though he could not be under this section because he had not concealed the fact of his previous marriage, and it is all that is necessary to save his case from this penalty. In other words, this section must be restricted only to cases where there has been no mention made at all of the fact of the previous marriage, the last section alone being applicable to other cases where that fact is mentioned but explained away.

5556. Again the criminality of the act necessarily admits of degree. For instance, there is on the one hand, the person who knowing of the averseness of the other to marry him if the fact of his previous marriage were known, conceals that fact and so compasses the ruin of the person for whom marriage was merely a trap; while on the other hand, there is a child of tender years who is made to go through a second marriage by her guardian, neither of whom informs the husband of the first marriage, in which case she could not be punished under this section. This was the view of Parsons and Ranade, JJ., in a case in which the accused, who was a child of ten, was remarried to the prosecutor by her mother during the lifetime of her first husband, upon which she was convicted under this section, but the Court quashed her conviction on the ground that she had not attained sufficient maturity of understanding to judge of the nature and consequence of her conduct on the occasion of her second marriage[15] (§§ 746-749). The question whether the gravity of this offence depended upon the length of separation from the husband, was considered in a case in which the accused remarried on her husband having absented himself for sixteen months, whereupon she was convicted under this section by Loch and Kemp, JJ., though Glover, J., was in favour of indulgence.[16] Here the prisoner was the wife of a tea garden coolie, who used to absent himself on duty for long periods. During one such absence she contracted a second marriage. She appears to have acted on a

(15) S. 83; *Godi*, (1896) B. U. C. 876. (16) *Enai Bibi*, 4 W. R. 25.

casual report that her husband was dead, but she took no steps to ascertain the truth of this report, nor did she believe it, for she neither broke her bangles nor performed the other obsequial rites customary in her caste. At any rate her second marriage was not contracted in the *bona fide* belief of the death of her first husband, and as she had failed to inform her second husband of her previous marriage, the Court convicted her under this section, and thought it to be no case for mercy.(17)

Marriage-ceremony fraudulently gone through without lawful marriage.

496. Whoever dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

[*Dishonestly*—s. 24. *Fraudulently*—s. 25.]

Synopsis.

(1) *Analogous Law* (5557-5558).
(2) *Section* 493 *Distinguished* (5558).
(3) *Procedure and Practice* (5559-5560).
(4) *Proof* (5561).
(5) *Form of Charge* (5562).
(6) *Principle* (5563).
(7) *Fraudulent Mock-marriage* (5564-5567).
(8) *Not Lawfully Married* (5565).
(9) *Local Amendment* (5567).

5557. Analogous Law.—This section punishes the offence of contracting a mock-marriage, with the object of achieving a dishonest or fraudulent purpose. The essence of the offence is deception, whether of the other party to the marriage or a third person. The section is somewhat widely worded, but it is not to be construed so as to include offences otherwise expressly provided for. A person who contracts a bigamous marriage may become liable under this section, but bigamy is punishable otherwise and it is not contemplated here. The essence of the offence here is that the marriage-ceremony should be fraudulently gone through and that there should be no lawful marriage. The parties to the marriage, or at least one of the parties to the marriage must have knowledge that there is no marriage,(18) and, of course, in that case only that party could be liable under this section.

Section 493 Distinguished.

5558. This section is somewhat akin to section 493, but from which it is easily distinguishable. In the first place that section only affects the man, while this section affects a person of either sex. That section again requires no form to symbolize marriage—a mere verbal deception that the woman is married is sufficient, though if the decep-

(17) *Ib.*, p. 26.

(18) *Sheikh Alimuddin* 10 C. W. N. 982; *Rama Soma*, (1873) B. U. C. 77.

tion may as well be by going through a form of marriage—but it is not necessary under that section, though it is the very essence of this offence. Again, while this offence is complete without cohabitation or the holding of a sexual intercourse on faith of the marriage, it is a *sine qua non* of the offence punishable under s. 493. These distinctions between the two offences are, however, more academic than practical—for a person who deceives another into a belief that he is married to her, will ordinarily go through some form of marriage, and thereupon he would ordinarily also cohabit or have sexual intercourse with her. The two sections require revisions, for they multiply offences creating a distinction without any noticeable difference.

5559. Procedure and Practice.—No Court shall take cognizance of an offence punishable under this section except upon a complaint made by some person aggrieved by such offence. For what persons are so aggrieved reference must be made to ss. 494 and 498 (§§ 5486-5487). This offence is, therefore, non-cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable and is exclusively triable by the Court of Session.

5560. A person who merely allows another to go through the form of a mock-marriage in his house cannot be said to abet the commission of this offence, such a person may be said to facilitate the commission of this offence within the meaning of section 120, but this section is clearly inapplicable inasmuch it was not his duty to give notice of the intended marriage or to put a stop to it.[19]

5561. Proof.—The points requiring proof are:—

(1) That accused went through the form of marriage.

(2) That he was then aware that it did not bind him.

(3) That he went through the form of marriage dishonestly or fraudulently.

5562. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of—at——you dishonestly (*or* fraudulently) went through the ceremony of being married to A B, knowing that you were not thereby lawfully married, and that you thereby committed an offence punishable under section 496 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court.)

"And I hereby direct that you be tried by the said Court on the said charge."

5563. Principle.—This section is really enacted to meet a case which is neither bigamy nor an offence punishable under s. 493. All the same it is an abuse of the holy state of matrimony for the purpose

(19) *Kundun*, (1864) W. R. 13.

of dishonesty and fraud, and therefore deemed an offence of the same gravity as bigamy. But even here the question must naturally depend upon the nature of the dishonesty and fraud for if the ceremony was gone through merely for the purpose of keeping appearances, it will constitute no offence, though it was in a sense intended to be a fraud upon society. This was, however, not the purpose of the section, for the authors were aware of this form of deceit and regarded it venial unless it amounted to bigamy. For as they put it: "Suppose that a person arrives from England, and pays attentions to one of his countrywoman at Calcutta, she refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married she shall be an outcaste from society, that nobody in India knows that he has a wife, that he may very likely never fall in with his wife again, and that she is ready to take the risk. The lover accordingly agrees to go through the form of marriage."[20] Here the husband was clearly guilty of bigamy, and he may even be guilty of this offence, if the imposition intended on society could be held to be a fraud upon it. But this is not the sense in which that term has been used here. It is rather used in the narrower sense in which it is defined in section 25 (§§ 258-263).

5564. Fraudulent Mock-marriage.—The mischief which this section is intended to reach is that which debases the sanctity of the marriage oath for the purpose of dishonesty or fraud. Ordinarily, such deception would be practised upon an innocent person who is induced under the make-believe of a marriage to establish conjugal relationship. But the fraud may be collateral to the marriage and both parties may be privy to it; as in the case where a legacy is payable to A on her marriage to B, to which both A and B are averse, but who go through a form to satisfy the executor that they are duly married, which they are not, and whereupon A recovers the legacy payable to her. So a person may go through the form of marriage with an heiress with the single purpose of robbing her, in which case he would be guilty of this offence if the ceremony he goes through has not had the effect of lawfully marrying them which he knew.

Not Lawfully Married.

5565. The phrase "knowing that he is not lawfully married" rather points to a form of ceremony which is insufficient to constitute marriage. It does not apply to a case where the form was right, though the marriage was void or voidable owing to a personal defect or disqualification in either of the contracting parties. In such a case a person may be guilty of bigamy, but he could not be punished for this offence. This section rather applies to a case when there is only a show of marriage for some ulterior and fraudulent purpose. It has application rather to a marriage which is left incomplete owing to the omission of a necessary form,[21] than to a marriage which so far as the form went was complete, but which was rendered void owing to the fact that the parties were within the prohibited degree of consanguinity or that the wife had been already married to another.[22] But it is

(20) Note Q, Reprint, p. 171.
(21) *Sheikh Alimuddin*, 10 C. W. N. 982.
(22) *Roma Sona*, (1873) B. U. C. 77.

apprehended that this section should equally apply to a case in which a party adopts on purpose a wrong form so as to get out of the responsibility of a marriage, as where a Mahomedan represents himself to be a Christian and thereby induces Christian parents to give him their Christian daughter in marriage which is solemnized in Church. So again, the section should equally apply to a *sudra* passing himself off as a *kulin* Brahmin and thereby obtaining in marriage a daughter and rich dowry from a zeminder, in which case the form may be correct, but he would be nevertheless guilty of this offence, because he knew that it was insufficient to constitute his legal marriage and there was the superadded fraud which is the gist of crime.

5566. As was, indeed, remarked by the draftsman: "We do not at present propose any law for punishing a person who, without practising any deception, or intending any fraud, goes through the forms of a marriage which he knows to be invalid. The difficulty of framing such a law in this country is great. To make all classes subject to one law would, evidently, be impossible. If the law be made dependent on the race, birth place or religion of the offender, endless perplexity would arise. Races are mixed, religion may be changed or dissembled. An East Indian, half English, half Asiatic by blood, may call himself a Mahomedan or a Hindu; and there exists no test by which he can be convicted of deception. We by no means intend to express an opinion that these difficulties may not be got over. But we are satisfied that this part of the penal law cannot be brought to perfection, till the law of marriage and divorce has been thoroughly revised."(23)

Local Amendment.

5567. Under this section the woman, though a *particeps criminis* is exempted from punishment for reasons which the Law Commissioners considered sufficient.(24) But this exemption has had to be withdrawn in the Punjab Frontier districts,(25) the North-West Frontier Province(1) and Baluchistan.

Adultery.

497. Whoever has sexual intercouse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Session. Pres. Mag. or Mag. of 1st class. Non-cog. (S. 198, Cr. P. C.). Warrant. Bailable. Comp.

[*Reason to believe*—s. 26. *Rape*—s. 375.]

(23) Note Q, Reprint, pp. 172, 173.

(24) 2nd Rep., s. 355; cited s. 497, *post*.

(25) By rule No. 1 of the Frontier Rules of 5th January 1872, which, however, is not retrospective—*Khana*, (1872) P. R. No. 10. Nor can solitary punishment be awarded to the adulteress, inasmuch as she is punished under the Regulation and not the Code; *Manawar*, (1875) P. R. No. 4; but the jurisdiction of the Court trying her is as in the case of the male accused—*Rassul*, (1876) P. R. No. 18; *Halim*, (1881) P. R. No. 34; the local Court may try a person even though her husband was temporarily quartered there; *Kharak Singh*, (1881) P. R. No. 36.

(1) Frontier Crimes Regulation (III of 1901).

Synopsis.

(1) *Analogous Law* (5568-5570).
(2) *Procedure and Practice* (5571-5578).
(3) *Offence Continuing* (5574).
(4) *Who may Complain* (5575).
(5) *No Conviction Without Complaint* (5576).
(6) *Proof* (5579).
(7) *Charge* (5580).
(8) *Principle* (5581).
(9) *What is Adultery* (5582-5593).
(10) *There must be Sexual Intercourse* (5582-5584).
(11) *Woman must be Married* (5585).
(12) *Meaning of Marriage* (5586-5587).
(13) *Knowledge and Reasonable Belief Essential* (5588-5589).
(14) *Consent or Connivance of the Husband* (5590).
(15) *What is Connivance* (5591-5595).
(16) *Condonation of Adultery* (5596).

5568. Analogous Law.—This section marks a noticeable departure from the English Law, under which adultery is not an offence. The question was considered and dismissed by the first Law Commissioners with the following words:—

"The following positions we consider as fully established: *First*, that the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; *secondly*, that scarcely any native of the higher classes ever has recourse to the Courts of law in a case of adultery for redress against either his wife or her gallant; *thirdly*, that the husbands who have recourse in cases of adultery to the Courts of law are generally poor men, whose wives have run away; that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement; that they consider their wives as useful members of their small households; that they generally complain, not of the wound given to their affections, nor of the stain on their honour, but of the loss of a menial whom they cannot easily replace, and that, generally, their principal object is that the woman may be sent back. The fiction by which seduction is made the subject of an action in the English Courts is, it seems, the real gist of most proceedings for adultery in the mofussil. The essence of the injury is considered by the sufferer as lying in the *'per quod servitium amisit.*" Where the complainant does not ask to have his wife again, he generally demands to be reimbursed for the expenses of his marriage.

"These things being established, it seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes, those whom neither the existing punishment, nor any punishment which we should feel ourselves justified in proposing, will satisfy and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all; those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil injury.

"Some who admit that the Penal law now existing on this subject is in practice of little or no use, yet think that the Code ought to contain a provision against adultery; they think that such a provision though inefficacious for the repressing of vice, would be creditable to the Indian Government, and that, by omitting such a provision, we should give a sanction to immorality. They say, and we believe with truth, that the higher class of natives consider the existing Penal law on the subject as far too lenient, and are unable to understand on what principle adultery is treated with more tenderness than forgery or perjury.

"These arguments have not satisfied us that adultery ought to be made punishable by law. We cannot admit that a Penal Code is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that,

because an act is not punished at all, it follows that the legislature considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable The man who treats a generous benefactor with gross ingratitude and insolence deserves more severe reprehension than the man who aims a blow in a passion, or breaks a widow in a frolic, yet we have punishments for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow-creature from death may be a far worse man than the starving wretch who snatches and devours the rice; yet we punish the latter for theft, and we do not punish the former for hard-heartedness.

"That some classes of the natives of India disapprove of the lenity with which adultery is now punished we fully believe, but, this, in our opinion, is a strong argument against punishing adultery at all. There are only two courses which, in our opinion, can properly be followed with respect to this and other great immoralities; they ought to be punished very severely, or they ought not to be punished at all. The circumstances that they are left altogether unpunished does not prove that the legislature does not regard them with disapprobation; but when they are made punishable, the degree of severity of the punishment will always be considered as indicating the degree of disapprobation with which the legislature regards them. We have no doubt that the natives would be far less shocked by the total silence of the Penal law touching adultery than by seeing an adulteror sent to *prison* for a few months while a coiner is imprisoned for fourteen years. An example will illustrate our meaning. We have determined not to make it penal in a wealthy man to let a fellow creature, whose life he could save by disbursing a few pice, die at his feet of hunger. No rational person, we are convinced, will suppose, because we have framed the law thus, that we do not hold such inhumanity in detestation; but if we had proposed to punish such inhumanity with a fine not exceeding fifty rupees, we should have offered a gross outrage to the feelings of mankind; that we do not think a certain act a proper subject for penal legislation, does not prove that we do not think that act a great crime; but, that thinking it a proper subject for penal legislation we purpose to visit it with a slight penalty, does seem to indicate that we do not think it a great crime. Nobody proposes that adultery should be punished with a severity at all proportioned to the misery which it produces in cases where there is strong affection and a quick sensibility to family honor. We apprehend that among the higher classes in this country nothing short of death would be considered as an expiation for such a wrong. In such a state of society, we think it far better that the law should inflict no punishment than that it should inflict a punishment which should be regarded as absurdly and immorally lenient.

"There is yet another consideration which we cannot wholly leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of woman and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is, unhappily, very different from that of the women of England and France, they are married while still children; they are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law, an evil so deeply-rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory, and we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract comes just, reasonable and mutually beneficial."(2)

(2) Note Q, Reprint, pp. 173, 174.

5569. In thus regulating this offence to the domain of civil law the authors were making a departure from the pre-existing law under which it was treated and punished as a crime.(3) It was ordained an offence of high degree in the institutes of Manu,(4) and it was held penal under the Code Penal of France, and indeed of all the European countries with the exception of England; and some of the most celebrated English lawyers have considered its omission there as a defect. These facts weighed with the second Law Commissioners who recommended its insertion in the Code subject, however, to certain qualifications which they justified thus:—

"355. While we think that the offence of adultery ought to be omitted from the Code, we would limit its cognizance to adultery commited with a married woman, and considering that there is much weight in the last remark in Note Q. regarding the condition of the woman of this country, in deference to it we would render the male offender alone liable to punishment. We would, however, put the parties accused of adultery on trial together, and empower the Court in the event of their conviction, to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine."(5)

5570. These recommendations were mainly given effect to by the Legislature with the result that adultery is now constituted a crime though in a special and narrow sense.(6)

5571. Procedure and Practice.—No court shall take cognizance of this offence except upon a complaint made by the husband of the woman, or, in his absence, made with the leave of the Court by some person who had care of such woman on his behalf at the time when such offence was committed.(7) Provided that where such husband is a minor under the age of 18, or is an idiot or lunatic, or is from sickness or infirmity unable to make complaint, some other person may, with the leave of the Court, make a complaint on his behalf.(8) The offence is non-cognizable, and warrant should ordinarily issue in the first instance. It is both bailable and compoundable, and is triable by the Court of Session, Presidency Magistrate or Magistrate of the first class.

5572. Now though the offence is compoundable, still it is a rule applicable to all compoundable cases that no composition of such offences is allowed after the accused has been committed for trial or after he has been convicted and an appeal is pending, without the leave of the Court to which he is committed or before whom the appeal is to be heard.(9) It has accordingly been held that where the accused is committed to the Court

(3) Reg. XVII of 1817; Reg. VII of 1819; Act II of 1845.

(4) The punishment prescribed by Manu is death by torture of the offenders: Code, ch. viii, vv. 371-372: "Should a wife proud of her family and the great qualities of her kinsmen, actually violate the duty, which she owes to her Lord, let the king condemn her to be devoured by dogs in a place much frequented; [v. 372] And let him place the adulterer on an iron bed well heated under which the executioners shall throw logs continually, till the sinful wretch be there burnt to death." This rigour of the early law was however, relaxed in the later Institutes of *Vishnu* in which the offenders could be let off with a fine (Bishnu, ch. v, vv. 40-42).

(5) 2nd Rep., s. 355.

(6) Literally, the term means sexual connection by a married person with one who is not his or her wife or husband; from Lat. *adultero—ad*, to, and *alter*, other.

(7) S. 199, Cr. P. C.

(8) S. 199, proviso added by Act XVIII of 1923.

(9) S. 345 (5), Cr. P. C.

of Sessions on a charge of adultery and that Court permits the withdrawal of the charge on the husband expressing his unwillingness to prosecute the case, it is not a matter for interference in revision.[10] But the Magistrate has no jurisdiction to permit withdrawal of a complaint after the case has once been committed by him, and if, therefore, he permits such a withdrawal it is an act, by which the Sessions Judge is not bound, but if the latter erroneously acquit the accused acting upon such a compromise, the High Court refused to set aside the acquittal when the husband was not desirous of pressing his complaint.[11] The husband is, in such cases, the *dominus litis* and though after a committal or conviction he has not the absolute power of withdrawal which he possessed before those stages are reached, still the Court seldom refuse permission unless the offence is one in which the withdrawal of the husband would entail acquittal of the accused of another charge for which the Courts had power to punish him independently of the husband's volition. Such may be the case where the accused stands charged for house-breaking with intent to commit adultery[12] (s. 457).

5573. But in a case presenting no such circumstance of aggravation the husband is ordinarily left to prosecute the case as far and offering such evidence as he chooses. So where the husband charged the accused under this and the next section but refused to examine his wife or to adduce other evidence to prove the fact of his marriage, whereupon the Magistrate discharged the accused, which order was however set aside in revision by the Session Judge who ordered a retrial and examination of the wife, but this order was again set aside by Prinsep and O'Kinealy, JJ., who considered the order for retrial erroneous in view of the fact that there had not been any improper exclusion of evidence and the Sessions Judge had not exercised a proper discretion in ordering a retrial *suo motu*.[13]

Offence Continuing.

5574. Adultery is a continuing offence, so that a person once convicted of the offence may again and again be convicted of it if he is guilty of holding sexual intercourse after his first conviction. Of course, his conviction for one act does not justify his repeating the very act for which he had been punished.[14] His subsequent acts are rather in the nature of aggravations calling for more condign punishment.

Who may Complain ?

5575. The right to complain of an offence under this section is limited to the husband, the wife and to persons specified in s. 199 of the Code of Criminal Procedure (§ 5571). In the first place the person solely entitled to complain of the act is the husband for it is an offence against his marital right. But his complaint is necessary only to set the law in motion, so that if the Court is once seized of the case upon his complaint, his death does not necessarily have the effect of putting an end to the prosecution, though it is then desirable that such charges should be withdrawn by the

(10) *Jamni*, 5 B. H. C. R., 27 *note*; followed in *Ramlo*, 5 B. H. C. R. 27.

(11) *Gumbheer*, 2 N. W. P. H. C. R. 234; to the same effect, *Mohun*, (1871) P. R. No. 8.

(12) 5 M. H. C. R. (App.) 5.

(13) *Chunder Nath Ghose* v. *Nundolal*, 11 C. 81.

(14) *Emaji*, (1880) B. U. C. 150.

prosecution.[15] The existence of this provision is intended to prevent unnecessary intrusion into another man's privacy. A husband who has been living apart from his wife, is not precluded from complaining of this offence; nor can his complaint be dismissed on that account.[16]

No Conviction Without Complaint.

5576. The special provision of law requiring a complaint as a condition precedent to the Court possessing jurisdiction to take cognizance of offences under this and the next section, has resulted in some diversity of views as to the meaning of s. 238 (3) of the Procedure Code which precludes the Court from convicting an offender under this and the next section, even though he be found to have committed those offences "when no complaint has been made as required by that section" *i.e.*, s. 199.[17] It has been held that the word "complaint" in this section means a complaint to a Magistrate as defined in s. 4 (*h*) of the Procedure Code and does not include one to the Police.[18] The want of such complaint cannot be made good by his complaint of any other offence, *e.g.*, s. 366,[19] or by his evidence as a prosecution witness on a charge of rape against the seducer of his wife,[20] unless he has expressed a desire that the offender should be punished even if found guilty of ss. 497 or 498.[21] On the other hand, the fact that the commission of that offence was involved in the graver offences, does not preclude the trial of the accused for those offences without such complaint, but if the only offence proved is that punishable under this or the next section then the court cannot convict the offender of it without the complaint of the persons mentioned in s. 199 of the Procedure Code. Of course, if the husband has complained, the fact that he has exaggerated the facts or failed to mention this offence as appropriate to his case, would not prevent the court from convicting of it, provided it is satisfied that the husband's complaint was inclusive of the offence.[22]

5577. The view of the Punjab Chief Court appears to be that if the husband complains of this offence, the Court has no jurisdiction to convict the accused of the offence described in the next section,[23] but later cases recognize the fallacy of this view,[24] for whether the accused be guilty of adultery or abduction or of both, the only impediment in the way of the Court to taking cognizance of the case is that offered by section 199 of the Procedure Code, and it stands no longer in the way as soon as the husband has complained. But complained of what? The accused may be guilty of adultery and the husband may merely complain of house-trespass and theft, being from a feeling of delicacy or shame reluctant to complain of the real offence of which he knows the accused to be guilty. Is the Magistrate then empowered to convict the accused of adultery or abduction if that be the offence disclosed by the evidence. The question has

(15) *Anon*, 4 M. H. C. R. (App.) 55.
(16) *Maung Kala* v. *Nga Kin Mya*, 38 I. C. (R.) 433, 18 Cr. L. J. 321.
(17) S. 238 (3), Cr. P. C.
(18) *Tara Prasad Laha*, 30 C. 910 F. B.; *Kailas Kumari*, *ib.*, 285; *Jagobundoo*, *ib.*, 415; *Kallu*, 5 A. 233.
(19) *Kallu*, 5 A. 233; followed in *Bangaru*, 27 M. 61; *Arunachalam*, 45 M. L. J. 543, 74 I. C. 949, 24 Cr. L. J. 837.
(20) *Chemoa Gora*, 29 C. 415; following *Kallu*, 5 A. 233.
(21) *Bhawani Dutt*, 38 A. 276.
(22) *Jatea Sheikh*, 20 C. 483; *Alli*, 23 A. 209; *Brahama Dat*, 24 O. C. 232, 64 I. C. 134, 22 Cr. L. J. 442.
(23) *Sher Singh*, (1873) P. R. No. 18.
(24) *Nihal Singh*, (1874) P. R. No. 17; *Rahmatulla*, (1883) P. R. No. 10; *Faiz Ahmed*, (1879) P. R. No. 5; *Hashmat*, (1882) P. R. No. 19; *Piran Ditta*, (1895) P. R. No. 23.

arisen in connection with cases in which the accused were prosecuted for house-trespass, house-breaking and other similar offences in which the conflict of views between the several Courts has been already noticed (§§ 4947-4954).

5578. The legality of conviction in such cases has been affirmed in the Punjab in several cases which are instructive. So where the prosecutor complained to a Magistrate under s. 371 (habitually dealing in slaves) but his statement of facts in the complaint clearly indicated a case under section 498, his conviction under that section was justified by the Court, who observed: "All that a complainant has to do is to state to the Magistrate the facts upon which he relies, and it is for the Magistrate to decide whether any and what offence has been committed. If the facts, as stated, disclose an offence under section 498 of the Penal Code, the Magistrate cannot act except upon the complaint of the husband, or of some one having charge of the wife on behalf of the husband, but it is quite sufficient for the husband to state the true facts in his own language, and it is then for the Magistrate to apply the law to those facts."(25) But in another case the husband complained of abduction under s. 498 and the Magistrate convicted the accused of bigamy, but it was held that he was not justified in convicting the accused of a charge of which the husband had not complained(1) though in another case a complaint for bigamy was held to justify the accused's conviction for abduction.(2) And so a charge of rape was held to justify a conviction for adultery,(3) and a complaint of abduction a conviction for adultery.(4) In any case the complaint must be made to a Magistrate, for a report made to the police is not a complaint sufficient to confer on the Magistrate jurisdiction to take cognizance of the case.(5)

5579. Proof.—The points requiring proof are:—

(1) That the accused had sexual intercourse with a woman.

(2) That such woman was married.(6)

(3) That the accused knew or had reason to believe it.

(4) That the connection was held without the consent or connivance of her husband.(7)

(5) That the sexual connection so held does not amount to rape.

5580. Charge.—A charge of adultery alleging commission of offences between two dates is legal where it is impossible, in the circumstances of the case, to assign particular dates on which sexual intercourse took place.(8) The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the———day of———at———you committed adultery by having sexual intercourse with A B, the lawful wife of C D,

(25) *Piran Ditta*, (1895) P. R. No. 23.
(1) *Faiz Ahmed*, (1879) P. R. No. 5.
(2) *Hashmat*, (1882) P. R. No. 19.
(3) *Rahmatulla*, (1883) P. R. No. 10.
(4) *Nihal Singh*, (1874) P. R. No. 17.
(5) *Jit Mal*, (1888) P. R. No. 4 *Narain Singh*, (1888) P. R. No. 25.

(6) It must be proved by independent evidence; *Bahu Dhondi*, 17 Bom. L. R. 75, 27 I. C. 837, 16 Cr. L. J. 213; *Gopal*, (1925) R. 328.

(7) Acquiescence *post* and *post facto* sufficient; *Munir*, 91 I. C. 533, (1926) A. 189.

(8) *Bhola Nath*, 51 C. 488.

whom you knew (*or* had reason to believe) to be the wife of C D, without the consent or connivance of the said C D, and that you thereby committed an offence punishable under section 497 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5581. Principle.—This section defines the offence of adultery in a special narrow sense, as having carnal knowledge of a married woman with knowledge or reasonable belief that the woman was married and without the consent or connivance of her husband. The offence can only be committed by man, the woman being exempt from punishment as an abettor, and of course as an adulteress. But the man may be married or unmarried, though the woman he ravishes must be married, for if she is unmarried he commits no offence by the mere fact of having sexual intercourse with her. The offence is thus held punishable not because of the connection had with woman, but for the collateral purpose of preserving the peace and sanctity of family life.

5582. What is Adultery?—As has been observed before, the offence designated as adultery here consists in having carnal knowledge of a married woman with knowledge of that fact, without the consent or connivance of her husband. The section, of course, assumes that the intercourse was had with the consent of the wife, for otherwise the offence would be rape and not merely adultery. In adultery then the woman is necessarily the abettor, and but for the saving clause in her favour she would have been equally liable for the act as a co-accused (§§ 1023, 1024). The criminality of the act is defined to lie in having sexual intercourse with a married woman. Under s. 376, penetration is held to be sufficient to constitute the sexual intercourse necessary to the offence of rape,[9] and it is apprehended that penetration of the male organ is equally necessary to constitute the sexual intercourse necessary to this offence.[10] But without penetration there may be an attempt, or it may even fall short of it.

(1) There must be Sexual Intercourse.

So where the wife went over to the shop of the accused to have sexual intercourse, but was at once followed and entrapped before she could have connection, her act was held not to go beyond the mere stage of preparation.[11] In another case the accused was discovered with a married woman in a room but before he could hold sexual connection with her, her husband surprised them both, whereupon the accused was convicted of an attempt to commit this offence, but the conviction was quashed on the ground that the act was not sufficiently proximate to the commission of the offence to constitute an attempt.[12] This was also the view of the Madras Court in which Shephard, J., said: "Adultery being an act which requires the consent of both the parties, it appears to me that for a man to be guilty of an attempt it is not sufficient that he was found in a place

(9) S. 376, Expl.

(10) *Madhub Chunder Giri*, 21 W. R. 13.

(11) *Paira Ram*, (1902) P. R. No. 25.

(12) *Ghulam Mahomed*, (1879) P. R. No. 13, followed in *Paira Ram*, (1902) P. R. No. 25.

in which adultery might have been committed, and that he was minded to commit it. Because he was so minded and had entered the woman's room it does not necessarily follow that, but for the interruption, the offence would have been consummated.(13)"

5583. But this must not be understood to suggest that a person cannot be convicted of this offence unless he is surprised *flagrante delicto*. Indeed, this is neither necessary nor possible, the more so in view of the fact that the offence is by its nature committed in secrecy, and the woman is not likely to make a disclosure disadvantageous to herself. The fact must be inferred from the surrounding circumstances of cohabitation or the like.(14) For instance, if the accused trespasses into the apartment of a married woman and remains there sufficiently long to be able to consummate the act, the Court would be justified in holding that he had achieved the purpose of his visit for which he had both time and opportunity, and more could not be reasonably expected.(15)

As Markby, J., observed in a case: "Then it is said that familiarity, even culpable familiarity, does not constitute adultery, and that, even if full credence be given to the witnesses, they do not establish conclusively the fact of sexual intercourse. It is contended that actual sexual intercourse must be proved, and cannot be presumed, and that penetration ought to be proved. I have already said that this must be proved, but I know of no law in this country which requires any particular kind of proof of adultery, or which recognizes any different degrees of proof in different cases. Differences in the proof required of the same fact in different cases very often arise out of the circumstances of the case. You can hardly presume sexual intercourse in a charge of rape, because, by the hypothesis, one of the parties is doing her best to prevent the act. The hypothesis in adultery is precisely the reverse, and the evidence differs accordingly. I knew of no authority for saying that the evidence of sexual intercourse must be stronger on a charge of adultery than in a suit for a divorce. The best proof available must always be produced, but in both cases evidence of opportunities sought for and obtained, and of familiarities which point strongly to an inference of guilt, are sufficient to establish the fact of sexual intercourse.(16) To which Birch, J., added: "To go further than this, and require absolute certainty, would go to the length of excluding altogether circumstantial evidence.(17) A conviction for this offence or that made punishable by the next section is not invalid merely because it proceeds upon the uncorroborated evidence of the husband and the wife, especially when they were subjected to no cross-examination.(18)

5584. Of course, in such a case, a person could not be convicted of committing an indecent assault upon a married woman, for such assault implies want of consent on the part of the woman, which is presumed in a case under this section.

(13) *Basava Chary*, (1889) 1 Weir 569.
(14) *Hunter*, 61 I. C. (A) 238, 22 Cr. L. J. 382.
(15) *Madhub Chunder Giri*, 21 W. R. 13 (16, 17).
(16) *Ib.*
(17) *Ib.*, p. 20.
(18) *Syed Munir*, 14 N. L. R. 28, 42 I. C. 760, 18 Cr. L. J. 1016.

(2) Woman must be Married.

5585. Again, the woman with whom connection is had must be married, that is to say lawfully married to another, of which there must be strict[19] and formal proof. The evidence of the husband or of the wife, or of both that they were married may for this purpose be quite sufficient.[20] Indeed, the question whether two persons were married or not is a question of fact and not of law.[21] But this view has not been acceded to in other cases in which the Courts seem to require stronger proof the nature of which was, however, not indicated.[22] In one of these cases the Court observed that under section 50 of the Indian Evidence Act,[23] marriage in such cases must be strictly proved in the regular way.[24] But that section merely enacts that an opinion on that relationship is insufficient. It does not exclude it, nor does it prescribe any special mode of proof, in the absence of which the Court must be guided by those general principles which regulate the sufficiency of evidence. And it is apprehended that while the evidence of eye-witnesses to the marriage is in every case desirable,[25] it is not the *sine qua non* of legal proof and the evidence of the married couple should suffice if it is believed in, especially if it was not assailed by the accused. But where a foreign marriage has to be proved, the Courts insist upon proof of its *factum* by independent evidence of its essential ceremonies, and its validity by the evidence of an expert.[1] A woman is not the wife of a man within the meaning of this and the next section if their marriage is voidable, as in the case of *Sunni* Mahomedans in whose case the wife has that option in certain cases (§ 5517).

Meaning of Marriage.

5586. The question what constitutes marriage has been already considered (§§ 5493, 5494). As pointed out there, marriage is an elastic term and is patent of different meanings. In England it means a monogamous marriage solemnized in accordance with the rites of the Church or the rules of law (§§ 5493, 5494). In non-Christian countries and as applied to non-Christian communities it bears a different sense and its validity must be judged by applying different tests and in accordance with the *lex loci* by which it is regulated (§ 5494). This must depend upon the personal law of the parties, and the custom and usages of the caste to which the parties belong. So a *nika* marriage is a well recognized form of Mahomedan marriage and it will be sufficient to support a matrimonial offence whether of bigamy or adultery.[2] So *pat* marriages in the Mahratta countries[3]

(19) *Smith*, 4 W. R. 31, 4 W. R. Cr. L. 10; *Pitambur*, 5 C. 566, F. B.; *Arshad Ali*, 13 C. L. R. 125; *Kallu*, 5 A. 233; *Santok Singh*, (1898) A. W. N. 186; *Dal Singh*, 20 A. 166; *Nazir Khan*, 36 A. 1; *Bhagu*, 17 Bom. L. R. 75; *Danesh* v. *Tafir*, 7 C. W. N. 143.

(20) *Subbarayan*, 9 M. 9; *Syed Munir*, 14 N. L. R. 28, 42 I. C. 560.

(21) *Subbarayan*, 9 M. 9; *Wadhawa* v. *Fatteh Muhammad*, (1894) P. R. No. 5; *Piran Ditta*, (1895) P. R. No. 23; *contra* in *Akhbar Khan*, (1882) P. R. No. 40.

(22) *Pitambur Singh*, 5 C. 566, F. B., overruling *Wazira*, 8 B. L. R. (App.) 63, followed in *Kallu*, 5 A. 233; *Dal Singh*, 20 A. 166; *Buddhu*, 42 A. 401; *Petero*, 2 S. L. R. 22, 10 Cr. L. J. 235; *Bechar*, 5 S. L. R. 270, 15 I. C. 813, 13 Cr. L. J. 541.

(23) Act I of 1872.

(24) *Pitambur Singh*, 5 C. 566 F. B.

(25) *Subbarayan*, 9 M. 9.

(1) *Povey*, Dears C. C. 32 (36); *Savage* 13 Cox 178; *Lindsay*, 66 J. P. 505; *Naquib*, (1917) 1 K. B. 359 (362) dissenting from *Neacton*, 2 Moo. & R. 503.

(2) *Judoo*, 6 W. R. 60, 4 W. R. Cr. L. 1.

(3) *Ramjee Teli* v. *Rayho Teli*, 12 C. P. L. R. 19.

and *sagai* marriages among the low caste Hindus, such as the Korio of Bihar[4] are customary, and a woman remarrying could not be convicted of bigamy or of this offence. Indeed, in questions arising out of marriage relationship in this country with people of diverse races each following its own customs, the question of custom is necessarily paramount[5] and, therefore, by them the *factum* and validity of a marriage must be judged.

5587. But of course there is a limit to the domain of custom and if it is immoral and illegal the Courts are precluded from recognizing or giving effect to it. Such a custom was set up by the accused who justified his elopement with the prosecutor's wife which had the effect of *natra* marriage with her and which he claimed to be sanctioned by usage, though the Court had no occasion to go into that question.[6] It is, however, evident that no Court could tolerate an elopement though it may have become sanctified by the usage of caste and acquired an euphemistic appellation.

(3) Knowledge and Reasonable Belief Essential.

5588. But the fact that the woman was married is not conclusive of the accused's guilt, for there still remains the equally material question whether the accused knew or had reason to believe her to be the wife of another man. This does not mean that the accused should know who the husband of the woman is, for all that is necessary is that he should know that she has a husband though the accused may not know him. Such knowledge may be gained in the case of Hindu women by the outward insignia of married life, by the dress worn, the parting of the hair, the application of red ochre in the part and on the forehead, the use of bangles and other ornaments, the application of turmeric on the hands and body, and, indeed, by numerous other indications which even a casual observer could not mistake.[7] Similar signs are also visible in the case of Mahomedan females, though the indications in their case are not so well marked. Even woman of other nationalities usually wear some token of their marriage, a wedding ring for instance, but in their case the external symbols are still less marked. But in any case these *indicia* are significant though by themselves insufficient to impute knowledge in the accused.[8]

Again, since Hindu and Mahomedan girls are by custom married before they attain puberty, a person cohabiting with a young woman of this class may be presumed to know that the chances are that she is married. At any rate, that fact may well give him reason to pause and inquire, and if he does not, he could not be acquitted of having had no reason to believe her to be a married woman. But this doctrine of presumption must not be pushed too far, for while it is true that young Hindu and Mahomedan girls are as a rule married, it is also true that some of them lose their husbands and pass through life in single blessedness. But here again, there are the tell-tale signs of widowhood, the shaven head or cropped hair, the absence of ochre bangles or ornaments, and a plain covering for body. But in the case of Maho-

(4) *Bissuram*, 3 C. L. R. 410.
(5) *Chamia*, 7 C. L. R. 354.
(6) *Manohar Raiji*, 5 B. H. C. R. 17.
13 (17).
(8) *Madhub Chunder Giri*, 21 W. R 13.
(7) *Madhub Chunder Giri*, 21 W. R.

medans the external signs are again less certain and in the case of Christians the widow's weeds are not confined to the peroid of widowhood. All the same, these, when present, afford a certain indication of single or married life which should put the accused upon inquiry.

5589. But since the presence of this knowledge or reasonable belief must be established by the prosecution, since it constitutes the *mens rea*, it follows that the prosecution must shew facts from which the Court could legitimately infer that the accused had reason to believe that the woman was married. If he was a friend of the family, or lived in the neighbourhood it is natural to infer such knowledge. But if he was a stranger then the prosecution may have to rely upon other circumstances, such as those indicated before. They were relied upon in the case of the Tarkessur Mahant who was prosecuted for this offence, in that he was found to have received in his private chamber a Brahmin woman where both were one day apprehended. The Court held that the facts that the woman not only wore the dress of a married woman but was well known in the neighbourhood of Tarkessur, and that her intercourse with the accused was long continued, were sufficient to hold that the accused had at least reason to believe that he was misconducting with a married woman, and in that view his conviction was upheld.(9)

(4) Consent or Connivance of the Husband.

5590. Another requirement of law, and one which has also to be satisfied by the prosecution is that the adultery complained of had not been consented to or connived at by the husband. This is necessary, for the offence is intended to preserve his bed unsullied and if he elected otherwise law cannot help him against himself: *Volenti non fit injuria.*(10) This is a principle of other applicability, but it is equally applicable to this offence. And in this respect the rule here coincides with the English rule which holds the husband's consent to bar his action though his improper conduct, not amounting to consent, goes only in the reduction of damages.(11) On the same principle, a husband has no right to turn his wife away on account of her adultery at which he connived; he cannot complain of that to which he was a willing party.(12) The term "consent" is here intended in the wider sense as denothing a consent whether express or implied. It means a permission to the paramour of his wife to have connection with her. Such consent may be implied from the fact that he admitted the accused into a brothel of which his wife was an inmate, or that he presented her to him in accordance with a vicious religious custom of a certain sect which ordains that the first fruit of married life shall belong to the priest. The question of consent presents no difficulty. Such consent must, of course, be free and not brought about by anything prohibited in s. 90 (§§ 859-867). It may be given before or after the act, as consent subsequently given will at least amount to condonation of the act, and it has in other respects the same legal effect.(13)

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(9) *Madhub Chunder Giri*, 21 W. R. 13 (17).

(10) *Ib.*

(11) "What is consented to cannot injure."

(12) *Duberby* v. *Gunning*, 4 T. R. 651.

(13) *Wilson* v. *Glossop*, 20 Q. B. D. 354.

What is Connivance?

5591. The term "connivance"[14] is not so easy to describe. It has no doubt acquired a well defined sense in law, but the question whether a given set of circumstances constitute such connivance is not always easy to answer. Connivance is an act of the mind, and implies knowledge of and acquiescence in the act. As applied to this offence, it is the toleration of the act by the husband which he may not approve of but he does not disapprove. It is, in short, a voluntary blindness to the act. But it is not merely negligence or inattention, but something more than the mere negligence, inattention or overconfidence, dulness or apprehension or mere indifference. There must be intentional concurrence.[15] To establish connivance it is requisite, not that the party conniving should actually be an accessory before the fact, so as to have taken any active measure to bring about the result of adultery, but that he should be cognizant that such a result would follow from certain transactions that he approved of and consented to.[16] As such, there is scarcely any difference between connivance and consent.

So where the husband after some angry discussion with his wife respecting the impropriety of her conduct told her she must either choose her paramour or himself and that he could not live with her any longer if she continued her previous intimacy, after which she deliberately left her husband with full knowledge on his part that she was going to join the adulterer, but which he did nothing to prevent, it was held to be no case of connivance, Sir C. Cresswell observing: "I cannot construe that into a willing consent that the adultery should be committed. It is an unwilling consent, given because she would not comply with the condition he insisted upon of giving up the improper intimacy. By connivance I understand the willing consent of the husband, that the husband gives a willing consent to the act, although he may not be an accessory before the fact; that, although he does not take an active part towards procuring it done, he gives a willing consent and desires it to be done. What this man desired was, not that the act should be done, but she should not torment him by keeping up an intimacy of this character, and at the same time living with him as his wife and she should give up the one or other."[17]

5592. And so in another case[18] Hill, J., told the jury that "in order to establish connivance by the husband, it must be shown that he gave, a willing consent to the adultery. Mere negligence, inattention, dulness of apprehension, or indifference will not suffice: there must be an intention on his part that she should commit adultery." But as Dr. Lushington said: "Facts, to constitute connivance, must have a direct and necessary tendency to cause adultery to be committed or continued."[19] "The word 'conniving,'" observed, Lord Westbury, L. C., "is not to be limited to the literal meaning of wilfully refusing

(14) From Lat. *connivo*, to wink.

(15) *Rogers* v. *Rogers*, 3 Hag. 57; *Phillips* v. *Phillips*; 1 Rob. 145; *Allen* v. *Allen* 30 L. J. P. M. & A. 2; *Gipps* v. *Gipps*, 11 H. L. C. 1.

(16) *Glennie* v. *Glennie*, 32 L. J. P. M. & A. 17.

(17) *Marris* v. *Marris*, 31 L. J. P. & M. 69; Todd's Divorce Bill, (1896) W. N. 60 (3).

(18) *Stone* v. *Stone*, 1 Rob. Ec. Rep. 99 (101).

(19) *Gipps* v. *Gipps*, 11 H. L. C. 1 (14).

to see, or affecting not to see or become acquainted with that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur. Still more must 'conniving at' include the case of a husband who, having discovered the adulterv of the wife, takes a sum of money from the adulterer upon an engagement not to complain of the acts of the wife, but to abandon his legal remedy, and then leaves the wife in such a situation as cannot but facilitate the continuance or renewal of the adulterous intercourse."(20)

5593. But in order to establish a case of connivance "it is not necessary to prove connivance to actual adultery, any more than it is necessary on other side to prove an actual and specific fact of adultery. If a system of connivance or the improper familiarity, almost amounting to proximate acts, be established, I shall infer a corrupt intention as to the result, and shall not call for more direct proof."(21) And so Sir William Wynne said: "Connivance is the word used. It has been argued that it must be such as to show knowledge of, and privity to the actual commission of adultery, but that is not so. If there has been such extreme negligence to the conduct of his wife, such an encouragement of acquaintance and familar intimacy as was likely to lead to the consequence that ensued—an adulterous intercourse, it would subject him deservedly to a refusal of the sentence he prayed." "Connivance" said Lord Chelmsford, "is a figurative expression meaning a voluntary blindness to some present act or conduct, to something going on before the eyes, and is inapplicable to anything past or future."

5594. From these pronouncements it is manifest that "connivance" may amount to consent, but it is not in all respects equivalent to consent. Its essential elements rather are (*i*) extreme negligence, and (*ii*) consciousness that it may lead to impropriety. Such, for instance, was the case of the prosecutor who complained against the accused under the next section, but it was proved that his wife had ceased to live with him since six or seven years and that the prosecutor had taken no steps to complain against the accused though he was aware of his claim to have married her by *nikah*. It was held that the husband's omission to prosecute for so long a time amounted to connivance of the adultery complained of.(22) The same view was taken in another case in which the husband separated himself from his wife, who till then had been a virtuous woman, merely because she had run him into debt. After separation he ceased writing to her, made her no allowance and never went to see her. She thereupon led the life of a prostitute and the petitioner sued her for divorce but his desertion of her was held to have disqualified him from obtaining the divorce he had prayed for.(23) In this case the petition was filed within two years of the desertion but the same view was taken in several English cases, in which, however,

(20) *Per* Sir William Scott in *Moorson* v. *Moorson*, 3 Hag. Ec. Rep. 95.

(21) *Gilpin* v. *Gilpin*, 3 Hag. Ec. Rep. 150.

(22) *Gipps* v. *Gipps*, 11 H. L. C. 1 (27); *Kartar Singh*, 90 I. C. 156, (1925) L. 406.

(23) *Jasimaddin* v. *Chohak*, 1 C. W. N. 498.

the period of desertion was greater, amounting to eight[24] and sixteen years.[25] But time is immaterial where the husband lives upon his wife's prostitution.[1]

5595. But apart from other circumstances the court may legitimately infer connivance from a mere delay to prosecute the adulterer, though it is capable of explanation.[2] Ignorance of the misconduct of his wife is one such explanation,[3] though whether the circumstances were more consistent with ignorance than with connivance is a question of fact which must depend upon the individual circumstances of each case. Connivance is a sufficient defence to a charge of adultery though it may not have been connivance of the wife's misconduct with the accused.[4] So Lord Westbury said: "If a husband is proved to have connived at the adultery of his wife with A, he cannot obtain a dissolution of marriage on account of her adultery with B; nor if he has connived at adultery committed by his wife with a particular person at one time, can he complain of adultery committed with the same person at a subsequent time. It would be contrary to the spirit of the Act[5] and highly prejudicial to public morality, if any other interpretation were adopted. It would be a disgrace to the law to suppose that a husband may connive at the adultery of his wife on Monday, and yet be at liberty to complain of the repetition of the adultery on Tuesday."[6]

5596. Condonation of Adultery.—The section speaks only of connivance but not of condonation of the crime. But under the law of divorce, condonation has equally the effect of disqualifying the aggrieved spouse from complaining of the wrong.[7] Condonation differs from connivance in that it is a pardoning remission or forgiveness of the adulterer after the act which has the effect of releasing the injury. The question may then arise whether it has equally that effect upon the injury viewed as a crime. It is no doubt true that since condonation does not imply acquiescence or antecedent negligence amounting to connivance, the act of the accused amounts to this offence as soon as it is committed, and that what is an offence does not cease to be an offence by any subsequent condonation on the part of the injured party unless such condonation amounts to a composition.[8] In ordinary cases, the two are scarcely distinguishable since a person condones what he compromises and compromise implies condonation. If the condonation takes the form of a composition for money, the amount not paid but promised could not be recovered, because the object of the agreement being illegal, the agreement is altogether void as contrary to law and public policy.[9] If, therefore, that element disappears

(24) *Holloway* v. *Holloway*, 5 A. 71 (76).
(25) *Heyes* v. *Heyes & Mason*, L. R. 13 P. D. 11.
(1) *Hawkins* v. *Hawkins*, L. R. 10 P. D. 177.
(2) *Coleman* v. *Coleman*, L. R. 1 P. & M. 81.
(3) *Williams* v. *Williams*, 3 C. 688 (692).
(4) *Ib.*, p. 692.
(5) His Lordship was dealing with the Divorce Act (20 & 21 Vict., c. 85), s. 29.
(6) *Gipps* v. *Gipps*, 11 H. L. C. 13 (14).
(7) Divorce Act (20 & 21 Vict., c. 85), s. 30; *Keats* v. *Keats*, 28 L. J. P. & M. 57.
(8) S. 345, Cr. P. C.
(9) *Gipps* v. *Gipps*, 11 H. L. C. 1 (24).

from the legal view of the subject there remains scarcely any difference between a previous connivance and a subsequent condonation. Moreover, since condonation disqualifies a person from obtaining a divorce, it is scarcely just that the doors of the Criminal Courts should be open to him when those of the Civil Courts are closed. The Punjab Chief Court appears to have proceeded upon this view in dismissing the husband's complaint when it appeared that he had after the act complained of and before filing his complaint, divorced his wife.(10)

Enticing or taking away or detaining with criminal intent a married woman.

Pres. Mag or Mag. of 1st or 2nd class. Non-cog. (s. 199. Cr P. C.) Warrant. Bailable. Comp.

498. Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Woman*—s. 10. *Reason to believe*—s. 26. *Takes or entices*—s. 361.]

Synopsis.

(1) *Analogous Law* (5597-5598).
(2) *Procedure and Practice* (5599-5603).
(3) *Sentence* (5603).
(4) *Proof* (5604).
(5) *Form of Charge* (5605).
(6) *Principle* (5606).
(7) *Meaning of Words* (5607).
(8) *Abduction of Married woman* (5608-5616).
(9) *Woman Enticed must be Married* (5610).
(10) *Accused must Know that the Woman was Married* (5611).
(11) *Taking must be From the Husband* (5612-5613).
(12) *Divorced and Deserted Women Excluded* (5615-5616).
(13) "*Conceals or detains any such women* (5617-5618).

5597. Analogous Law.—The special provisions of this section are necessarily limited and controlled by those of sections 361 and 366, the result being that this section would apply only to cases not falling within the scope of those sections. For instance, a girl wife aged below sixteen may be taken or enticed away from the lawful guardianship of her husband or any other person, in which case the accused would be guilty both of this offence as well as of that punishable under, s. 366, but inasmuch as this is a minor offence as compared to that described in section 366 the accused may justifiably be convicted of that offence though the husband had only complained of this offence, and *vice versa*.(11) But could the Police take cognizance of the offence hold-

(10) *Hukam Din* v. *Allachi*, (1879) P. R. No. 27.

(11) *Jatra Sheikh* v. *Reasab Sheikh*, 20 C. 483; *contra* in *Kallu*, 5 A. 233.

ing it to be one under section 366 without the husband's complaint as required by section 199 of the Procedure Code? It would certainly so appear, for the only prohibition enacted in the Procedure Code is that which prevents the Courts from taking cognizance of this offence without the complaint of the husband.[12] It does not extend the disqualification to any inquiry at all into offences committed in respect of married women without the consent of their husbands.

5598. Another point left in doubt by the section is that relating to the criminal liability of the wife as an abettor. Under the last section she is expressly exempted, but is she equally exempt under this section though the section makes no express exemption in her favour? It has been held that in spite of the absence of express exemption she must be treated as exempt, because this offence is as compared to adultery a minor offence and it would be inconsistent to exempt her from the one without exempting her from the other.[13]

5599. Procedure and Practice.—No Court shall take cognizance of this offence unless upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman, or some other person mentioned in s. 199 of the Code of Criminal Procedure Code.[14] As such, the offence is non-cognizable and warrant should, ordinarily, issue in the first instance. It is both bailable and compoundable, and is triable by the Presidency Magistrate or Magistrate of the first or second class. A prosecution under this section does not abate with the death of the complainant husband.[15]

As to what amounts to a complaint justifying judicial action under this section, (*see* § 5576).

5600. In cases arising under this section, the accused usually challenges the legality of the prosecutor's marriage to the woman enticed away, and as often as not he sets up his own marriage to her in justification of the act. The Criminal Courts consider the issues so raised sufficient to refer the complainant for redress to the Civil Court, but this is an erroneous procedure and a dereliction of duty; for as pointed out by the Punjab Chief Court the fact that the prosecutor has the Civil Courts open to him does not affect his right to set the criminal law in motion, and the Criminal Court has no authority to refuse a hearing and to pass an order which entails upon him the delay and expense of a civil suit,[16] and, it may be added, defeats the object the Legislature had in view in enacting this section. Since the object of this section is to protect the marital rights of the husband, it follows that if he divorced his wife after her abduction and then files the complaint it will be dismissed.[17]

5601. Since this offence may conceivably be included in the offence punishable under the last section, a person convicted of adultery could

(12) S. 199, Cr. P. C.

(13) *Natha Singh*, (1883) P. R. No. 11; *Phulla* v. *Jiwan*, (1871) P. R. No. 6, *Mohun Gunsham*, (1871) P. R. No. 8, overruling *Syud Ahmed*, (1868) P. R. No. 17.

(14) Magistrate is, of course, incompetent to act upon Police report; *Bhana*, (1910) P. R. No. 32, 8 I. C. 1150, 12 Cr. L. J. 50.

(15) *Mary Din* 4 L. 7.

(16) 2 P. Cr. C. s. 50.

(17) *Hukam Din* v. *Allachi*, (1879) P R. No. 27.

not upon the same facts be also convicted of enticing under this section.[18] It should be added that since this section contemplates criminality committed under diverse circumstances, the finding should specify only those proved: that is to say, whether the accused had (*i*) taken away, or (*ii*) enticed away the married woman, or whether the taking or enticing away was (*iii*) from the husband, or (*iv*) any other person having the care of her on his behalf, and whether the taking or enticing away was (*v*) with intent to have illicit intercourse with her or whether her concealment or (*vi*) detention was with that intention. At the same time where the facts do not warrant the finding on such exclusive particulars, there appears to be nothing illegal in recording a finding in more general terms.[19]

5602. It is perhaps unnecessary to add that this is a continuing offence and the offender is always liable to prosecution for each act of detention, and an acquittal in respect of one detention is no bar to a fresh charge for a subsequent detention[20].

Sentence.

5603. It has been held that the accused should be treated with leniency where it appears that the woman abducted was of bad character married to an immature boy[21] or that the woman was an active abettor,[22] or that the husband was indifferent.[23]

5604. Proof.—The points requiring proof are:—

(1) That the woman was married.[24]

(2) That the accused knew or had reason to believe that she was the wife of another man.[25]

(3) That she was at the commission of the offence living under the care of her husband or some one else on his behalf.

(4) That the accused (*i*) took, or (*ii*) enticed her away from her husband or that other person; or (*iii*) concealed, or (*iv*) detained her.

(5) That his intention in doing as in (4) was that she might have illicit intercourse with some man.

5605. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of ——at ——you took away (*or* enticed away *or* concealed *or* detained) AB the wife of CD whom you

(18) *Pochun Chung*, 2 W. R. 35.
(19) *Mothoora Nath Roy*, 22 W. R. 72 (73).
(20) *Nadar* 4 L. L. J. 535, 73 I. C. 524, 24 Cr. L. J. 636.
(21) *Ram Chand* (1911) P. W. R. 29, 12 I. C. 220, 12 Cr. L. J. 500.
(22) *Lal Khan* (1914) P. W. R. 20, 24 I. C. 836, 15 Cr. L. J. 524; *Chandgi*, 99 I. C. 84, (1927) L. 91.
(23) *Gahra*, 91 I. C. 1008, (1926) L. 176.
(24) Which must be proved independently of the admission of the accused; *Phikku*, 89 I. C. 464, (1925) O. 701; *Gopal*, 94 I. C. 603, (1925) R. 328.
(25) Which must be proved by the prosecution by adducing formal evidence; *Bhandaram*, 61 I. C. (C.) 652, 22 Cr. L. J. 412.

then knew (*or* had reason to believe) to be the wife of the said CD from the said CD (*or* from EF who had the care of the said AB on behalf of CD) with intent that the said AB might have illicit intercourse with some person (*if known, name him*); and that you thereby committed an offence punishable under section 498 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

It is said that the omission to state that the person abducted was a married woman and that the accused knew it is a curable defect if the accused had not in fact been misled by it[1]: it is nevertheless a most material ingredient of the charge.

5606. Principle.—This is another section in enacting which the Code makes a departure from the English law under which though infants of tender years are protected against their being kidnapped or abducted, no special legislative sanction protects the husband against the seducer of his wife. It views such act in the light of a single wrong redressable merely in damages. But the line between crime and a civil wrong is conventional, and varies with the nature of the mischief and the state of society, the mischief to be averted and the remedy found efficient for the same.

5607. Meaning of Words.—"*Takes or entices away*:" This would include every form of elopement, whether the first proposal came from the paramour or the faithless wife.[2] It embraces every form of seduction culminating in the going away of the wife from her husband's coverture. "*Who is and whom he knows to be the wife of another man*": All that is required is that the woman should be married and her seducer must be aware of it. It is not necessary that he should know her husband (§§ 5588-5589). "*From any person having the care of her on behalf of that man*": This would exclude a case where the wife runs away from her husband's parents or other person and is then seduced to have illicit intercourse with another. Consequently, if a married woman leave her husband alone, and then take up with another, and there be no evidence of adultery against him, he may be wholly immune, though his intention may have been to have illicit intercourse with her. "*Illicit intercourse*" means, of course, sexual intercourse which is illegal. A woman taken away from her husband with his connivance would not then expose the accused to the penal visitation of this section. "*Any such woman*" means not a woman who has been taken or enticed away, but a woman who is and whom the offender knows to be the wife of another man.[3]

5608. Abduction of Married Woman.—The principle underlying the punishment of adultery is carried a step still further in this section which punishes the abduction of a married woman of whatever age or nationality, and irrespective of her consent. As such, in enacting these two sections the Legislature intended to protect and preserve the marital rights of the husband against their violation by a seducer. And since

(1) *Obiter* in *Allah Din*, 101 I. C. 451, (1927) L. 432. (But the accused were acquitted upon other grounds).

(2) *Kumarasami*, 2 M. H. C. R. 331.

(3) *Alabaksh*, (1891) P. R. No. 16.

women are the weaker vessel, law only punishes the male offender even though he may have been overpowered by the solicitations and entreaties of the faithless wife, so that his "taking away" may be in fact no more than a mere passive acquiescence in a course planned and executed by the wife. As Scotland, C.J., said: "I do not think that the facts found of the woman having been the tempter, and the prisoner in the first instance reluctant to yield to her solicitations, can render the case different from one in which the advances and solicitations are on the part of the man, and the woman complies, and willingly leaves her husband, and cohabits with the man. All that can be said is, that her consent is given under circumstances of greater profligacy in the one case than in the other." It is the taking or enticing of the wife from the husband for the illicit purpose that constitutes the offence. If, whilst the wife is living with her husband, a man knowingly goes away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, that, I think, is a taking from the husband within the meaning of the section. The wife's complicity in the transaction is no more material on a charge under this section than it is on a charge of adultery.(4)

5609. The difference between "taking" and "enticing" has been already considered (§§ 3807-3811). These words have been used here in the same sense in which they have been used in section 361. As under that section so under this, "taking" of a person is complete the moment such person is removed from the control of the husband, while "enticing" does not even require "taking" the woman "enticed" being merely induced to leave her husband and go to the seducer otherwise unassisted by him. It is not necessary the accused taking, enticing, concealing or detaining a married woman should intend to have illicit intercourse with her himself. He equally commits this offence if he intended to dispose her of in marriage to some other person(5) (§ 3811). Indeed, it is not necessary that the person taking or enticing may himself entertain designs upon her virtue for he may be merely acting for another who may have that intention. But in that case the seducer must be aware of the intention of his principal, added to which he must be aware of the fact that the woman was married.

The section uses the words "takes, entices, conceals or detains" in connection with the offence of the accused. If he does not do anything to amount to any of these things he may still be liable for adultery, and if besides committing that offence he takes, entices, conceals or detains her, he may be convicted of this offence as well. But before he can be convicted of it there must be evidence of his taking or enticing her *from* the husband or guardian, or her concealment or detention with intent to have illicit intercourse with her. Detention does not imply restraint. If a man keeps a woman under his protection in a house provided by him with the knowledge and intent specified in the section it is her detention.(6) But where the woman was free to leave her seducer but was unwilling to do so she could not be held to have been detained by him.(7) It is

(4) *Kumarasami*, 2 M. H. C. R. 331.
(5) *Naurang*, 13 A. L. J. 251, 28 I. C. 651, 16 Cr. L. J. 315; *Gobindu*, (1919) P. R. No. 10, 51 I. C. 842, 20 Cr. L. J. 554.
(6) *Bansi Lal*, (1913) P. W. R. 36, 21 I. C. 467, 14 Cr. L. J. 595.
(7) *Lachman Chamar*, 18 A. L. J. 311, 56 I. C. 209, 21 Cr. L. J. 417.

said that a person takes a married woman from her husband even though the latter should connive at it[8]; but this seems scarcely the intention of the section.

Woman Enticed must be Married.

5610. And it is incumbent upon the prosecution to establish it, for the section requires not only proof of the fact that the woman was married, but also that the accused was aware of it. Of course, marriage here must be proved with the same degree of strictness as in the case of bigamy or adultery[9] (§§ 5586-5587). It is not sufficient merely to prove that the complainant and the delinquent woman lived together as man and wife,[10] or that they were so regarded by society and intimate friends, for the opinions of such persons though relevant are expressly declared to be insufficient to prove a marriage in a proceeding under this section.[11] But no proof will suffice to establish a marriage between Hindus belonging to widely different castes, *e.g.*, a Bania and Jhiwari in the Punjab.[12] So again not only the *factum* but also the validity of the marriage must be established, unless it be apparent, for the fact that a certain form of marriage was gone through does not necessarily make the marriage valid unless by law or custom such marriages are recognized. For instance, there is a law called the "Alyasantan law" prevalent in Canara under which the woman is free after marriage to contract another marriage, provided that the marriage expenses of her first marriage are returned to her first husband. Such marriage though customary and regulated by the Code of Bhutalapandya is still not a "a marriage" as that expression is understood in this section[13] and sections 494-498. That term is confined here to signify a marriage in which the woman is enjoined strict monogamy. All other marriages howmuchsoever customary are not marriages within the meaning of this section.

Accused must know that the Woman was Married.

5611. Again, not only must the woman be married, but the accused must be aware of it. How this knowledge is to be brought home to the accused has been the subject of a previous discussion (s. 497), and it will, therefore, suffice here to state that the facts and circumstances necessary to be established under the last section must also be established under this section.

Taking must be from the Husband.

5612. Then the taking or enticing away must be *from* the husband or *from* any other person having the care of her on his behalf. This means that the woman must have been at the time of her elopement living in coverture. For, as has been pointed out by the Madras High Court, this section and the last have been enacted for the protection of the husband.[14] Consequently, if the wife leave her husband's protection before any attempt is made to take or entice her away, her subsequent seducer cannot be dealt with under this section though he may render himself liable for

(8) *Ganesh Ram*, 54 I. C. (Pat.) 619, 21 Cr. L. J. 139.
(9) *Pitambar Singh*, 5 C. 566, F. B.; *Sobrati* v. *Jungli*, 2 C. W. N. 245.
(10) *Arshed Ali*, 13 C. L. R. 125.
(11) Indian Evidence Act (I of 1872), s. 50.
(12) *Mokandi* v. *Mohri*, (1893) P. R. No. 17.
(13) *Koraga*, 6 M. 374.
(14) *Kumarasami*, 2 M. H. C. R. 331. *Pahlwan*, (1915) P. W. R. 5, 27 I. C. 840, 16 Cr. L. J. 216.

adultery.[15] This suggests the question, when is the wife with her husband so that her enticement is *from* him for the purpose of this offence. Ordinarily, the wife must be found living with her husband, but her residence in her husband's house during his absence on business is still her residence with him, so that her removal from his house during his absence would entail the penalty here prescribed. Then again in this country where polygamy is sanctioned, a man may keep his wife in a separate house maintaining her there, in which case she should still be under the protection of her husband though he may not continuously reside with her,[16] but in such case, of course, it must be established that the accused was aware or had reason to believe her to be married. And he must have known this at the time of the enticement. If, therefore, the woman first deserts her husband and then goes to the accused of her own accord[17] or if he picks her up in a brothel house or on the road, he could not be convicted of this offence, for though in such a case he may have enticed her, he did not entice her away from her husband.

5613. Besides her husband, the wife may be in charge of any other person on his behalf in which case the provisions of the section equally apply. Such person may be the wife's parents or other relations to whom she may have gone on a temporary visit in which case living with them, she continues to be under the protection of her husband. The same protection would extend even if she is lodged in a boarding house or a hotel, the husband paying for her board and residence in which case her abduction would, subject to the same reservation, be still punishable under this section. Indeed, her place of residence is in such cases comparatively immaterial; what is material is her husband's protection and its knowledge by the accused. So where the wife left her husband and began to live with her parents who gave her away in marriage to another, and the husband took no notice of her for six or seven years after which he prosecuted her alleged *nikah* husband for abduction and adultery, the Court threw out his complaint on the ground that the lapse of time betokened his desertion and connivance at the offence.[18]

5614. Thus then the husband's remedy may be lost by delay and desertion no less than by connivance and consent. But a mere ill-treatment or cruelty does not amount to desertion, though it has evidentiary value, if the case of the accused is that the woman was not enticed but was driven out of her husband's house by his own maltreatment. But the question whether she was enticed or left of her own accord is a question of fact for the determination of which her treatment is not all in all. For instance, where the wife, a young woman, twenty years old, confessed to her having been disgusted with her lot in her husband's house where her husband used to beat her, and being willing to exchange her life of drudgery and hard living for that of a Calcutta prostitute, whereby she expected to get good food, clothes, and money, but this was her secret inclination which she could not have given effect to without the assistance of the accused, a procuress who led her the way to a brothel house, it was held that this was sufficient for her conviction under this section.[19]

(15) *Pahlwan*, (1915) P. W. R. 5, 27 I. C. 840, 16 Cr. L. J. 216.

(16) *Multy Khan* v. *Mungloo*, 5 W. R. 50.

(17) *Pochun Chaung*, 2 W. R. 35; *Mihan Singh*, (1883) P. R. No. 15.

(18) *Jasimaddin* v. *Ichohak*, 1 C. W. N. 498 (500).

(19) *Srimotee Poddee*, 1 W. R. 45.

Divorced and Deserted Women Excluded.

5615. It has been said before (§ 5610) that the section only extends to women who are married and which fact is known to the accused. It has, therefore, no reference to a woman who though married at one time was afterwards divorced by her husband. So where the husband was found to have divorced his wife after her abduction, he was held disqualified to complain under this section.(20) In another case, the complainant, a Mahomedan, stated that he had married six women, out of whom he kept the two first partially divorced by pronouncing the formula of divorce only once or twice and not three times as required, in order to legalize his marriage with the fifth and sixth, and so keep within the law which permitted him only four wives. Accused was charged with abducting or committing adultery with the complainant's sixth wife, but it was held that since the first two wives had not been divorced, they still remained good wives so that his marriage to the fifth and sixth wives was illegal under the personal law to which he belonged, and consequently the accused could not be convicted of this offence for taking away his sixth wife.(21) The accused who had kept the wife who had been either divorced ed or discarded by her husband for many years allowing her to go and do as she pleased was held to have committed no offence under this section since the accused could not be said to have known that she was married when the husband had himself suffered her to act as if she were not.(22)

For other cases, *see* s. 494.

5616. Assuming now that the woman was legally married, the next requirement of the law is that the accused should have known or have reason to believe her to be married (§§ 5588-5589). And the intention of the accused must be that she should have illicit intercourse with any person. This makes it clear that it is not necessary that the abductor should himself intent to have such intercourse with her. Indeed, the abductor may be a pimp acting for another in which case his criminal responsibility could not be any less because he was the hired mercenary of the real seducer. Indeed, the real venom of criminality lies in the withdrawal of a married woman from her husband for an immoral purpose—it is then immaterial who holds illicit intercourse with her. The abductor may or may not himself be aware of it. For instance, he may be enlisting recruits for his brothel or he may intend to dispose of a woman to other persons willing to pay for her, in all of which cases he intends that the woman should have illicit intercourse with any person, which is all that is necessary for the offence. It is not even necessary that she should actually have such intercourse(23) or that she should even be aware of the purpose for which she was taken away.

5617. "Conceals or detains any such woman."—The section punishes not only the taking or enticing away of a married woman, but also her concealment or detention with the same intent, namely, the intent that she may have illicit intercourse with any person. The words "conceals or detains" do not necessarily imply wrongful confinement of the wife. They are rather intended to be applied to the enticing or inducing a wife to

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(20) *Hukam Din* v. *Allachi*, (1879) P. R. 27.
(21) *Rabnawaz Khan*, (1875) P. R. 1.
(22) *Pahlwan*, (1915) P. W. R. 5, 27 I. C. 840, 16 Cr. L. J. 216.
(23) *Gaman*, (1899) P. R. No. 9.

withdraw or conceal herself from her husband, and assisting her to do so, as much as to physical restraint or prevention of her will or action.[24] Such concealment or detention may be brought about simply by the influence of allurements and blandishments or it may be the result of coercion and restraint. Indeed, the only question material is whether she was taken or enticed away, concealed or detained; it is then immaterial for the purpose of the present case how that result had been brought about. It may affect the question of the accused's responsibility under some other provisions of the Code, but it is not a question that need be canvassed for the purpose of this offence.

5618. Again, when it is said that "any such woman" was concealed or detained, what is implied is that the woman concealed or detained was a married woman and known as such to the accused. It does not refer to such a woman taken away or enticed.[25] In other words, the offence is complete whether the woman is merely taken or enticed away, or is merely concealed or detained, provided that the accompanying intention is in each case the same.

(24) *Sundara Das*, 4 M. H. C. R. 20; *Abdul Wahid Khan*, 103 I. C. 559, (1927) O. 318.

(25) *Niadir*, 10 A. 580; followed in *Ala Baksh*, (1891) P. R. No. 16.

CHAPTER XXI

OF DEFAMATION

5619. Topical Introduction.—The foundation of civil society rests upon mutual aid and trust which makes co-operation necessary and possible. Such co-operation must assume the existence of the love of fame, reputation and character as a mainspring of individual action. Indeed, its operation is co-extensive with the moral law. The right then of every person to the character and reputation which his conduct deserves, stands on the same footing with the right to the enjoyment of his life, liberty, health, property, and all the comforts and advantages which appertain to a state of civil society, inasmuch as security to character and reputation are indispensably essential to the enjoyment of every other right and privilege incident to such a state. This cannot be denied, and it is a theme upon which the views of all nations are unanimous. The subject they, however, differ upon is the appropriate remedy. It is manifest that the circumstances on which the title to a remedy must depend are (*i*) the injurious quality or consequence of the calumny, (*ii*) the mode or extent of publication, (*iii*) the motive and intention of the party in publishing it, and (*iv*) the collateral circumstances connected with the publication.(1) And these will have to be presently considered.

5620. As has been elsewhere observed, the three main divisions of the Code comprise offences against the state, those against the person and those relating to property. This chapter may be said to refer to offences relating to reputation, and as such it should find its logical place in the part relating to personal injuries, where the next chapter relating to threats of injury should also find a more appropriate place. The law of defamation is based upon the fundamental principle that the reputation of a member of society, the esteem in which he is held by it, the credit and trust it reposes in his intelligence, honour and integrity, is his valuable asset, and that the love of reputation being a great moving principle of human action, must be encouraged and protected. The traces of this offence will consequently be found in the earliest records of human history.

The Psalms of David cursed the tongue that imagined wickedness and with lies cut like a sharp razor.(2) So the publication of false reports affecting the character of others was prohibited by the Mosaic Law,(3) though it appears to have prescribed no punishment. But the laws of Solon punished calumniators by an arbitrary fine, and the same penalty was sanctioned by the law of the Twelve Tables. And the civil law assigned to libel a distinct place in the *corpus juris*, the libeller being liable both to a prosecution as well as an action for damages. And this double remedy was open not only to the person actually defamed, but also to any member of his family, if they tended collaterally to expose him to degradation and contempt.(4) It is not clear whether the civil law admitted

(1) Folkard's Libel (5th Ed.) 15.
(2) Psalm 52, *see* also *ib.*, 5, 10, 14, 24.
(3) Exod. xxiii, 1.
(4) Heineccious, pt. 7, s. 118.

truth as a justification, but it was at any rate regarded as a qualified defence. The civil law on this subject has influenced the modern legislation of Western Europe, where the offence is enacted substantially in the form adopted in the Code. But in this respect the law of England marks a departure in that it places civil and criminal responsibility on distinct grounds, regarding the mischief to the private individual as the basis of the former, the mischief to society the foundation of the latter.

English and Indian Standpoints.

5621. The offence of defamation for which this chapter makes provision is presented here in a form materially at variance on two important points from that in which the offence is understood in English Law. Even the very principle underlying the two offences is different. For while under English Law the gist of the offence of defamatory libel is said to lie in its tendency to provoke breach of the peace,(5) the Code regards its essence to lie in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures, and those inconveniences of which a person who is the object of such unfavourable sentiments is exposed.(6)

Referring to these two standpoints the authors wrote. "It appears to us evident that between the offence of defaming and the offence of provoking to a breach of peace, there is a distinction as broad as that which separates theft from murder. Defamatory imputation of the worst kind may have no tendency to cause acts of violence. Words which convey no discreditable imputation whatever may have that tendency in the highest degree. Even in cases where defamation has a tendency to cause acts of violence, the heinousness of the defamation, considered as defamation, is by no means proportioned to its tendency to cause such acts: nay, circumstances which are great aggravations of the offence, considered as defamation, may be great mitigations of the same offence, considered as a provocation to a breach of the peace. A scurrilous satire against a friendless woman, published by a person who carefully conceals his name, would be defamation in one of its most odious forms. But it would be only by a legal fiction that the satirist could be said to provoke a breach of the peace. On the other hand, an imputation on the courage of an officer contained in a private letter, meant to be seen only by that officer and two or three other persons, might, considered as defamation, be a very venial offence. But such an imputation would have an obvious tendency to cause a serious breach of the peace."(7) In short, such an offence, viewed from the standpoint of provocation to breach of peace would vary in its gravity not according to the gravity of the libellous words but the power of retaliation. This is obviously a fallacious standpoint and the Code did well to discard it.

Libel and Slander.

5622. There is a difference on yet another point between the two systems. English Law discriminates between libel and slander, or defamatory words written and spoken, punishing only for the written words, and leaving the speaker to be dealt with by the civil

(5) *Wegner*, 2 Stark, N. P. 245, 19 R. R. 712; *Brooke*, 7 Cox 251; *Adams*, 22 Q. B. D. 66; *Eusor*, 3 T. L. R. 366.

(6) *Parwari*, 41 A. 311.

(7) Note R., Reprint, pp. 175, 176.

law. Here again the Code presents a noticeable departure in that it recognises no such distinction, classing both as defamation and punishing them as such. This deviation from the English standard may appear novel, but it had sufficient reason to commend itself. So the authors wrote: "By the English Law, defamation is a crime only when it is committed by writing, printing, engraving, or some similar process. Spoken words reflecting on private character, however atrocious may be the imputations which these words convey, however numerous may be the assembly before which such words are uttered, furnish ground only for a civil action. Herein the English Law is scarcely consistent with itself. For if defamation be punished on account of its tendency to cause breach of the peace, spoken defamation ought to be punished even more severely than written defamation, as having that tendency in a higher degree. A person who reads in a pamphlet a calumnious reflection on himself, or some one in whom he is interested, is less likely to take a violent revenge than a person who hears the same calumnious reflection uttered. Public men who have by long habit become callous to slander and abuse in a printed form, often show acute sensibility to imputations thrown on them to their faces. Indeed, defamatory words, spoken in the presence of the person who is the object of them, necessarily have more of the character of a personal affront, and are, therefore, more likely to cause breach of the peace than any printed libel.

"The distinction which the English criminal law makes between written and spoken defamation is generally defended on the ground that written defamation is likely to be more widely spread and to be more permanent than spoken defamation. These considerations do not appear to us to be entitled to much weight. In the first place it is by no means necessarily the fact that written defamation is more extensively circulated than spoken defamation. Written defamation may be contained in a letter intended for a single eye, spoken defamation may be heard by an assembly of many thousands. It seems to us most unreasonable that it would be penal to say in a private letter, that a man is dissipated, and not penal to stand up at the Town Hall, and there, before the whole society of Calcutta, falsely to accuse him of poisoning his father.

"In the second place, it is not necessarily the fact that the harm caused by defamation is proportioned to the extent to which the defamation is circulated. Some slanders, and those slanders of a most malignant kind, can produce harm only while confined to a very small circle, and would be at once refuted if they were published. A malignant whisper addressed to a single hearer, and meant to go no further, may indicate greater depravity, may cause more intense misery, and may deserve more severe punishment than a satire which has run through twenty editions. A person, for example, who, in private conversation, should infuse into the mind of a husband suspicions of the fidelity of a virtuous wife, might be a defamer of a far worse description than one who should insert the lady's name in a printed lampoon.

"It must be allowed that, in general, a printed story is likely to live longer than a story which is only circulated in conversation. But, on the other hand, it is far easier for a calumniated person to clear his character, either by argument or by legal proceedings, from a charge fixed in a printed form, than from a shifting rumour, which nobody repeats exactly

as he heard it. In general, we believe, a man would rather see in a newspaper a story discreditable to him which he had the means of refuting, than know that such a story, though not published, was current in society."(8)

5623. This was admitted by the English Law Commissioners who said: "The truth of the general abstract proposition is undeniable that when the subject of publication is in its own nature noxious and offensive, any mode of publication must be objectionable, and can be material only as regards the extent and degree of the mischief likely to be occasioned by it." They allowed that slanderous and abusive language may be much more likely to provoke the party to whom it is applied when spoken in the presence of many others than if addressed to him by letter, where an interval was allowed for the subsidence of sudden resentment; as also that a law which "with a view to the public peace merely prohibited written insult, would be incommensurate with its object, *viz.*, the preservation of the peace which is quite as likely to be broken in consequence of an oral as of a written insult."

"Each mode of publication," they observed, "may, in truth, be more pernicious than the other when the comparison is made of different injurious consequences." They remark, however, that in ordinary cases there is this marked distinction between oral and written communication, as regards the mind and intention of the publisher and the effect of the thing published that, "the committing of injurious and defamatory matter to writing evinces a more determined and deliberate purpose than is ordinarily to be inferred from mere words spoken. Communications by writing are therefore likely to make stronger impressions than such as are merely oral. They are permanent and capable of wider diffusion." Conceding that "distinctions founded merely on a consideration of the particular mode of communication must be in a great measure arbitrary and artificial, and dependent on reasons of collateral policy and convenience," they still defended that distinction on the ground that when "considerations of extrinsic policy are taken into the account, and allowed to operate in restraint of criminal liability, it is obvious that a dstinction founded on the mode of publication, including within its scope such modes as, by their capability and facility of diffusion and their permanency, must ordinarily be considered as the more dangerous, and excluding such as are merely oral, may well consist with general convenience."

5624. They then urged two objections to the inclusion of slander among offences on the ground of (*i*) general inconvenience and (*ii*) the facility of proof. The first they explained that "to make mere oral communications penal when they reflected on the characters of individuals, would be a very heavy restraint on the ordinary intercourse of mankind, and would necessarily and unavoidably occasion much and vexatious litigation, and would weaken the great securities for the discharge of legal as well as moral obligations, the love of reputation, and the fear of public censure and disgrace." As to the second they said: "In the next place, the proof of an offence committed by the writing and publishing of illegal matter is far more definite and complete than where the offence is merely oral, when so much depends on tone and manner, the situation of

(8) Note R, Reprint, p. 177.

the speaker, the circumstances under which he spoke, the understanding and memory of the hearers."(9)

But these objections were not found insuperable to the assimilation of slander with defamatory libel, by the Select Committee of the House of Lords who in 1843 proposed to alter the existing law with these pertinent remarks: "At present, while for many words reduced into writing which in any way tend to injure reputation, though communicated to only one individual, the law gives a remedy, there is no remedy, without proof of special damage, for mere words, however injurious to reputation, and however publicly spoken unless they impute an idictable offence, or apply to a man in his business or import that he is labouring under an infectious disease, so that falsely and maliciously to impute in the coarsest terms and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honour, cannot be made the foundation of any proceeding civil or criminal; whereas an action may be maintained for saying that a cobbler is not skilful in mending shoes, or that any one has held up his hand in a threatening posture to another. The Committee conceive that these distinctions, which are quite peculiar to the law of England, do not rest on any solid foundation, and that wherever an injury is done to character by defamation there ought to be redress by action." This recommendation was, however, not given effect to in the Statute which, though otherwise amending the law, still retained the distinction between oral and written slander.(10) But these reasons appeared more cogent to the authors of the Code and their views have been given effect to by the Legislature.

5625. While therefore the Code makes no distinction between a spoken and a written defamation it leaves that distinction to be taken into consideration in apportioning the punishment. In other words, the Code regards the mode of publication as by no means essential to the constitution of the crime, though it regards it material for the purpose of determining its gravity. And so there exist two sections (ss. 501-502) intended to arrest the dissemination of defamatory matter by means of printed or engraved matter. In the same way it views the question about the offence having a tendency to breach of peace, regarding it as an aggravation rather than an essential element of the crime. And this gives rise to a fresh offence punishable under section 504, namely, the giving of intentional insult with intent to provoke breach of the peace. This offence may then be said to present somewhat closer analogy to defamatory libel of English Law, though the latter then admits of the exceptions like those enacted under section 499 but which the former takes no account of. Insult may then be regarded as a form of defamation, viewed from a different standpoint and constituting a different offence. Sedition dealt with under section 124-A is another species of the same offence, though it has been placed under a different category and is now regarded as a distinct offence. So is also s. 153 which is defamation of a class as such and has otherwise become a distinct offence.

5626. But they all belong to the same genus, though they are now no longer subject to the same exceptions. These ten exceptions refer to

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(9) 6th Rep., p. 48.

(10) 6 & 7 Vict., c. 96.

cases in which words *prima facie* libellous are not punishable. This may be classed under two main heads: those in which truth spoken for the public good is no offence, and in which case the question of *bona fides* is immaterial[11] and those in which *bona fides* and not truth are material. In the one case the words must be true and uttered for the public good whatever may be the speaker's motive or intention; in the other case publication must have been made *bona fide*, though it may not be true.

5627. These exceptions, save one omission, generally follow the lines of English Law, but one of them at least is not in consonance with the published recommendation of Lord Macaulay's Committee. Instead of the first exception as now enacted it proposed to except the publication of truth at all times and under all circumstances, and they based their innovation on the following reasoning: *First*, that in some cases of prosecution for defamation the truth of the imputations alleged to be defamatory ought to be a justification; *secondly*, that in the vast majority of such cases if not in all, truth, if it be not a justification, ought to be a mitigation; and from which they held a third proposition established, *viz.*, that in all cases of prosecution for defamation, if the defendant avers that the imputations complained of as defamatory are true, the Court ought to go into the question of the truth of those imputations. This, they said, ought to be done not only in justice to the public and to the defendant, but in justice to the innocent complainant, for to clear his fame is his first object.[12] But this surely is not the object of the offence, nor indeed, could it be generally said that a complainant who applies to the Court for protection against a libel comes to Court to clear himself and not to punish his assailant. The Legislature has, therefore, wisely negatived the suggestion to make truth as an all-sufficient defence. This section makes another departure, conscious or otherwise, from the English Common Law in that it does not extend the same immunity to judges, jurors and counsel, parties and their witnesses which they enjoy in England since their privilege is only subject to the General Exceptions (7) to (9).

Defamation.

499. Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation. 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation. 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of person as such.

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(11) Exceptions 1 & 4. (12) Note R.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considerad as disgraceful.

Illustrations.

(*a*) *A* says: "*Z* is an honest man; he never stole *B*'s watch," intending to cause it to be believed that *Z* did steal *B*'s watch. This is defamation, unless it fall within one of the exceptions.

(*b*) *A* is asked who stole *B*'s watch. *A* points to *Z*, intending to cause it to be believed that *Z* stole *B*'s watch. This is defamation, unless it fall within one of the exceptions.

(*c*) *A* draws a picture of *Z* running away with *B*'s watch, intending to be believed that *Z* stole *B*'s watch. This is defamation, unless it fall within one of the exceptions.

Imputation of truth which public good requires to be made or published.

First Exception—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Public conduct of public servants.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Conduct of any person touching any public question.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character so far as his character appears in that conduct and no further.

Illustration.

It is not defamation in *A* to express in good faith any opinion whatever respecting *Z*'s conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Publication of reports of proceedings of Court.

Explanation.—A justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice is a Court within the meaning of the above section.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever, respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further

Merits of case decided in Court or conduct of witnesses and others concerned.

Illustrations.

(*a*) *A* says: "I think *Z*'s evidence on that trial is so contradictory that he must be stupid or dishonest." *A* is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects *Z*'s character as it appears in *Z*'s conduct as a witness, and no further.

(*b*) But if *A* says: "I do not believe what *Z* asserted at that trial, because I know him to be a man without veracity." *A* is not within this exception, inasmuch as the opinion which he expresses of *Z*'s character, is an opinion not founded on *Z*'s conduct as a witness.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Merits of public performance.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author, which imply such submission to the judgment of the public.

Illustrations.

(*a*) A person who publishes a book, submits that book to the judgment of the public.

(*b*) A person who makes a speech in public, submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage submits his acting or singing to the judgment of the public.

(*d*) *A* says of a book published by *Z*: *Z*'s book is foolish; *Z* must be a weak man. *Z*'s books is indecent; *Z* must be a man of impure mind." *A* is within this

exception, if he says this in good faith, inasmuch as the opinion which he expresses of *Z* respects *Z*'s character only so far as it appears in *Z*'s book, and no further.

(*c*) But if *A* says: "I am not surprised that *Z*'s book is foolish and indecent for he is a weak man and a libertine." *A* is not within this exception, inasmuch as the opinion which he expresses of *Z*'s character is an opinion not founded on *Z*'s book.

Censure passed in good faith by person having lawful authority over another.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration.

A judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils, a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Accusation preferred in good faith to authorized person.

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation.

Illustration.

If *A* in good faith accuses *Z* before a Magistrate; if *A* in good faith complains of the conduct of *Z*, a servant, to *Z*'s master; if *A* in good faith complains of the conduct of *Z*, a child, to *Z*'s father—*A* is within this exception.

Imputation made in good faith by person for protection of his or other's interests.

Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person or for the public good.

Illustrations.

(*a*) *A*, a shopkeeper, says to *B* who manages his business: "Sell nothing to *Z* unless he pays you ready money; for I have no opinion of his honesty." *A* is within the exception, if he has made this imputation on *Z* in good faith for the protection of his own interests.

(*b*) *A*, a Magistrate, in making a report to his superior officer, casts an imputation on the character of *Z*. Here, if the imputation is made in good faith, and for the public good, *A* is within the exception.

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Caution intended for good of person to whom conveyed or for public good.

Synopsis.

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(3) *Meaning of Words* (5631).
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(26) *Defamation of the Dead* (5667-5672).
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(46) *Criticism on Public Question* (5709-5711).
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(49) *Comments on Judicial Proceedings* (5715).
(50) *Jurisdiction Immaterial* (5716).
(51) *Report of Preliminary Judicial Inquiry* (5717-5718).
(52) *Mode of Publication Immaterial* (5718).
(53) *Report of Non-judicial Public Proceeding* (5719-5720).
(54) *Comment on Cases* (5721-5725).
(55) *Privilege of Party to Judicial Proceeding* (5725).
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(57) *Opinion must Relate to the Merits* (5729-5731).
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(85) *Undue publicity* (5780).
(86) *Communication in Confidence* (5781).
(87) *Unnecessary Aspersion* (5782).
(88) *Statement to Pleader* (5783-5784).
(89) *Legislators' Absolute Privilege* (5785)

5628. Analogous Law.—The two main distinctions between the English Law of libel and the offence here defined consist in that (*i*) whereas English Law views the crime as having a tendency to provoke breach of peace, the Code views it as an offence on account of the mental suffering of the person defamed, and (*ii*) while English Law excludes spoken words from the category of the crime,[13] regarding them as of compara-

(13) 2 Salk. 417; *Langley*, 6 Mod. 125, Parwari, 41 A. 311.

tively minor importance and as such sufficiently redressed in compensation, the Code makes no such distinction, though it does not consider the question as wholly immaterial in apportioning the punishment.

5629. This section first defines the offence and then it sets out the ten exceptions to which it is subject. Of these the first was made the subject of much comment, the question before the draftsmen being whether truth alone should at all times be a sufficient justification or whether it should be qualified by necessity. Lord Macaulay's Committee were of the first opinion, which they justified in a long minute, but the Legislature did not fall in with their views, the result being that truth alone is not a sufficient justification of defamation. The remaining exceptions follow generally the lines of the English statute law known as Fox's Libel Act,(14) though they differ in minor details which will be presently considered.

The Code is, of course, exhaustive of the law of libel as applicable to this country, though its provisions are naturally subject to those of the Government of India Act which exempts legislators from its authority in respect of speeches made by them in the House.(15)

5630. Principle.—This offence is intended to protect one's personal reputation as the other offences are designed to protect persons against other injuries to their person and property. The principle underlying each case is the same, for as the Law Commissioners observed: "It is difficult to suggest any good reason for making penal restraints for the protection of property or for the safety of the person, which would not be equally applicable to the providing for the protection of reputation."(16) But since such protection must necessarily be made subject to the protection of society, it follows that the protection of personal reputation must necessarily admit of exceptions in favour of the interest of society which law justly esteems greater than the interest of an individual. This accounts for the ten exceptions to which the offence is subject, and the particular operation of which will have to be more fully discussed in the sequel.

As regards the special privilege of Judges, Jurors, and Counsel the enactment of this section has engendered some difficulty. Under the English Common Law, Judges and Counsel are both absolutely privileged. This rule is held to be equally applicable to this country in respect of their civil liability, since there is no statutory enactment to the contrary but the interposition of this section is held to qualify their privilege as regards their criminal liability which would be determined in accordance with the general law here enacted subject only to its own exceptions resulting in their privilege being limited by good faith; which applies equally to all litigants and their legal advisers and witnesses. At one time some courts were disposed to hold this qualification enlarged by the common law but the courts are now agreed that there is no room for such extension; but at the same time while so holding they draw a line between parties and pleaders presuming in the case of the latter good faith until the contrary is shewn.

5631. Meaning of Words.—"*By words spoken,*" *i.e.*, words spoken and not reduced to writing; "*or intended to be read,*" *i.e.*, words written

(14) 3 & 4 Wm. IV, C. 85.
(15) S. 67 (7); s. 72-D (7).
(16) 6th Rep., p. 48.

for publication, words entered in one's confidential diary would thus be excepted. *"By sign or visible representations"*: Illustration (*b*) is an example of such sign, and illustration (*c*), of such verbal representation which may consist of anything in the nature of a caricature, and effigy, sign, or a statue or the like.

"Makes or publishes any imputation," that is to say, the words and signs or visible representations must convey some *imputation* against any person. The word "make" is used in the general sense of including all those who in any way contribute to it, so that if one dictates and another writes, both make such an imputation. This sense is further amplified in the word "publishes," which means giving publicity to a thing by circulating it to other persons. The word implies something more than a mere communication by the defamer to the person defamed (§ 5633). The term "imputation" implies an allegation of fact and not merely a term of abuse which may amount to an insult, but is not defamation (§ 5647).

"Concerning any person": The term person here includes a Company or Association or body of persons, whether incorporated or not[17]; but not a newspaper[18] or any abstract concept.

"That such imputation will harm the reputation," i.e., actual harm is not necessary.[19] A person's own opinion of himself is not his reputation. It rather means the opinion of others about him. The good name one bears or the esteem in which one is held in society is one's reputation. This is evident from explanation 4. The moral character there spoken of must be understood as used in a general sense, so that if a person speaks of a minister of religion calling him an atheist, it will be libellous, because it will be an attack both upon his calling as well as his moral character. But, of course, where the harm is trivial, the provisions of s. 95 should apply[20] (§§ 5653, 5654).

"Anything which is true.....if it be for the public good": That is to say, truth alone is never a defence to a prosecution for defamation. In order to be a defence the imputation made or published must be both true as well as made for the public good. The question whether an imputation was for the public good is, of course, declared to be a question of fact. But exceptions 2 and 3 give instances of two such imputations which are not only protected as being for the public good, but which are further protected in that they need not be true if only they are made *bona fide*. The same policy dictates the rest of the exceptions.

For other words, *see* the discussion below.

5632. What is Defamation?—Defamation is, in short, an imputation made against another person, which is and believed by the maker to be injurious to his reputation. Such imputation may be made in one or more of the four ways specified in the section, that is to say: (*i*) by spoken; or (*ii*) written words; (*iii*) by signs; or (*iv*) visible representa-

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(17) S. 11.
(18) *Mg. Sein*, 4 R. 462.
(19) *McCarthy*, 9 A. 420, Gobind *Pershad* v. *Gurth*, 28 C. 63; *Pimento*, 22 Bom. L. R. 1224 (1228); *Bhikh Chand*, 96 I. C. 116, (1926) S. 258; *contra* in *Anand Rao*, 17 Bom. L. R. 82 (92), 27 I. C. 57 (is unsound).
(20) *Mg. Sein*, 4 R. 462.

tions. It must be "made" or "published," and the maker must have at least reason to believe that such imputation will harm the reputation of the person to whom it relates. This constitutes the general offence, but it is otherwise subject both to the general exceptions and the special exceptions here set out.

The gist of the offence lies in the dissemination of harmful imputation. It is, of course, manifest that a person is not responsible for holding an opinion, harmful to another man's reputation. This cannot be averted, and it would be a counsel of perfection to expect otherwise. The Code is not concerned with whatever opinion one may hold of another, howmuchsoever that opinion may in his estimation be detrimental to the character and reputation of another. If then a number of persons hold definite views about a man's character, he cannot complain, because he knows that he is considered a person of evil repute. So far they are within their rights—but the moment they give expression to their thoughts they make themselves amenable to the penalties of this section, unless, of course, their case is saved by one or other of the ten exceptions to which the rule is subject.

5633. "Makes or publishes."—The offences then lie in the dissemination of harmful information concerning another. This is expressed in the section by the words "makes or publishes." The word "make" is intended to refer to the originator of the imputation, but it is equally applicable to one who though not its author, repeats, writes or copies it. The word "makes" is intended to supplement the sense of "publishes,"[21] which is no doubt used here in its etymological sense as connoting "to make public" or to make known to people in general. It is thus evident that if a person merely compose a libel, but refrain from making it public, he could not be held liable for this offence, though he had no doubt "made" it within the meaning of this section. So again, since publication implies communication to the public or the people, whose hostility it is intended to arouse, it follows that it is no publication if the libeller merely communicates his libel to the person defamed. Such communication may amount to an insult and be punishable as such, but it is not publication for which he could be held liable under this section.

Publication then implies communication to at least one person other than the person defamed. And so it has been held in England that there can be no publication unless the libel is communicated to a third person, though that person be the complainant's wife, who though considered one person with her husband in actions of tort as well as contract,[22] is nevertheless sufficiently a third person for the purpose of publication of libel.[23] The question whether the libel had in fact been communicated to a third person is, therefore material, for upon it depends the question of publication. It is not enough that the libeller posted it to a third person, or that the third person received it, for what has to be proved is communication and not an opportunity afforded for it.[24] So where A sent a libellous note to B to be made over to the plaintiff, which he did without reading it himself, which he could have if he so desired, it was held to be no

(21) From Lat. *publicus*, for *populicus*, from *populus*, people.
(22) *Phillips* v. *Barner*, 1 Q. B. D. 436.
(23) *Wenman* v. *Ash*, 13 C. B. 836; *Jones* v. *Williams*, 1 T. L. R. 572.
(24) *Burdett*, 4 B. & Ald. 143.

publication of the libel therein complained of.[25] A letter containing a defamatory statement was sent by A to B to whom the communication was privileged being made in confidence during B's absence: it was opened by C. The Court held it to be no publication to C.[1]

Is Communication to the Person Defamed Publication?

5634. This raises the question whether the communication of libel only to the party libelled amounts to its publication within the meaning of this section. Under English Law, it is settled that it is sufficient publication in a criminal proceeding,[2] though not in a civil proceeding, in which publication means communication to a third party.[3] The difference between the two proceedings is explained on the ground that an indictment for a libel being sustained on the ground of its tendency to produce a breach of the peace its communication to the complainant is sufficient.[4] But in a civil proceeding where damages are awarded for injury to reputation, no such damages can be presumed to have been incurred unless the libel is promulgated to a third party. And since this is the underlying principle of the offence as here defined, it follows that in order to constitute publication the libel must have been communicated to a third person, and that its publication to the party defamed is insufficient, though it may amount to some other offence, such as criminal intimidation or insult.[5] This view seems to be consistent with the language of the section, which makes the causing of intentional harm to one's reputation the gist of the crime. And since it is explained that no imputation is said to harm a person's reputation unless it lowers it in the estimation of others,[6] it follows that there can be no publication unless it reaches at least a third person, in whose estimation the reputation of the person defamed could possibly suffer. Moreover, the Code has made other provision for punishing the communication of a calumny to another person,[7] from which again, it may be inferred that the term "publication" was used here in the special sense in which it is understood in the English Civil Law, and not in the narrower sense in which it has passed current in the criminal law of libel.

This was the view of the majority of the Full Bench of the Allahabad High Court, in which the accused had sent a notice of suit to the prosecutor, a policeman who had made a search of his house for stolen property without a warrant and in consequence of which he claimed damages, adding at the same time that the search was malicious and *mala fide* and that the prosecutor had made it with a view to obtain a bribe, words which were sufficiently defamatory if their communication in a closed cover to the complainant could amount to their publication, and this was, therefore, the question referred to the Full Bench of five Judges, four of whom held it to be no publication which they held required communication to a third

(25) *Clutterbuck* v. *Chaffers*, 1 Stark, 471; *Day* v. *Bream*, 2 Moo. & Rob. 54.

(1) *Powell* v. *Gelston*, (1916) 2 K. B. 615.

(2) *Harvey*, 2 St. Tr. (N. S.) 1; *Holt*, 4 T. R. 436; *Topham*, 4 T. R. 129; *Phillips* v. *Jansen*, 2 Esp. 624.

(3) *Clutterbuck* v. *Shaffers*, 1 Stark, 471; *Day* v. *Bream*, 2 Moo. & Rob. 54; *Komul Chunder Bose* v. *Nobin Chunder Bose*, 10 W. R. 184; *Bishwa Nath* v. *Keshab*, 7 C. W. N. 74; *Mohamed Ismail Khan* v. *Mahomed Tahir*, 6 N. W. P. H. C. R. 38.

(4) *Wegener*, 2 Stark, 245; *Shepherd* v. *Trustees of the Port of Bombay*, 1 B. 477.

(5) *Sadashiv* v. *Atmaram*, 18 B. 205.

(6) Expl. 4.

(7) Ss. 504, 506.

person.[8] The contrary was laid down by Duthoit, J., who laid emphasis on the fact that defamation may be completed both by "making" as well as "publishing," and that the term "making" must be something distinct from "publishing" and was quite applicable to a communication only made to the person defamed. This would at first sight appear to be unanswerable, and taken alone it is so, but in construing a Penal Statute regard must be had both to the context as well as to its purpose, and these are decidedly in favour of the view taken by the majority of the Court, and Fulton, J., of the Bombay High Court.[9] In this view the term "publication" must bear the same sense both in civil[10] as well as criminal proceeding.

Negligent Communication Excepted.

5635. Now, the question that a communication to a third person is necessary to constitute publication raises other questions. Should such communication be intentionally and consciously made or would it do if it reaches the third party, it may be by accident or mistake? Here again English Law differentiates between a civil and criminal proceeding, holding the writer liable in the one case even if the publication to the third person was made by accident or inadvertence, but exonerating him from criminal liability unless the communication was made at least with his knowledge. These rules are naturally the outcome of the different principles which govern personal liability in the two cases. In the one case a person is held civilly liable for his negligence and the natural consequence of his own act, but in the other case a person could not be punished for his negligence, for negligence is human and not always a crime.

Even as regards civil liability law stops at negligence, holding a person not liable for what is a mere accident or misfortune. So if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and steals the letter publishing its contents, the owner could not be held liable for the publication.[11] But if a person enclose libel in a letter intended for A but he by mistake addressed it to A's employer B who opened and read it, the writer would be civilly liable for his mistake and he could not be heard to say that he had duly intended to communicate it to A[12]; but in such a case his mistake would protect him against a criminal prosecution. So where the defendant, who was the publisher of a print, called the "Bookseller" inserted therein by mistake a notice of a dissolution of partnership under the wrong heading of "First Meetings under the Bankruptcy Act" the Court held, in a suit for damages, that it amounted to publication[13] though of course it would have been a complete answer to an indictment.[14]

(8) *Per* Sir Comer Petheram, C. J. (Oldfield, Brodhust, Mahmood, JJ., *contra* Duthoit, J.), in *Taki Husain*, 7 A. 205.

(9) *Sadashiv* v. *Atmaram*, 18 B. 205.

(10) *Komul Chunder Bose* v. *Nobin Chunder Bose*, 10 W. R. 184; *Biswa Nath* v. *Keshab*, 7 C. W. N. 74; *Mahomed Ismail* v. *Mahomed Tahir*, 6 N. W. P. H. C. R. 38.

(11) *Per* Lord Esher, M. R., in *Pullman and another* v. *Hill & Co.*, (1891) 1 Q. B. 524 [527].

(12) *Fox* v. *Broderick*, 14 Ir. C. L. R. 453; *Thompson* v. *Dashwood*, 11 Q. B. D. 43.

(13) *Shephard* v. *Whitaker*, L. R. 10 C. P. 502; *Stubs* v. *Marsh*, 15 L. T. 312.

(14) *Abingdom* (*Lord*), 1 Esp. 228; *Munslow*, (1895) 1 Q. B. 758; *Brett* v. *Watson*, 20 W. R. (Eng.) 723; *Blake* v. *Stevens*, 4 F. & F. 232. It was pointed out by Russell, C. J., in *Munslow*, (1895) 1 Q. B. 758 (761), that the amendment of the libel law in 1843 requiring the publication to be made "maliciously" was made to except cases of mistake and accident.

5636. There were five partners in the firm of Pullman and Company, of whom two held some land as their private property. The defendant had a dispute with these two about a hoarding on the land, but in which the firm was in no way interested or concerned. The defendant, however, knew the two Messrs. Pullman to be sole partners in the firm. He addressed a libel to them as "Pullman & Co.," at their business address, which was in the ordinary course of business opened by a clerk of the firm who had authority to open all letters addressed to the firm. In a civil suit for damages it was held that there was publication to the clerk.(15) But since the publication was merely the result of a mistake, it is evident that if the case had to be decided on indictment the finding of the Court would have been otherwise. So where A sent a servant to his study to fetch a certain paper which he wished to show to B. The servant by mistake fetched a libellous writing which A made over to B who read it aloud to C, it could not be treated as publication of the libel either to B or C.(16) So a person could not be held accountable for a publication which he had no reason to anticipate. For instance, if A send a libellous letter in a closed cover to B, and B shows it to a friend, A could not be charged with its publication.(17) So where A sent such a letter to B, who thereupon sent for A in the presence of his friend C, and questioned him as to its authorship, at the same time disclosing its contents to B in the hearing of C, it was held to be no publication by A.(18)

Negligence When Inexcusable.

5637. It is thus clear that there can be no publication for the purpose of this section unless it is made at least with consciousness of the fact—an intention to publish it to him is not necessary. So it was held to be sufficient where the writer dictated it to a scribe in the language understood by him.(19) This qualification is necessary, because if a libel is uttered before an audience however large in an unknown tongue, it cannot be publication to them, for they may hear but cannot understand, and without understanding they cannot harm the reputation of him concerning whom the libel was spoken.(20) So it will be no publication if it is couched in cryptic language so that it is not understood by any one except by the person attacked, for in that case, though the words were spoken they bore no meaning to those who listened to them which could in any way prejudice them against the complainant. But of course, such language must be distinguished from the language of irony and satire, which rather than fall flat upon the audience reaches them in a form which should be an aggravation of the crime.

A libel may not be intended to influence any person in particular, nor need it be so addressed. It will suffice if it will in fact reach the ears of the third person, in a manner which the libeller could have easily foreseen. So a libel may be published if it is written on a postcard though the

(15) *Pullman and another* v. *Hill & Co.*, (1891) 1 Q. B. 524; *Boxsius* v. *Goblet Freres and others*, (1894) 1 Q. B 842.

(16) *Paine*, 5 Mod. 167.

(17) *Barrow* v. *Lewellin*, Hob. 62.

(18) *Fowville* v. *Nease*, Dudley, S. C. (Amer.) 303.

(19) *Pullman and another* v. *Hill & Co.*, (1891) 1 Q. B. 524; *Varnakote* v. *Kotalmana.*, (1900) 1 Weir 579 (580). The law is the same in America; *Keen* v. *Ruff*, 1 Clarke (Iowa) 482; *Sunder* v. *Andrews*, 6 Barbour (N. Y.) 43; *M'-Combs* v. *Tuttle*, 1 *Blackford* (Md.) 431.

(20) *Hurtert* v. *Weines*, 26 Iowa 134

postcard be addressed to the person libelled,(21) or if it is telegraphed to him in a language easily decipherable.(22) In such cases it is no defence to say that the accused had an interest in making the communication, and that the party to whom it was addressed had a corresponding interest in receiving it, or that it was sent *bona fide* and without malice.(23) Indeed, the fact that the open communication had reference to a matter of mutual interest to parties justifies the making of a communication, but not making it in an unnecessarily offensive form.

So where the tradesman sent a bill for a small amount written on a postcard upon which he wrote: "Your plea of illness for not paying this trifle is a mere moonshine. We will place the matter in our solicitor's hands if we have not stamps by return, if it cost us ten times the amount." It was held that though this might have been privileged if sent in a cover, as sent written on the back of a postcard it was a libel, because postcards were intended to be the vehicle of ordinary communication, not of defamatory matter. So where A, an orthodox Hindu, attended a Hindu widow remarriage opposed by the orthodox community and thereupon his spiritual preceptor, B, declared him out of caste till he performed a prescribed penance and sent a registered postcard of similar purport to A, the Court held the missive to constitute publication of the matter which the Court held to be defamatory.(24)

Communication Confidence.

5638. So there may be publication if a person sends a written libel to another in a language unknown to him, and of which fact the writer is aware, in which case he may be presumed to know that the receiver will have it read which is then a sufficient publication. So where a person filed a defamatory petition before a superior public officer who in the ordinary course of official routine sent it on to a subordinate officer for enquiry, it was held to be sufficient publication in the place where the petition was received for which the writer might *prima facie* be held liable, whether or not he expressly asked for inquiry.(25) So conversely a person who employs an amanuensis to copy a libel, publishes it before it is sent out, or one who prints it, is sufficiently guilty of publication.(1) And it is no defence in such cases to say that the communication to the intermediary was made in confidence and that he was under pledge not to disclose, for he may not disclose it to others, but the disclosure to him is publication. As Lord Coleridge, C. J., referring to libel sent by a telegram said: "It would be extending the doctrine of privileged communication to a most alarming degree if the transmission of a telegram were put upon the same footing as that of a sealed letter. Although the clerks are prohibited under severe penalties from disclosing the contents of telegrams passing through their hands, still there is a disclosure to them."(2)

(21) *Williamson* v. *Freer*, L. R. 9 C. P. 393; followed in *Sankara*, 6 M. 381; *Thiagaraya* v. *Krishnasami*, 15 M. 214; *Chattel* v. *Turner*, (1896) 12 T. L. R. 360; *Beamish* v. *Dairy Supply Co.*, (1897) 13 T. L. R. 484; *Sudgrove* v. *Hob*, (1901) 2 K. B. 1.

(22) *Whitfield and others* v. *South East Ry. Co.*, E. B. & E. 115; *Somerville* v. *Hawkins*, 10 C. B. 583; *Robinson* v. *Jones*, 4 L. R. (Ir.) 391; *Smith* v. *Crosker*, (1889) 5 T. L. R. 441; *Robinson* v. *Robinson*, (1897) 13 T. L. R. 564.

(23) *Robinson* v. *Jones*, Ir. L. R. 4 Ex. D. 391.

(24) *Ib.*

(25) *Raja Shah*, (1889) P. R. No. 14.

(1) *Pullman and another* v. *Hill & Co.*, (1891) 1 Q. B. 524; *Varnakote* v. *Kotalmana*, (1900) 1 Weir 579.

(2) *Williamson* v. *Freer*, L. R. 9 C. P. 393 (394).

5639. Publication by Printer.—This is the ordinary rule, but the liability of a printer is placed on an exceptional footing. For he is in possession of an appliance affording facility for the widest publication, and his accountability for his act is therefore commensurately greater. As has been elsewhere seen (§ 1272) all printers are required to make a declaration of their being in possession of a printing press(3) and a further declaration has to be made by the printer and publisher of a "printed periodical work, containing public news"(4) the effect of which is then as follows:—

Office copy of declaration to be *prima facie* evidence.

"7. In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid attested by the the seal of some Court empowered by this Act to have the custody of such declarations, shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be subscribed to such declaration, that the said person was printer or publisher (according as the said words of the said declaration may be) of every portion of every periodical work whereof the title shall correspond with the title of the periodical work mentioned in the declaration.(5)

5640. Now the word "publishes" as used in section 499 does not only include the publisher within the meaning of s. 7 of the Press and Registration of Books Act, but also any printer, compositor, proof reader, and indeed, any one whether or not connected with the press and having to read the communication, it follows that besides the declared printer and publisher, many others connected with the press may be concerned with the publication of a libel. But, of course, as will be presently seen, all persons merely publishing a libel do not by that very fact make themselves criminally liable (§ 5643), though even in this respect printers and publishers are necessarily subject to exceptional liability. For as is enacted in the section before cited such declarant is deemed to have published the libel whether as a matter of fact he knew it or not.(6) But the presumption so created is rebuttable, and may be rebutted, by the editor, printer or the publisher who may shew that the libel complained of had been published in his absence and without his knowledge, and that he had in good faith placed the temporary management of the newspaper during his absence in competent hands.(7) In this respect the rule here follows the rule of English Common Law, as amended by the Statute of 1843,(8) under which the proprietor of a newspaper was held criminally liable for the publication of a libel in its columns, though he may now, since the passing of the Statute of 1843, show that the libel was in fact published without his authority, consent or knowledge and that the publication did not arise from want of due care and caution on his part.(9)

5641. But the case of a joint-stock printing company is necessarily exceptional. For having employed a competent manager to do a lawful

(3) Press and Registration of Books Act (XXV of 1867), s. 4.
(4) *Ib.*, s. 5.
(5) *Ib.* s. 7.
(6) *McLeod*, 3 A. 342; in which, however, the liability was based on English Law.
(7) *Ramasami* v. *Lokananda*, 9 M. 387; *Mokand Ram* (Pundit), (1883) P. R. No. 1; *Phanendra Nath Mitter*, 35 C. 945 (953).
(8) 6 & 7 Vict., c. 96, s. 7; *Holbrook*, 4 Q. B. D. 42. In *Ramasami* v. *Lokananda* (9 M. 387), the English Statute was, of course, held not to apply to India, though the Court declared the effect of Act XXV of 1867 to be substantially the same.
(9) *Emmens* v. *Pottle*, 16 Q. B. D. 354 (357).

act, the share-holders must be taken to authorise him to do it in a lawful and not in an unlawful manner, so that the same constructive liability could not be extended to them merely because of their being the proprietors of the printing press. The case of an actual editor and printer is of course different. The one is presumed to edit all matter submitted to his judgment, and the other gives publicity to it by undertaking to print it. He makes profit by printing it, and he should be presumed to know the character of what he prints. So Lord Tenderden, C. J., said: "Surely a person who derives profit from, and who furnishes means for, carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to be caused to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication."(10)

So in another case Lord Esher, M. R. said: "The proprietor of a newspaper who publishes the paper by his servants, is the publisher of it and he is liable for the acts of the servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it."(11) But whether a proprietor, printer or publisher, or even an editor, the presumption of law is in every case rebuttable and may be rebutted by showing that the publication was merely accidental. But it is no defence that the publication was made because it was a *bona fide* communication received from a correspondent. As Best, C. J., put it: "If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act.(12)

5642. Publication by Repetition.—The term "publication" is wide enough to include a repetition or republication of a libel already published, for tale-bearers are as bad as tale-makers. So if a newspaper reproduce a libellous article from another, it makes the article its own, and is liable to all the consequences resulting from its publication, though the fact that the article was merely a re-print would be conducive to mitigation of the sentence or damages awarded.(13) But this may be done out of compassion but cannot be claimed as of right. For law considers it no mitigation that one should give currency to a libel which another has originated. As Best, C. J., put it: "Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified or even excused by wrong."(14) And it is no defence that the libeller indicated the source of his information. So where A told B that C was bankrupt and that his horses had been seized from the coach on the road and that he had been arrested, and thereupon B went about telling every one: "A says C's horses have been seized from the coach on the road, and he himself has been arrested and that the bailiffs are

(10) *Gutch and others*, Moo. & Malk. 548.

(11) *Per* Wills, J., in *Keenslow*, (1895) 1 Q. B. 758 (765).

(12) *DeCrespigny* v. *Wellesley*, 5 Bing., 392 (402).

(13) *Tallutt* v. *Clark*, 2 M & Rob. 312. *Saunders* v. *Mills*, 6 Bing. 213; *Watkin* v. *Hall*, L. R. 3 Q. B. 396; *McPherson* v. *Daniels*, 10 B. & C. 270.

(14) *DeCrespigny* v. *Wellesley*, 5 Bing 404.

in house," it was held that C could sue B though the latter had merely repeated what A had told him.(15) So where A told C: "Thou art a sheep-stealing rogue, and farmer Parker told me so," A was held liable, it being immaterial whether Parker had or had not in fact told him so.(16) A rumour was current that a fall in the shares of a certain railway was due to the failure of its chairman. The defendant repeated the rumour in the following words: "You have heard what has caused the fall. I mean the rumour about the South Eastern Chairman having failed." The Court held that the existence of the rumour afforded no defence to its publication by the defendant.(17)

As Littledale, J., said: "As great an injury may accrue from the wrongful repetition as from the first publication of slander; the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a Court of law for injurious matter published concerning him, because another person previously published it. That shews, not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a Court of law, but that he has been wronged by another person as well as the defendant, and may consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person, as well as the defendant."(18) Again, the fact that the first publication was privileged does not render its second and subsequent publication privileged(19) and so contrarywise the fact that a defamatory statement made out of Court was afterwards repeated in Court on a privileged occasion as witness in a case, does not preclude his prosecution for the statement made out of Court, though he could not be prosecuted for having repeated that statement in Court.(20)

5643. The principle of these cases has been followed in this country in cases decided under the next section. So where the accused was accused of publishing a defamatory article shown to have been extracted from another paper, West, J., said: "The Indian Penal Code makes no exception in favour of a second or third publication as compared with a first, and such an exception would obviously be made a means of defeating the principal provision of the law of defamation."(21) A person prosecuted for republishing libellous matter cannot be heard to say that another journal publishing the same matter had not been prosecuted,(22) nor is the recovery of damages against one journal

(15) *McPherson* v. *Daniels*, 10 B. & C. 263.

(16) *Gardiner* v. *Atwater*, (1756) Sayer 265; *Meggs* v. *Griffith*, Cro. Eliz. 400; *Read's case*, Cro. Eliz. 645; *Lewis* v. *Walter*, Cro. Jac. 406; *Davis* v. *Lewis*, 7 T. R. 17.

(17) *Watkin* v. *Hall*, L. R. 3 Q. B. 396 (401).

(18) *McPherson* v. *Daniels*, 10 B & C. 263 (272, 273), cited with approval by Blackburn, J., in *Watkin* v. *Hall*, L. R. 3 Q. B. 396 (401); *Speight* v. *Gosney*, 60 L. J. Q. B. 231.

(19) *Tidman* v. *Ainslie*, (1854) 10 Exch, 63; *Mills and wife* v. *Spencer and wife*, Holt N. P. 533; *McGregor* v. *Thwaites*, 3 B. & C. 24.

(20) *Periyasawmi*, (1886) 1 Weir 581 (584).

(21) *Howard*, 12 B. 167, following *Holt*, 8 Cox 411; *Waithman* v. *Weaber*, 11 Price 257-*n*, *Kerr* 8 C. & P. 117.

(22) *Holt*, 8 Cox 411.

accepted even as mitigation in an action against another journal for a repetition of the libel.[23]

Mitigating Circumstances.

5644. But in considering the effect of repetition the Court may appropriately take into consideration the circumstances of the case, such as the mode and manner of the publication, and the fact whether the republication was a malicious exaggeration or invention, or merely a reckless repetition of a rumour more due to the bad taste than the bad intention of the accused. So the Court may take into consideration the fact that wider publicity was given to the libel by its insertion in a newspaper,[24] and even in the case of the printer of a newspaper the Court discriminates between the first printer and another who has taken only a subordinate part in disseminating the matter already made public. So it has been held by Lord Romer that if he published it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at, and if he succeeds in showing (*i*) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (*ii*) that there was nothing in the work or circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (*iii*) that when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was *prima facie* publication of it, he may nevertheless on proof of the before mentioned facts, be held not to have published it. But the *onus* of proving such facts lies on the defendant, and the question of publication or non-publication is a question of fact and not one of law.[25] The defendants were the proprietors of an extensive circulating library, and as such received and circulated books amongst the subscribers. As such they circulated one which contained a libel for which they were sued. It was shown that they had been in the habit of receiving and putting into circulation all books received without exercising any scrutiny for which they entertained no establishment, thinking it cheaper to pay for the libel than for a regular establishment. It was held that the defendants were civilly liable.[1] But of course, in such a case, there could be no question of criminal liability, for, though the defendants published the libel they had done so without criminal intention.

5645. Publication may be by Words or Signs.—Again if what is done amounts to publication, the fact that it was done by words spoken or written or by means of signs or visible representation is immaterial, though the mode of publication is undoubtedly a question which the Court should take into consideration in judging of the gravity of the offence. But it is otherwise immaterial as is clear from illustration (*b*) which is an instance of defamation committed by signs, and illustration (*c*) in which A defames Z by means of a visible representation, namely, a picture. So where a libellous placard was erected by the roadside, and the defendant sat by, saying nothing but constantly pointing to the placard so as to attract to it the attention of the

(23) *Kerr*, 8 C. & P. 177; followed in *Howard*, 12 B. 167.

(24) *Janardhan*, 19 B. 703.

(25) *Vizetelly* v. *Mudie's Select Library*, (1900) 2 Q. B. 170.

(1) *Ib.*

passers-by, it was held to be evidence of publication which should have been left to the jury.(2) Of course, words and signs, however, libellous in themselves, do not amount to defamation unless they are published and no publication however broadcast is libellous unless it is made in one of the four ways here specified. Of these the words spoken need not be spoken by the defamer, for he may put them into a gramophone or utter them through a telephone or through an infant who does not understand their purpose, in which case he would be deemed to have spoken them in the same way as if he had himself uttered them: *Qui facit per alium facit per se.*(3)

But the words uttered must be uttered to the hearing of at least one person other than the person defamed. If they are uttered however aloud in a desolate moor they do not constitute this offence. In the same way words written must be "intended to be read" by others. If therefore a person records a libel in his own private diary intended for his own amusement, he could not be held liable for writing down a libel. So if a person put up a libellous placard and take it down again before any one could read it, it is no publication; but if it was exhibited long enough the jury may presume its publication unless the defendants shews that as a matter of fact no one read it.(4) The fact that a person merely intends another to read his writing does not suffice to make his writing libellous—for he may have written it with no immediate thought for publication, in which case the writer could not be punished for writing what he intended to be read but which he did not intend to publish.(5) The use of signs must serve the same purpose, namely, of publication, but in that case the mere use of signs would hardly suffice to constitute defamation, but there is nothing to prevent other evidence being given to explain their meaning.

5646. The same object may be achieved by means of a visible representation, such as a caricature, effigy, statute or bust depicting the subject in a manner calculated to arouse popular ridicule, hatred or contempt. Indeed, the use of visible representation is use of pictorial language which may appeal even to a wider circle, producing among them an impression more deep-rooted than what could be created by a descriptive letter-press. For instance, if a person burns another in effigy could it be denied that the onlookers would be more deeply impressed than if he had merely inveighed against his character?(6) So it was held to be a libel on a person where the accused fixed up a gallows and other ignominious or reproachful sign against a man's door.(7)

The defendants were the proprietors of a well-known wax exhibition known as Madam Tussaud's Exhibition in which were exhibited life-like wax figures of well-known people as well as criminals. As such they exhibited the effigy of the plaintiff Monson—alleged to be a notorious anarchist who had been tried for having shot a young man

(2) *Hird* v. *Wood*, 38 Sol. J. 234; *Spall* v. *Massey and others*, 2 Stark, 559.
(3) "He who employs another to do a thing is as good as if he had done it himself."
(4) 2 Starkie's Libel, p. 16, Note (*n*).
(5) *Taki Husain*, 7 A. 205 (222), F. B
(6) *Eyre* v. *Garlick*, 42 J. P. 68.
(7) Hawk, P. C. 542; *Jefferie* v. *Duncombe*, 11 East 226.

in Scotland but discharged on the jury having returned the verdict of "Not proven." They advertised their exhibits by means of Sandwitch boards, and in the newspapers with the words "*See* the Chamber of Horrors (extra room 3*d*) and the instruments of torture—*See* vaillant the anarchist and Monson of Ardlamont—Admission to the Exhibition and Entertainment 6*d*." The plaintiff applied for an *interim* injunction to restrain the defendants from exhibiting the plaintiff's model and advertising it. The defendants said that they intended to cast no imputation whatever upon the plaintiff, but asserted that the plaintiff had become a notorious person, and contended that where a man had become notorious, either for creditable or discreditable reasons, they were at liberty to exhibit his effigy, and so to gratify the public curiosity which had been aroused with regard to him. The Court held that the plaintiff was entitled to the injunction, but though the Court of appeal disallowed an interlocutory injunction holding that though the question whether the publication of such a model amounted to a libel was for the jury who had not then decided, still they unanimously agreed that no one had the right to exhibit the bust, portrait or effigy of another even though it be his faithful likeness, even for the purpose of gratifying public curiosity, if it has the effect of bringing the original into disrepute.[8]

And the fact that the representation was true did not justify the publication, for no one has the right to perpetuate another's disgrace and keep it constantly before the public by means of portraits and effigies. It may be that when a person is on his trial the newspapers have the right to publish his portrait as supplementing the report of judicial proceedings, but that right does not enure for all time. Indeed, the lives of criminals would be an intolerable burden if law offered no protection even to the reputation of such person. There are no doubt circumstances and occasions when such a publication would be legal, but as will be presently seen, law then has regard to other considerations which are rather in the nature of an exception.[9]

5647. Imputation must be Harmful.—It is then clear that (*i*) there must be a publication (§§ 5633-5642), and (*ii*) that what is published must amount to words, signs or visible representation (§§ 5645-5646). The section next requires (*iii*) that what is published must be an "imputation," and (*iv*) it must be harmful to the reputation of another. The word, "imputation"[10] is a word of evil significance and implies the attribution of evil, the making of an accusation, allegation, insinuation or a charge against a person. Such imputation may be made in any of the ways in which human thoughts are communicated to others, directly or indirectly, by a declaration as much as by way of exclamation, a feigned interrogation, expression or conjecture, irony or innuendo. And the imputation may be made not only in the language of words but by pictorial representation so long as it is sufficiently expressive and conveys a meaning harmful to the reputation of another person (§§ 5645-5646). For since the protection of personal reputation is the object

(1) What is an Imputation?

(8) *Monson* v. *Tussands Ltd.*, (1894) 1 Q. B. 671 (687).

(9) 5th Exception.

(10) From Lat. *imputatio*, a charge.

of its solicitude, law only punishes publication of an imputation if it is intended to harm or which the accused knows or has reason to believe will harm the reputation of some person.

(2) What is Harm?

5648. The question whether an imputation will have the effect depends in a great measure upon what is "harm" in the eye of the law. That term is not defined in the Code, but it has been used in defining "injury"[11] which is merely harm illegally caused, and as such the two words bear practically the same meaning, for if "harm" does not amount to "injury" it is *damnum sine injuria* and as such it is neither civilly actionable nor criminally indictable. The harm must then amount to injury, and the injury must be to a man's reputation. If it causes injury to his property without necessarily affecting his reputation, it is not a harm within the meaning of this section. The section then protects the injury or harm of a special kind—that which has a tendency to affect his reputation though it may do so directly or indirectly.[12] Moreover, it is not a part of the definition that the imputation made, should have in fact caused any harm to another person's reputation for it bases criminal responsibility upon the intention, knowledge and belief of the maker of the imputation.

(3) No Actual Harm Necessary.

5649. It is not consequently necessary that a person complaining of defamation should show that he had actually suffered any harm in reputation.[13] It will suffice if he shows that the accused intended to harm it or that he knew or had reason to believe that it will harm it. In other words, the question in such cases is not what harm the complainant had suffered but whether the accused intended to inflict any harm upon him. From this it is clear that a person who makes an imputation against another need not obtain credence from the public. In fact he may be then and there discredited, the reputation of the complainant may be too well established to be shaken by his scurrility. But law protects one by punishing the other on account of his depraved intention and its tendency to cause harm. It is one of those cases in which law punishes the archer as soon as the arrow is shot, no matter if it fails to hit the target. The accused who was a dismissed clerk in the Public Works Department, sent an anonymous petition to the Governor-General complaining of the Executive Engineer as having blindly appointed another person as a store-keeper "who was in irons for a year or two for embezzlement of Government money." He was convicted of this offence and in defence he urged that his petition had done no harm to any one; but the Court considered that question immaterial, holding that the accused's criminality depended upon his belief, of which the nature of the imputation made by him afforded ample presumption.[14] It may happen that the defamer defeats his object by the very fact of his exaggeration in which case his imputation carries with it its own refutation, but in that case surely he could not be heard to say

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(11) S. 44.

(12) *Per* Mahmood, J., in *Taki Husain*, 7 A. 205, F. B.

(13) *Pimento*, 22 Bom. L. R. 1224, 59 I. C. 202, 22 Cr. L. J. 58; *Ram Narain*, 22 A. L. J. 639.

(14) *Thakur Dass*, 6 N. W. P. H. C. R. 86. To the same effect, *Govind Pershad Pandey* v. *Garth*, 28 C. 63; *Anon*, (1883) 1 Weir 575.

that he was exempt from punishment because forsooth nobody could be found to believe in his libel.[15]

On the other hand, if the accused had reason to believe that his imputation will harm another man's reputation, it is nothing that he had not been actuated by malice, for malice is no part of the definition of this offence, though the Courts have somewhat unnecessarily assumed its existence as necessary for the constitution of the crime[16]; for though "malice" is necessary under the English definition of libel, it is by no means necessary for the offence in the Code. So where the accused gave out that the complainant should be outcasted for having had intercourse with a pariah woman, and the Magistrate acquitted him holding that, in the absence of actual ill-will, the imputation made by the accused must be accepted as being made *bona fide*, and thereupon Kindersley and Muttusami Aiyar, JJ., said: "In this view he is mistaken. Conscious violation of law to another's prejudice is sufficient, though there may be no malice in fact. When defamatory words are *prima facie* libellous, legal malice must be presumed until a case of privilege is made out by the accused, and in the present case the conduct of the accused in violently and publicly talking about the complainant in the manner he did, seems to go beyond a legitimate desire to protect the interests of those to whom he made the imputation."[17] As to this it is submitted that the fiction of a legal malice is the creature of English Law and no part of the definition, and the question whether the violent and public accusation amounted to defamation was a question of fact and not one of law.

5650. The only question of intentionality that is material for the constitution of this offence is whether at the time the accused made the imputation he (*a*) *intended* to harm, or (*b*) knew, or (*c*) had reason to believe that his imputation will harm the reputation of the person concerning whom it was made. The question is one of probability dependent upon the nature of the imputation and the time and place and manner of making it. The fact that it did in fact harm is immaterial except as evidence reflecting upon the question of intention.

5651. Ingredients of a Guilty Mind.—The offence does not require that any one's reputation should be intentionally harmed. For if it is harmed in fact and in consequence of the statement of the accused the latter would be criminally liable, if, in the words of the section he knew or had reason to believe[18] that his statement would cause the harm.[19] It is not necessary that the words should be maliciously published, for conscious violation of law to another's prejudice is sufficient though there may be no malice in fact.[20] Such was the case of the accused who had reason to believe that the complainant had had intercourse with a pariah woman, but which fact he published broadcast. The undue publicity to an imputation otherwise privileged if only published amongst members of the accused's caste, was held to be the

(15) *Senthinathaiyar* v. *Gnanamuthu*, (1884) 1 Weir 594.
(16) *Palani Asari*, (1882) 1 Weir 613.
(17) *Palani Asari*, (1882) 1 Weir 613 (614).
(18) S. 26.
(19) *Kewala Nandgir*, (1913) P. W. R 34, 21 I. C. 478.
(20) *Palani Asari*, 1 Weir 614.

gist of the crime.[21] A harm intended but not effected is no defence to the charge, provided the injury was likely though not actually suffered (§§ 5649-5651). On the other hand, evidence of malice is inadmissible where the statement is not *prima facie* libellous.[22] It was so held in a case in which the complainant had advertised for sale replicas of a painting by Ravi Varma. The accused who signed himself as "Anti-Humbug" wrote in the same paper doubting the genuineness of the original. The Court held that the *non de plume* alone was suggestive but it was no part of the imputation which was not libellous. Consequently, there being no libel it was not open to the complainant to prove that the accused had been actuated by malice.

Malice is an answer to a plea of fair comment and if there was no *prima facie* case of libel at all, any proof of malice would be irrelevant. Where the accused pleads good faith the complaint may prove malice. To prove malice, extrinsic evidence of malice is not necessary. The words of the libel and the circumstances attending its publication may themselves afford evidence of malice.[23] The use of violent language does not necessarily prove malice.[24] It may be due to excessive zeal. As the section is worded, there can be no defamation of a person of whom the accused had no knowledge. The contrary has been laid down in England in a case in which the defendant had satirized a fashionable foible, of men motoring about with women passing them off as their wives, illustrating it by a purely imaginary character of "Artemus Jones," whereupon a Barrister of that name sued the writer for libel. It was found that the defendant did not refer to the plaintiff at all with whom he was not even acquainted. But nevertheless the Court held the defendant liable for the libel, holding that, in an action for libel, it is no defence to shew that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory of the plaintiff.[25] Such *contretemps* is not possible under the Code since the imputation made concerning "any person" must be at least believed to harm the reputation of "such person." In other words, a random shot not directed against any particular man or class of men is outside the scope of the offence.

5652. This is sufficient to exclude terms of common abuse, and those reflecting upon one's female relations, abuses which if strictly construed are highly defamatory but which are not ordinarily intended to be used or taken seriously, and which could not then be said to harm the reputation of persons alluded to.[1] So where a pleader in the course of a judicial proceeding made an objectionable reference to his adversary who retorted by calling the pleader a "liar," Straight, J., held the case covered by s. 95, though it might been disposed of as an empty abuse not intended to convey any harmful imputation.[2]

(21) *Palani Asari*, 1 Weir 614 *Salar Mannaje* v. *Herejee Row*, 1 Weir 614 *Sankara*, 6 M. 381.

(22) *Narasinga* v. *Kasturiranga*, (1911) M. W. N. 226, 9 I. C. 279.

(23) *Motilal Raha* v. *Indra Nath*, 36 C. 907.

(24) *Laugleton* v. *Bishop of Sodar and Man*, L. R. 4 P. C. 495 (598).

(25) *Jones* v. *Hulton and Co.*, (1909) 2 K. B. 444 O. A.; *Hulton and Co.* v. *Jones*, (1910) A. C. 20.

(1) *Bihari*, (1883) A. W. N. 36, in which the complaint related to "*beti ki gali, bahin ki gali*" (imputing unchastity to daughter and sister).

(2) *Vansittart*, (1883) A. W. N. 46.

5653. Person Defamed must be Certain.—As to the person defamed the section speaks of an imputation in connection with "any person"—the "person" here being used in the sense in which it is defined in section 11. Now since the term as there defined, "includes any company or association or body of persons, whether incorporated or not" it follows that this offence may be committed as much against a natural person as against what is called a juridical person. So where misconduct is imputed to the Police with reference to a case,(3) or where insolvency is imputed to one member of a firm, either he or the firm may complain, for it is a reflection on the credit of both.(4) But in such a case a distinction must be made between libel on an individual and a libel upon a class—that is to say, if the libel relate to a general body of men as distinct from any of its individuals then no individual member of that body could arrogate to himself the right to complain. For instance, "if a man wrote that all lawyers were thieves, no particular lawyer could sue him, unless there is something to point to the particular individual."(5) But in this case if the libel had been that "all lawyers of the place A are swindlers" it would then give each lawyer in A a right to complain.

Explanation 2.

So where the accused said that "Scorton Nunnery is a brothel of prostitution" it was held that in doing so he was attacking the individual characters of the body of whom the Scorton Nunnery consisted and that as such his words were indictable.(6) So the accused was indicted for having published libel in a book in which he stated that an aide-de camp of the Governor of Leeward Island had whipped a negress of his own while she was pregnant and that on her complaining to the Governor he lashed her the more in consequence of which he was dismissed. It appeared that at the time of the alleged incident the Governor had eight aides-de-camp and the indictment charged the accused with libel concerning the eight, but there was no proof that it applied to any one of them, whereupon it was argued that the libel was not a libel on the body of aides-de-camp at large, but Abbot, J., said: "I have not the slighest particle of doubt that a count might be so framed as to this being a libel against the eight; for if it were otherwise, a person might publish a libel of one of eight persons, and the facts being so false, no human being could apply it to any one of them, he must go unpunished though he may have brought eight persons into slander and reproach"(7) (§ 5662).

5654. Reputation must be Attacked.—Again, the causing of harm made punishable by this section is only such as affects a person's "reputation. Now a person's estimate of one's self is not his reputation, so that a harm which merely causes him mental and bodily pain does not

What is Reputation.?

(3) *Pratap Chandra Gupta*, 29 C. W. N. 904, 90 I. C. 387, (1925) C. 1121.

(4) *Harrison* v. *Berington*, 8 C. & P. 708 *Cook* v. *Batchellor*, 3 Bos. & Peel, 150; *Forster* v. *Lawson*, 3 Bing. 452.

(5) *Per* Willes J., in *Eastwood* v. *Holmes*, 1 F. & F. 347 (349).

(6) *Per* Alderson, B., in *Gathercole*, Lew. C. C. 254; *Gopabandhu*, 1 Pat. 414, 67 I. C. 609, 23, Cr. L. J. 433.

(7) *Hatchard*, (1817) unrep. cited in Folkard's Libel (5th Ed.) pp. 821, 822.

injure his reputation.[8] That word is intended to denote the estimation in which a person is held by others, the character imputed to him in the community in which he lives. Reputation is the esteem in which a person is held by the community, and harm to reputation must then be an injury which that esteem suffers in the estimation of others. From this it follows, *first*, that the communication of a libel only to the person libelled is not defamation, and it is so settled (§ 5634), and, *secondly*, that the words of common abuse such as "you idiot," "you scoundrel," and others, which convey no definite imputation harmful to one's reputation do not constitute defamation. It has also been so held both in England[9] and in this country.[10] But words of mere abuse may amount to defamation, and defamation may be interspersed with abuse in which it is for the Court to disentangle abuse from defamation and judge of the effect of one in the light of the other. It all depends upon what was meant by the speaker and understood by the by-standers.

The complainant Sundar Lal had sent out an intimation that there would be a festival in which banner would be consecrated and Brahmins fed. The accused a Brahmin felt aggrieved at what he considered his supersession and called the complainant a *Kori Chamar*. He was in fact a *Kayastha*, with the result that the other priests refused to officiate at the ceremony. The term, though intended merely to belittle the complainant, had a far-reaching effect, and the Court held it to amount to defamation.[11] So where the defendant addressing the plaintiff said: "You are a thief; you robbed Mr. Lake of £30," the Court held the words to be too specific to amount merely to abuse, though it was open to the defendant to shew that they were taken in their literal sense by the by-standers who listened to the whole conversation, though previously unacquainted with the matter to which the words related.[12] But where the words used were general as that "you are a thief, a rogue and swindler," the defendant was held precluded from giving evidence to explain the particular transaction which he had in his mind at the time, since he did not in any way expressly refer to it in the presence of his hearers.[13]

The accused was a pleader for the defendant in the case of *Ram Ghulam* v. *Mendai Lal* then being heard in the Court of a Munsiff, and the question was the general respectability and *status* of the parties. The accused was arguing for the defendant, and under instruction from his client said: "Why, who was Ram Gulam's father? He died when he was scraping grass." At this Ram Gulam put his head in a small door in the Munsiff's Court, and said: "What does Amir Hasan know of pleading? Up to yesterday he and his father were pedlars, and hawked about small wares through the streets." These expressions gave rise to mutual prosecutions and both parties were fined, but their

(8) From Lat. *reputare*, to think over, a reckoning consideration; hence, good reputation, favourable regard, public esteem, general credit, good name.

(9) *Minors* v. *Leeford*, Cro. Jac. 114; *Penfold* v. *Westcote*, 2 Bos. & P. N. R. 335.

(10) *Amir Hasan*, (1883) A. W. N. 167.

(11) *Bachcha*, 6 I. C. (All.) 876.

(12) *Haukinson* v. *Bilby*, 16 M. & W. 442; *Tomeinson* v. *Brittlebank*, 4 B. & Ad. 630.

(13) *Martin* v. *Loei*, 2 F. & F. 654; *Read* v. *Ambridge*, 6 C. & P. 308.

convictions were quashed by Straight, J., who said: "The language of section 499 is no doubt open to the most elastic application, but Magistrates will act wisely in refusing to adapt it to cases in which no real harm has been done, or where a civil remedy might more appropriately be sought. In the present instance Amir Hasan's remark with regard to Ram Gulam was a most improper one, especially from a pleader, and the latter's retort was equally objectionable; but the proper person to have taken notice of the matter was the Munsiff in whose presence the observations were made, and to the order and decency of whose proceedings they were an undoubted interruption." He then quashed both the proceedings holding the words to amount to no more than vulgar abuse which did not amount to defamation.(14)

Words Defamatory though Reputation Not Harmed.

5655. But of course the transition from abuse to defamation is narrow and imperceptible. But in each case the Court must be guided by the sound sense of seeing that its process is not abused, and that at the same time the law is not too narrowly interpreted so as to become a dead letter. The gravity of the offence must, no doubt, be measured by the harm caused, but at the same time the causing of actual harm should not be made a *sine qua non* to the initiation of proceedings. Indeed there is no inflexible standard for judging the question of harm. For in a country people by communities so complex and diverse as India, the question of harm to reputation must be considered from the personal standard of the complainant. If, for instance, a person were to speak of another as having taken water from the hands of a pariah, the question whether the accused intended any harm depends upon the caste of the complainant. If he was a Christian, the statement may have been made to establish the equality of all men. If he was a Hindu, the statement must have been made to put him out of the caste. The question then depends upon a variety of circumstances other than merely the words spoken. But apart from these circumstances there still remain imputations which will be defamatory to whomsoever addressed. In such case the question is one of construction, for words may be defamatory not only for what they express but also for what they suggest. For this purpose the effect of words may be considered in the following order: words that are (*i*) obviously defamatory (§§ 5653-5654), (*ii*) ambiguous (§5659-5665), (*iii*) neutral (§ 5666).

(1) Words Obviously Defamatory.

5656. Of these, the first class calls for no particular notice. For words that are obviously defamatory are *prima facie* punishable, unless their use is justified under any of the exceptions to be presently considered. Such words could only be excused on the ground that they were meaningless, being words of vulgar abuse. Such would be the expression "you are a thief"(15) or a rogue (16) in which case the words are plainly defamatory unless they are shewn to have been used in their secondary sense. So where the defendant told the complainant that he had stolen his apples, he was not allowed to prove that it was only an expression, and that what he meant to say was that the com-

(14) *Amir Hasan*, (1883) A. W. N. 167.
(15) *Blumby* v. *Rose*, 1 Roll. Abr. 73; *Slowman* v. *Dutton*, 10 Bing. 402.
(16) *Esufalli*, 20 Bom. L. R. 601, 46 I C. 411, 19 Cr. L. J. 731.

plainant had removed them under an unfounded claim of right.(17) So where a person was accused of blackmailing, it was held to be plainly actionable(18) and it would be also punishable under this section.

So the word " pettifogger " as applied to a lawyer has a well-known meaning which the Courts could not ignore.(19) So where a person charges another with undue intimacy with a woman of another caste in consequence of which she became pregnant, he knows that his words are clearly defamatory, though he may have couched them in the form of a circular warning to caste people.(20) Such is the statement made by a person against another with whom he had a dispute about a plot of land that he was an ex-convict which had nothing to do with the claim.(21) So while the accused was under examination, the complainant asked the Magistrate to question him if he had not been convicted, whereupon, before the Magistrate could decide upon the relevancy of the question, the witness exclaimed: "I was convicted, because I had Kasim Saheb's wife in my house," which he repeated in spite of a warning by the Magistrate, it was held that he was guilty of defaming Kasim's wife.(22)

5657. Words which impute the commission of a crime to another are clearly defamatory. So words charging a person with having committed treason,(23) murder,(24) or homicide,(25) or an attempt to commit either,(1) robbery,(2) or house-breaking,(3) assault with intent to rob,(4) pocket-picking,(5) theft,(6) extortion,(7) forgery,(8) or embezzlement,(9) bigamy,(10) or adultery,(11) committing an unnatural offence,(12) or maintaining a brothel,(13) perjury,(14) or subornation of perjury,(15) cheating(16) and conspiracy,(17) or conspiring to commit a crime,(18)

(17) Cf. *Rowcliffe* v. *Edmonds*, 7 M. & W. 12.

(18) *Edsall* v. *Brooks*, 2 Robb. (N. Y.) 29; Robb. (N. Y.) 284; *Marks* v. *Samuel*, (1904) 2 K. B. 287.

(19) *Bailey* v. *Kalamazoo Publishing Co.* (1879) 4 Ch. (Mich.) 251.

(20) *Ramanand*, 3 A. 664; *Shirgowda*, 3 Bom. L. R. 188.

(21) *Ramasami Naidu*, (1895) 1 Weir 612.

(22) *Syed Husain*, (1881) 1 Weir (3rd Ed.), 357.

(23) *Waldegrave* (*Sir William*) v. *Ralph Agas Cro.* Eliz 191; *Stapleton* v. *Frier*, Cro. Eliz. 251.

(24) *Peake* v. *Oldham*, Cowp. 275; s. c. *sub nom Oldham* v. *Peake*, 2 W. Bl. 959; *Button* v. *Hayward*, 8 Mod. 24.

(25) *Ford* v. *Primrose*, 5 D. & R. 287; *Edsall* v. *Russell*, 4 M. & G. 1090.

(1) *Scott* v. *Hilliar*, Lane, 98; *Preston* v. *Pinder*, Cro. Flliz. 308.

(2) *Lawrence* v. *Woodward*, Cro. Car., 277; *Rowcliffe* v. *Edmonds*, 7 M. & W.12.

(3) *Somers* v. *House*, Holt 39.

(4) *Lewknor* v. *Cruchley*, Cro. Car. 140.

(5) *Baker* v. *Pierce*, 6 Mod. 23; *Stebbing* v. *Warner*, 11 Mod. 255.

(6) *Leyman* v. *Latuner*, 3 Ex. D, 15, 352.

(7) *Neve* v. *Cros* Sty. 350; *Jones* v. *Herne*, 2 Wills. 87, *contra* in *Anon*, 3 Leon, 231, overruled.

(8) *Baal* v. *Baggerley*, Cro. Car. 326; *Jones* v. *Herne*, 2 Wills. 87.

(9) *Williams* v. *Stott*, 1 C. & M. 675.

(10) *Heming* v. *Power*, 10 M. & W. 564; *Delany* v. *Jones*, 4 Esq. 191.

(11) Slander of Women Act, 1891 (54 & 55 Vict., c. 51).

(12) *Thompson* v. *Nype*, 16 Q. B. 175; *Wolnoth* v. *Meadows*, 5 East. 463; *Colman* v. *Godwin*, 3 Doug. 90.

(13) *Brayne* v. *Cooper*, 5 M. & W. 249; *Huckle* v. *Reynolds*, 7 C. B. (N. S.), 114.

(14) *Ceely* v. *Hoskins* Cro. Car. 509; *Holt* v. *Scholefield*, 6 T. R. 691; *Roberts* v. *Camden*, 9 East 93.

(15) *Guerdon* v. *Winterstud*, Cro. Elliz. 308; *Harris* v. *Dixon*, Cro. Jac. 158; *Bridges* v. *Playdel*, Brown & Golds 2; *Harrison* v. *Thornborough*, 10 Mod. 196.

(16) *Gordon Cumming* v. *Green and others*, (1891) 7 T. L. R. 403.

(17) *Tibbot* v. *Haynes*, Cro. Eliz. 191.

(18) *Cookaine* (*Sir Thos.*) v. *Witnain*, Cro. Eliz. 49; *Leversage* v. *Smith*, Cro. Eliz. 191; *Passie* v. *Mondford*, Cro. Eliz. 747; *Deane* v. *Eton*, 1 Blus 201; *Crofts* (*Sir Harbert*) v. *Brown*, 3 Blus. 201.

bribery and corruption[19] and indeed, any offence which has a tendency to lower one in the estimation of his fellowmen, are defamatory. And so it has been held that to call a man an ex-convict,[20] bankrupt,[21] a gambler,[22] or an outcast,[23] is actionable, though when words such as cheat,[24] swindler,[25] rogue, rascal, villain, vagabond,[1] common-filcher,[2] or the like are used merely as abusive epithets they cannot be regarded in the same light, though they may then constitute insult, and be, as such, punishable under s. 504. And it is so because having obtained currency in another sense they could not be said to have been used in the belief that they will be seriously taken by the by-standers so as to affect the reputation of the person to whom they are applied. But such would be the case where a person is charged with suffering from a contagious or loathsome disease the result of which may well be expected to exclude the complainant from society. So where a person is said to be suffering from plague, leprosy, venereal disease[3] or smallpox[4] he has the right to complain. So since virtue is the pride of womanhood, to charge a woman with unchastity[5] is highly defamatory and the more so if her children are called bastards.[6]

5658. And so in the case of-professional men it will be highly defamatory to make imputations touching the efficiency, honesty or integrity of the person who lives by his profession. So to charge a religious preacher with immorality or other misconduct which would be a reason for his degradation is libellous.[7] So to charge a clergyman with drunkenness,[8] or incontinence,[9] lying in the pulpit,[10] or misappropriating the money given to charity is clearly libellous[11]; and since barristers are presumed to be learned in the law, to speak of one as a dunce,[12] or a jackanape,[13] or that he has been guilty of unprofessional conduct, or that he has disclosed his instructions to the other side and deceived his client,[14] or that he wantonly led his client astray to feather his own nest, would entail the same consequence[15]; and the same protection is extended to solicitors and attorneys. Therefore to say of an attorney that he has no more law than

(19) *Bendish* v. *Lindsay*. 11 Mod. 194.
(20) *Fowler* v. *Dowdney*, 2 M. & Rob. 119; *Bell* v. *Byrne*. 13 East 554.
(21) *Robinson* v. *Merchant*, (1845) 7 Q. B. 918; *Bhikam Chand*, 98 I. C. 124, (1927) S. 54.
(22) *Tikam Das*, 96 I. C. 499, (1927) S. 58.
(23) *Yusuf Beg Saheb* v. *Mhd. Sayad*, 99 I. C. 943, (1927) M. 397.
(24) *Savage* v. *Robery*, 5 Mod. 398; *Davis* v. *Miller*, 2 Str. 1169.
(25) *Savile* v. *Jardine*, 2 H. Bl. 531 *Black* v. *Hunt*, 2 Ir. L. R. 10; *Ward* v. *Weeks*, 7 Bing. 211.
(1) *Stanhope* v. *Hopkins*, 2 Lev. 214.
(2) *Goodale* v. *Castle*, Cro. Eliz. 554.
(3) *Villers* v. *Monsely*, 2 Wils. 403; *Taylor* v. *Perkins*, Cro. Jac, 144.
(4) *Brooke*; v. *Wise*, *Cro.* Eliz. 878 *Grimes* v. *Lovel*, 12 Mod. 242; *Whitfield* v *Powel*, 12 Mod. 248.
(5) *Cook* v. *Wingfield*, 1 Str. 555.
(6) *Davis, case* (Anne), 4 Rep. 17; *Salter* v. *Browne*, Cro. Car. 436.
(7) *Pemberton* v. *Colls*, 10 Q. B. 461.
(8) Folkard's Libel, p. 124, citing A 63.
(9) *Evans* v. *Gwyn*, 5 Q. B. 844; *Highmore* v. *Harrington* (*Earl and Countess of*), 3 C. B. (N. S.) 142; *Hartly* v. *Herring*, 8 T. R. 130.
(10) *Cranden* v. *Walden*, 3 Lev. 17; *Sarrum* (*Bishop of*) v. *Nash*, Buller's N. P. 9; *Drake* v. *Drake*, 1 Roll. Abr. 366.
(11) *Highmore* v. *Harrington* (*Earl and Countess of*), 3 C. B. (N. S) 142.
(12) *Peard v. Jones*, Cro. Car. 382; *Bankes* v. *Allen*, 1 Roll. Abr. 54.
(13) *Palmer* v. *Boyer*. Cro. Eliz. 342; *Brooke's case*, Mod. 409.
(14) *Snag* v. *Gray*, 1 Roll. Abr. 57.
(15) *Anon*, 3 Salk, 328; *Lake*, 2 Ventr. 28.

a goose,[16] or the devil,[17] or that he is both a knave and a fool, or that he lives by cheating,[18] or that "he is only an attorney's clerk and a rogue, he is no attorney,"[19] or that he is a turncoat,[20] and will betray his client,[21] or that your attorney is a bribing knave and has taken £20 of you to cozen me,"[22] or that an attorney has been guilty of professional misconduct and ought to be struck off the rolls have been all held to be actionable, and would clearly be defamatory under this section. In England words[23] that an attorney had defrauded his creditors and had been horsewhipped off the course at Doncaster[24] have been held to be not actionable, though it is submitted they will be clearly defamatory, being words tending to lower his general reputation. But in his case too, words which are merely abusive must be distinguished from those that are intended to be defamatory.

5659. So since skill and capacity are necessary in a medical man, to charge him with having caused the death of a patient through his ignorance and culpable negligence is libellous[25] so it is defamatory to call him a quack or a mountebank,[1] but if the surgeon is a quack, there would be probably no defamation in calling a spade a spade.[2] But to say of a qualified man that he had ignorantly or unskilfully administered the wrong medicines or in excessive doses would be defamatory.[3] But under the peculiar law of slander in Engand (§§ 5628-5629), to charge a physician with adultery unconnected with his professional conduct is not actionable,[4] but a different fate will await such a defamer in this country. In England a physician is presumed to be a scholar, so a statement that "he is no scholar" is slanderous, because it is said that no man can be a good physician unless he be a scholar,[5] but this is pushing the doctrine of prosecution too far, for indeed, an ordinary physician will blush to think that law imputes to him scholarship the denial of which is actionable. But a schoolmaster must be a scholar, and so to say of him that he is a dunce and incompetent to teach[6] or that he is a habitual drunkard[7] is actionable, and it will be equally punishable under the next section.

5660. And so since honesty and integrity in a high degree is required of all public servants in the discharge of their duties, to charge a judicial officer with corruption[8] or being a blood-sucker.[9] is action-

(16) *Baker* v. *Morfue*, 2 Keble 202.
(17) *Day* v. *Buller*, 3 Wils, 59.
(18) *Anon*, (1638) Cro. Car. 516; *Powel* v *Jones*, 1 Lev. 297.
(19) *Hardwick* v. *Chandler*, 2 Stra. 1138.
(20) *Annison* v. *Blofield*, 1 Roll. Abr. 55: *Shire* v. *King*, Yelv 32.
(21) *Martyn* v. *Burling*, Cro. Eliz. 589; *Garr* v. *Selden*, 6 Barb. (N. Y.) 416: *Foot* v. *Brown*, 8 Johns. 64.
(22) *Yardley* v. *Ellill*, Hob. 8.
(23) *Byrchley's* case 4 Rep. 16; *Phillips* v. *Jansen*, 2 Esp. 624.
(24) *Doyley* v. *Roberts*, 3 Bing. N. C. 835.
(25) *Poe* v. *Mondford*, Cro. Eliz. 620: *Watson* v. *Vanderlash*, Hetl. 71; *Edsall* v. *Russell*, 4 M. & Gr. 1090.
(1) *Allen* v. *Eaton*, 1 Roll. Abr. 54.
(2) *Collins* v. *Carnegie*, 1 A. & E. 695.
(3) *Collier* v. *Simpson*, 5 C. & P. 73; *Tutty* v. *Alewin*, 11 Mod. 221; *Secor* v. *Harris*, 18 Barb. 425; *Edsall* v. *Russell*, 12 L. J. C. P. 4.
(4) *Ayre* v. *Craven*, 2 A. & E. 2.
(5) *Cawdry* v. *Highley*, Cro. Car. 270.
(6) *Watson* v. *Vanderlosh*, Hetl. 71.
(7) *Hume* v. *Marshall*, 42 J. P. 136; *Goslett* v. *Garment*, (1897) 13 T. L. R. 391.
(8) *Coesar* v. *Curseny*, Cro. Eliz. 305; *Carn* v. *Osgood*, 1 Lev. 280; *Alleston* v. *Moor*, 1 Hetl. 167; *Masham* v. *Bridges*, Cro. Car. 223; *Isham* v. *York*, Cro. Car. 15: *Beamond* v. *Hastings*, Cro. Jac, 240; *Aston* v. *Blagrave*, 8 Mod. 270.
(9) *Hilliard* (*Sir Christopher*) v. *Constable*, Cro. Eliz. 306.

able, and would be here punishable as defamation; but comments upon his intelligence may not fall into the same category, for they may be privileged under Exception 2.

5661. But to say of a banker or trader that he is insolvent,[10] or of a merchant that he is a sharper or a "cheating knave and keeps a false debt-books,"[11] or that he uses false weights,[12] or that he adulterates the goods he sells,[13] or that he professes to sell lamb but supplies coarse mutton,[14] or that he is an infernal rogue and swindler,[15] and indeed any imputation which reflects upon his credit, honesty or capacity for business may become defamatory.

(2) Ambiguous Words.

5662. Between words plainly defamatory and those which are ambiguous, there is this difference that while in the case of the former the complainant has merely to prove their publication upon which the Court will presume an intention to defame, in the case of the latter the complainant must not only prove their publication but also that they were used in the sense defamatory. As Lord Herscell, L. C., said: "People not unfrequently use words, and are understood to use words, not in their natural sense, or as conveying the imputation which in ordinary circumstances and apart from their surroundings they would convey, but extravagantly and in a manner which would be understood by those who hear or read them, as not conveying the grave imputation suggested by a mere consideration of the words themselves."[16] In order to show that the words though ambiguous were well understood by those to whom they were published in a sense defamatory of the complainant, the complainant may prove the surrounding circumstances, as also the sense in which they were taken by the hearers. So where the person defamed was only mentioned by his initials, it is allowable to give evidence as to their meaning, by shewing that from what preceded and followed, the prosecutor and no one else could have been understood, that it was he whom the people understood by the allusion.[17] So where in a written libel the name of the person traduced was left blank, general evidence by those who knew him was admitted for the purpose of proving that he was the person meant.[18]

So where the defendant wrote that "in some of the Irish factories cruelties were practised," the plaintiff was permitted to give evidence to show that the defendant specially referred to him by *innuendo*, and Lord Cottenham, L. C., in the course of his judgment observed: "If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known

(10) *Johnson* v. *Lemmon*, 2 Roll. R. 144, *Robinson* v. *Merchant*, 7 Q. B. 918; *Harrison* v. *Bevington*, 8 C. & P. 708; *Gostling* v. *Brooks*, 2 F. & F. 76; *Brown* v. *Smith*, 13 C. B. 596.

(11) *Crawford* v. *Dale*, 3 Salk 327.

(12) *Griffiths* v. *Lewis*, 7 Q. B. 61; *Prior* v. *Wilson*, 1 C. B. (N. S.) 95.

(13) *Jesson* v. *Hayes*, 1. Roll. Abr. 63.

(14) *Crisp* v. *Gill*, 29 L. T. (O. S.) 82.

(15) *Johns* v. *Gittings*, Cro. Eliz. 299.

(16) *Australian Newspaper Co.* v. *Bennett*, (1894) A. C. 284 (287, 288).

(17) *Per* Ellenborough, C. J., in *Du Bost* v. *Bercsford*, 2 Camp 512.

(18) *Per* Abbot, C. J., in *Bourke* v. *Warren*, 2 C. & P. 307.

who they are as the jurors have found it to be here; and if those who must be acquainted with the circumstances connected with the party described, may also come to the same conclusion, and may have, no doubt, that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation if parties suffering all the inconveniences of being libelled were not permitted to have that protection which the law affords. If they are so described, that they are known to all their neighbours as being the parties alluded to and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels."[19] So where the prosecutor complained of a newspaper libel, upon a person not named but described as "a member of the aristocracy of refined taste and studious habits, and an artist of more than ordinary ability," and the accused editor of the newspaper filed an affidavit to the effect that he had made inquiries from the writer of the article who denied that the imputation was directed against the prosecutor, Cockburn, C. J., held that, that was sufficient to clear the prosecutor and the rule was discharged by consent.[20]

5663. But in a recent case the Court of appeal appear to have inclined the other way. In that case the defendants published in their paper called the *Sunday Chronicle*, an article received from their Paris correspondent descriptive of a motor festival at Dieppe and of the gaiety then prevailing in the following words: "Upon the terrace marches the world, attracted by the motor races—a world immensely pleased with itself, and minded to draw a wealth of inspiration—and, incidentally, of golden Cocktails—from any scheme to speed the passing hour....Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing." The plaintiff who bore the name of Thomas Artemus Jones complained of the allusion as libellous to him. It was proved that the defendant's correspondent had invented the name Artemus Jones as an imaginary character and the defendants contended that since the name Artemus Jones had been coined by the writer of the article and was not intended to refer to any person in existence, it was not a libel on anybody and a *fortiori* not on the plaintiff himself. But Lord Alverstone, C. J., held that the question for consideration was not what the writer of the article intended, but whether the person referred to in the libel would be understood by persons who knew him to refer him to the plaintiff and in that view the Court held the plaintiff entitled to damages.[21] But as has been elsewhere explained,[22] this is not the stand-point of the Code, or of the section, which regards criminality from the subjective stand-point—so that in the case last assumed the plea of the defendant would have been a sufficient defence.[23]

(19) *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637 (664).

(20) *Gower* (*Lord Ronald*) v. "The *man of the World*," (1879) Ms. cited Folkard Libel (5th Ed.), 823.

(21) *Jones* v. *E. Hulton & Co.*, (1909) 2 K. B. 444 (453); following *Abrath* v. *North Eastern Ry. Co.* 11 App. Cas. 247 (253, 254).

(22) General Intro. §§ 51-54.

(23) *Cf.* also s. 80.

5664. In the construction of words the Court or the jury as the case may be, has to take into consideration the figure of speech, so that words which may at first appear laudatory may, on close examination, be found to have been intended to be defamatory. So a person may call an attorney "an honest lawyer," meaning thereby that he was dishonest.(24) And where the intention is clear the accused will not be heard to say that he had merely used the epithet in jest for as Joy, C. B., said: "The principle is clear that a person shall not be allowed to murder another's reputation in jest. But if the words be so spoken that it is obvious to every bystander that only a jest is meant, "no injury is done and consequently no action will lie."(25)

5665. But where the words used are plain and unambiguous, the Court must construe them literally, but where they are unintelligible, as where they are slang expressions varying in sense or having a local meaning, the Court will call evidence to elucidate their meaning. In such cases "the Judge must decide if the words are reasonably capable of two meanings; if he so decide, the jury must determine which of the two meanings was intended."(1) "It is for the Court to determine whether the words used are capable of the meaning alleged in the *innuendo*, and it is for the jury to determine whether that meaning was properly attached to them."(2) For this purpose evidence of subsequent libels is admissible to explain the meaning of the one in controversy, even though such libels be published after the proceeding,(3) and in judging of the meaning and effect of such libel the Court is to have regard to the time and place of publication, the relationship between parties, and in fact the whole circumstances of the case.(4) So where the defendants published in the newspaper in the list of "Births" that Mrs. M. had given birth to twins, evidence was admitted to show that Mr. and Mrs. M. had been married only one month, upon which the Court held that the words amounted to a charge of unchastity and were therefore actionable.(5)

Neutral Words.

5666. The last is an illustration of the use of neutral words, that is to say, words which by themselves signify nothing but which are nevertheless defamatory and are intended to be so, but which require an explanation. Such are slang phrases, and words used in a special local, technical or customary sense. So to call a stock-jobber, a lame-duck is libellous for it is understood to mean that he had not fulfilled his obligations with respect to stocks and shares.(6) Such are the words "blackleg" and "blacksheep."(7)

(24) *Boydell* v. *Jones*, 4 M. & W. 446; *Brown*, 11 Mod. 86; *Hick's* (*Str. Baptist*) *case*, Hob. 215.

(25) *Donoghue* v. *Hayes*, (1831) Hayes Ir. Exch. 265.

(1) *Per* Sir Montague Smith in *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; *Grant* v. *Yetes*, 6 App. Cas. 158 (1886), 2 T. L. R. 368.

(2) *Per* Lord Herschell, L. C., in *Australian Newspaper Co.* v. *Bennett*, (1894) A. C. 284 (287).

(3) *Capital and Counties Bank* v. *Henty & Sons*, 5 C. P. D. 514, O. A. 7 App. Cas. 741.

(4) *Churchill* v. *Gedney*, 53 J. P. 471.

(5) *Morrison* v. *Ritche & Co.* (1902) 4 F. 645.

(6) *Morris* v. *Langdale*, 2 Bos. & Pul. 284.

(7) *McGregor* v. *Gregory*, 12 L. J. Ex. 204; *O'Brien* v. *Clement*, 16 L. J. Ex. 77; *Barnett* v. *Allen*, 27 L. J. Ex. 412.

5667. Defamation of the Dead.—The first explanation is enacted to extend the sense of the term "person" as used in the main clause where it is obviously used in the sense in which it is defined in section 11 (§ 133). In extending, however, the offence to a person deceased, the clause follows the lead of English Law, which in its turn borrows its provisions from civil law enacted at a time when the reverence paid to the deceased ancestors amongst the Romans was as much a part of their religion as it is a part of the established creed of all nations of the East. In this respect the rule may be said to be founded upon the same principle upon which the law of libel is explained in England, namely, in its tendency to provoke breach of the peace. So Mr. Starkie wrote: "The same conclusion is to be drawn from the consideration that the law punishes libels on the dead as well as on the living, out of the just apprehension that otherwise the family of the deceased would visit the insult as a personal affront to themselves; and one reason, and that a forcible one, for punishing libels, even on the subject of religion, is the consideration that to revile a man's religion cannot but be regarded as an indirect affront to himself."[8] Accordingly the question of defamation in such a case is made to depend not on the intention or belief of the defamer but upon the susceptibilities of the near relatives of the deceased. But in laying down this test the clause does not enlarge the definition but rather restricts it by an additional qualifying limitation. It in fact enacts that (*i*) the imputation must amount to defamation—that is to say it must be such as would have been defamatory to the deceased if he were living; and (*ii*) it must be made with intend to hurt the feelings of his family or other near relatives.

Explanation 1.

5668. Now the first question demands that the imputation made must be such as would have been harmful to the reputation of the deceased if it had been made when he was alive. So far the question depends upon the harm caused and not the harm intended—for in the case of a deceased, the latter test is clearly inapplicable. Now since the first defining clause makes the offence depend upon the accused's intention, knowledge and belief, it follows that cases falling under it will not necessarily fall under this explanation. At the same time, there are cases there contemplated in which the harm intended was also the harm likely to be caused, which would furnish apt illustration of what is here implied. Such was an imputation made against the deceased wife of a baronet, imputing adultery to her with one of her menial servants.[9] In another case the accused stated that the prosecutor had purchased a commission in the Army and become a Colonel of the Militia out of the proceeds of his father's embezzlements, and it was held that the prosecutor was entitled to take the opinion of the jury as it was a libel upon him.[10]

So where the accused, a clergyman, published a libel upon the deceased Queen Mary to the following effect: "Mary's Epitaph. Here lies King James' disobedient daughter, who was addicted, etc.," he was held to be

(8) Folkard's Libel, 45 Comm.
(9) *Weaver and others*, E. T., 2 Geo. IV.
(10) *White* v. *Tyrrell*, 5 Ir. C. L. R. 498.

guilty of making it, though he was shown to have written it from the dictation of another person.(11) A similar view was taken of the bookseller who, in the year 1824, published a libel on George II, whereupon Abbot, L. C., told the jury that human society and human nature were so constituted that the honour and dignity of a father were connected with that of a son; and that there was no son who would not be disturbed and disquieted by imputations of that character, from which it must follow that its effect must be to bring the son into scandal and disgrace. If it was defamation, it could not be entitled to the latitude which should be afforded to the discussions of the events of the reign and of the character of the late King; and it must have the effect of disturbing the minds of his present majesty and the other members of his family, and of bringing them into disgrace.(12)

5669. This is exactly the view this explanation takes of the matter (§§ 5671-5672); that is to say, the imputation must not only be defamatory of the deceased, but it must also hurt the feelings of his *near* relatives. Such was held to be the case of the accused who in an obituary notice of one Sir Charles Nicoll, K.C.B., said that the deceased could not be called a friend to his country, for he changed his opinion for a red ribbon, and voted for that pernicious object, the excise. It was stated that this passage was published to vilify and defame the memory of the deceased knight and to stir up the hatred and evil will of the people against his family, upon which an information was granted.(13) But in a similar case where the charge for publishing a libel on the late Earl Cowper, with intent to disgrace his memory, omitted to add that it was intended to create ill-blood or throw scandal on the children and family of Earl Cowper, or to provoke them to a breach of the peace, the verdict of guilty was given, but the judgment was arrested on account of the omission, Lord Kenyon, C. J., observing: "To say that the conduct of a deceased person can at no time be canvassed; to hold that, even after ages are past, the conduct of bad men cannot be contrasted with that of the good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose to vilify the memory of the deceased, and with a view to injure his posterity as in *R.* v. *Critchley*, then it is done with a design to break the peace, and it becomes illegal.(14)

Feelings of the Family must be Hurt.

5670. The question that the imputation made against the deceased was such as would have harmed his reputation is, therefore, material, but what is more material is the fact that its publication must be intended to be hurtful to the feelings of his family or other near relatives. It will be observed that the word "intended" is advisedly used—for the accuser may know or have reason to believe that such consequence will ensue it is not sufficient, if his primary intention was different. For instance, he may be writing a history in which case he may feel compelled to record a fact distasteful to the relatives of the accused, but he could

(11) *Pain*, Holt Rep. 294; *Taylor*, 3 Salk, 198.

(12) *Hunt*, (1824) 2 St. Tr. (N. S.) 69.

(13) *Critchley*, (1734) 4 T. R. 129-*n*.

(14) *Topham*, (1791) 4 T. R. 126. The prosecution failed for the same reason in *Labouchere*, 12 Q. B. D. 320; *Eusor*, (1887) 3 T. L. R. 366.

not then be held liable for this offence, since criminality under this clause depends upon the criminal's primary intention being to hurt the feelings of the family of the deceased.

5671. The question who are members of his family or other near relatives must depend upon the nature of the imputation and the likelihood of its reflecting upon the honour and credit of the survivors. For instance, if a married woman is attacked in her virtue, her husband is certainly her near relative to complain of it,(15) but if suppose her father's honesty had been in question it is doubtful if her husband would be a "near relative" entitled to complain. But the children of the deceased are such relatives and directly interested in upholding the honour of their father.(16) The applicant, the Duke of Vallombrosa, applied to the Queen's Bench that a criminal information should be filed against the non-applicant, Henry Labouchere, proprietor of the newspaper *Truth* for publishing a libel upon his deceased father, about whom the non-applicant had published that he was "an army contractor who was nearly hanged on a charge of supplying as meat to a French Army Corps, the flesh of soldiers who had died in hospital or who had been killed in battle. Luckily for him the first Empire came to an end before the trial could take place, and the contractor having retired to Italy and purchased a dukedom, became a grand seigneur, and an ardent adherent of the Bourbons." Lord Coleridge, C. J.,(17) in refusing the rule said that the filing of criminal information(18) was an extraordinary remedy and discretionary in the Court, and that no case had been made out in favour of it (*i*) because the libel affected only the private individual who had been assailed in his private capacity,(19) and (*ii*) the complainant was resident abroad. But at the same time the Court left it open to the complainant to proceed against the accused if he was so advised by indictment.(20) In this case, the fact that the son had the right to complain was neither questioned, nor denied and it could not be, for if the son is not a near relative who else could be so treated? The same view may be taken of the brother or grandson of the deceased, though a cousin of the deceased was apparently not so regarded.(21)

(15) *Weaver*, E. T. 2 Geo. IV.
(16) *Hunt*, 2 St. Tr. (N. S.) 69.
(17) Denman, Field, Hawkins and Mathew, JJ., concurrent.
(18) The initiation of a public prosecution by the Court directing the filing of a criminal information after which the State becomes the prosecutor, has nothing akin in the procedure of this country, though s. 190 of the Cr. P. C. approaches it. The other mode of proceeding by indictment is what may be called an initiation of a criminal proceeding on complaint. In ordinary cases criminal information is granted only "where some person in a public or official position was attacked in relation to such position, or where the attack was of so cruel and outrageous a sort as to make it a matter which interested the public and called for interference of the Court as representing the public and charge with the defence of its interests."—*Labouchere*, 12 Q. B. D. 320 (326)
(19) *Per* Lord Coleridge, C. J., in *Labouchere*, 12 Q. B. D. 320 (329): "If a peer is libelled *as a peer* for his conduct in Parliament, or as Lord Lieutenant (if he is one) or as Magistrate, or as the holder of a public office, it would undoubtedly be almost of course (all other conditions being fulfilled) that the court should interfere in his behalf. But that a peer in private matters is entitled to and interference at the hands of this Court which the Court would not extend in favour of the humblest subject of the Queen. I respectfully but emphatically deny."
(20) *Labouchere*, 12 Q. B. D. 320.
(21) *Luckumsey* v. *Hurbun*, 5 B. 580.

No Civil Remedy.

5672. Again, this is one of those cases in which while the Code gives criminal relief, the party feeling wronged has no corresponding civil remedy. It was so held in a case in which at the funeral of the plaintiff's cousin, the defendants who were his castemen reviled the deceased calling him *patit* (*i.e.*, fallen) and an outcast sinful man, attendance at whose funeral should be visited with fine by the caste, whereupon several persons left it. The plaintiff sued the defendants for damages, but his suit was thrown out by West, J., on this short ground: "Slander of A as a ground of action by B would lead to infinite litigation."[22] The same view has prevailed in other cases, in which the right of the brother to sue for damages for defamation of his sister was denied[23] and so in other cases it has been held that the father could not sue for the defamation of his daughter[24] or the husband for the defamation of his wife and calling his children bastards.[25] This is clearly an anomaly, and is so recognized[1] but nevertheless it exists and marks the different stand-points from which the two branches of law view the question in the case of such responsibility.

Explanation 2.

5673. Defamation of a Class.—That the subject of defamation may be "any person" the word "person" being understood in the sense in which it is defined in s. 11 leads to the conclusion, more explicitly set out in explanation 2, but which is only intended to amplify what was already implied in the definition (§ 133). But in considering the question of the defamation of a class, two points must be clearly borne in mind. *First*, that the class must not be too large to cease to be distinct from the members of a certain trade or profession—as for example, law or medicine. So if a person were to inveigh against the lawyers as a class calling them thieves,[2] or the medical men as a class of cut-throats in disguise, or the police force as a hot-bed of corruption, there would be no indictable libel because the class is too large and the generalization too sweeping to affect any of its composing members.[3] So while a statement, such as that "all men are liars," could not be made the subject-matter of a complaint for this offence, a statement that the Scorton Nunnery is a "brothel of prostitutes,"[4] or that an aid-de-camp of the Governor of Leeward Island was guilty of indecent brutality upon some negro woman,[5] or that a murder had been committed by certain Jews recently arrived from Portugal, and living near Broad-street which led to the barbarous treatment of Jews in several parts of the country,[6] or that the clergy of a certain diocese were guilty of a certain conduct reflecting upon their character, were all held to be libellous, and they would be so held under this clause.[7]

So while there may be defamation of a college or a hospital or of the general body of trustees of a fund,[8] the municipality or district council

(22) *Luckumsey* v. *Hurbun*, 5 B. 580 (583); *Varajlal* v. *Rambat*, 26 B. 259 (265).
(23) *Subbaiyar* v. *Kristnaiyar*, 1 M. 383.
(24) *Daya* v. *Param Sukh*, 11 A. 104.
(25) *Brahmanna* v. *Ramokrishnama*, 18 M. 250; *Varajlal* v. *Ramdat*, 26 B. 259 (265).
(1) *Balkrishna*, 17 B. 573 (575).
(2) *Eastwood* v. *Holmes*. 1 F. & F. 346; *Osborn*, 2 Barnard 138, 166.
(3) *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637.
(4) *Gatherco'e*, 2 Lew. C. C. 254.
(5) *Hotchard*, (1817), Unrep, cited in Folkard's Libel (5th Ed.) 821, 822.
(6) *Orme*, 2 Salk. 224.
(7) *Williams*, 5 B. & Ald. 595.
(8) *Griffin*, Cas. Temp. Hardw. 39; *Booth* v. Briscoe, 2 Q. B. D. 496.

or police or Magistrate of a certain town, still where those institutions are generally made the theme of libellous attack it is too wide to hurt any one and it therefore ceases to be criminal. *Secondly*: Though the defamation of a class is conceivable, the mischief the offence is intended to guard against is that which is levelled at individual reputation. Consequently, in considering this class of cases, the Court has more regard to the effect produced than to the object aimed at, though of course in taking into consideration the one, it does not shift the centre of responsibility from the other.

5674. These considerations appear to be present in the choice of words used in this explanation, which enlarges the sense of "person" merely to "a company or an association or collection of persons, as such" which means a body of men considered in the aggregate. It is, of course, not necessary that the company or association should be incorporated, but what is necessary is that the libel complained of must have affected them all so that every individual could predicate of himself that the imputation was calculated to harm his own reputation as one member of that large body which had been made the libeller's target. But in such cases, no less than in the case of individual libel, the imputation made must amount to defamation. The accused who were members of the Reddi caste convened a meeting of their caste in the village at which they denounced the members of another caste, the Balijas, as inferior to their own with whom they should hold no intercourse, and that the village servants should not serve them. The latter consequently refused to serve them and the Reddies ceased associating with them. It was held that it was no case for conviction, because all that the accused had done was to express an opinion about their own superiority and that at least it was a case in which "one caste had combined against another, and, however inconsiderate and oppressive such combination may be, it is not penal unless it is for one of the purposes specified in section 141. If any of the civil rights of the complainant and his castemen is injured, the remedy is a suit for damages."(9)

A Class may Defame.

5675. The explanation only refers to where the persons defamed form a class. It has no reference to where the persons defaming are also a company, or an association or collection of men. But the section applies equally to "whoever" defames any person, which term is equally comprehensive and sufficient to include a body of men as distinct from its individual members. This view is in harmony with English law under which a corporation aggregate is liable both civilly and criminally in its corporate capacity in the same manner and to the same extent as an individual. So Lord Blackburn said: "I quite agree that a corporation cannot commit crime in one sense—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged and put to death, if that be the punishment for the crime. In all those senses a corporation cannot commit a crime; but a corporation may be fined or may pay damages, and I must totally dissent, notwithstanding what Bramwell,

(9) *Venkata Reddi*, (1885) 1 Weir 575.

L. J., said, or is reported to have said[10] from the supposition that a corporation that incorporated itself for publishing a newspaper could not be fined, or an action brought against it for libel, or that a corporation that commits a nuisance could not be convicted of the nuisance, or the like."[11]

5676. Defamation by Innuendo.—The third explanation expatiating on the meaning of the word "imputation" has also been already considered (§§ 5647-5651). As there remarked, a defamatory imputation may be as much conveyed by a direct accusation, as in a more guarded but equally forcible language. The language of irony and sarcasm is, indeed, if anything often more forcible and impressive than a bald statement. At the same time it provides a wider range for attack. For it is then necessary for the prosecution to establish that the words though innocent in appearance were intended to be used in a libellous sense. So it may be libellous to say of an attorney that he is an honest lawyer meaning thereby that he is the reverse of honest. But since this is not the meaning that the words used primarily bear, it cannot be presumed but must be established by proof of other circumstances such as the time, mode and manner of the conversation, the previous relations between the parties and the sense in which they were understood by the hearer. The question in what sense certain words were used is a question of fact, though whether they amount to libel is a question of law.[12] But the Court can take judicial notice of words which have gained currency in a certain sense. Such are, for instance, words such as Judas,[13] Shylock, Pettifogger,[14] and Ananias[15] blackleg, blacksheep,[16] and there are many more colloquial, local and other words which have by usage passed into popular parlance which require no explanation.

Explanation 3.

5677. But there are others the meaning of which is not quite apparent, in which it will be for the jury to find as to what was the speaker's meaning. This they may do from the context as where the words used were: "Thou art a clipper, and thy neck shall pay for it," in which case, though the word "clipper" was general and may mean a

(10) *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 Q. B. D. 310 (313)), reversing s. c. 4 Q. B. D. 313; O. A. 5 App. Cas. 857—in all of which the question turned on the meaning of the word "person" as used in the Pharmacy Act—a term which has been expressly held to include a juridical person in the Code.

(11) *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 857 (869, 870).

(12) *Roberts* v. *Camden*, 9 East 96; *Oldham* v. *Peake*, Cowp. 278; *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637 (664); *Wakley* v. *Healey*, 7 C. B. 605.

(13) *Hoare* v. *Silverlock*, 12 Q. B. 624.

(14) *Bailey* v. *Kalamazoo Publishing Co.* (1879), 4 Chaney 251. But Lord Bramwell sitting in the same Court in another case of malicious prosecution said: "A corporation is incapable of malice or of motive. If the whole body of share-holders were to meet and in so many words to say 'prosecute so and so, not because we believe him guilty but because it will be for our interest to do it,' no action would lie against the corporation, though it would lie against the share-holders who had given such an unbecoming order.—" *Abrath* v. *North Eastern Ry. Co.*, 11 App. Cas. 247 (251). But the rest of the Court had no occasion to support or dissent from this *dictum*. And, at any rate, the language of the Code is sufficiently clear.

(15) Which means a deliberate liar—*Australian Newspaper Co.* v. *Bennett*, (1894) A. C. 284.

(16) *McGregor* v. *Gregory*, 11 M. & W. 287; *O'Brien* v. *Clement*, 16 M. & W. 166; *Barnett* v. *Allen*, 1 F. & F. 125.

clipper of wool, cloth or the like, its association with the following words "and thy neck shall pay for it" may wholly change its meaning.[17] So the phrase "He is a lame duck" is sufficiently expressive as meaning a dishonest fellow who is not likely to fulfil his contract.[18] So the words "he is a healer of felons" may be explained to mean that he harbours them[19]; so to say that a man is "Man Friday" to another is by itself insufficient to support the averment that the term imputed undue subserviency and self-humiliation.[20] So to say of a shopkeeper that "His shop is in the market" is, standing alone, innocent, though it may mean that his shop is for sale and that the tradesman is bankrupt.[21]

So where it was said of a person that he had left his country for his country's good, evidence was allowed to be given to show that what was intended was that he had been transported. So where the defendants charged the plaintiff of having been guilty of "felonious practices," by which they meant unnatural crimes, May, C. J., said: "The question was, whether the paragraphs charged as libellous, read and interpreted by the light of surrounding circumstances, did or did not convey to the minds of persons of reasonable intelligence an imputation upon the plaintiff that he had been guilty of unnatural crimes. That the question was not what the defendant, in his own mind, intended by such language, but what was the meaning and inference that would be naturally drawn by reasonable and intelligent persons reading the said paragraphs."[22] But having regard to the different stand-point from which the Code views criminality, it is clear that this is only a subordinate question, the principal question being the question of intention, knowledge and belief which is the sole test of criminality.[23]

5678. In cases of expressions alleged to be ambiguous "the Judge must decide if the words are reasonably capable of two meanings; if he so decide, the jury must determine which of the two meanings was intended.[24] In other words, it is the province of the Judge to say whether the words are capable of bearing the alleged meaning; it is then for the jury to determine whether they do in fact bear that meaning.[25] For this purpose it is open to either side to prove facts tending to show that the words were used in their secondary and not their primary sense. Hence if the defendant or the accused can get either the Court or the jury to be in his favour, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the Court and the jury to decide for him.[1] As Lord Blackburn said: "If the words were reasonably capable of a meaning which, in the opinion of the Court, would be libellous on the plaintiffs personally, I think there can be no doubt that it ought to have been left to the jury to say whether

(17) *Naben* v. *Miecock*, Skin. 183; *Walter* v. *Beaver*, 3 Lev. 166.
(18) *Morris* v. *Laughdale*, 2 Bos. & Pul. 284.
(19) *Pridham* v. *Tucker*, Hob. 126.
(20) *Fordes*, 2 L. J. Ex. 109.
(21) *Ruel* v. *Tatnell*, 43 L. T. 507.
(22) *Bolton* v. *O'Brien*, 16 L. R Ir. Q. B. D. 97 (108); *Hankinson* v. *Bilby*, 16 M. & W. 445.
(23) General Introduction, §§ 2, 53.
(24) *Dictum* of Sir Montague Smith, *arguendo* in *Simmons* v. *Mitchell*, 6 App. Cas. 156 (158).
(25) *Per* Lord Herschell, L. C., in *Australian Newspaper Co.* v. *Bennett*, (1894) A. C. 287.
(1) *Capital and Counties Bank* v. *Henty & Sons*, 5 C. P. D. 514, O. A. 7 App. Cas. 741.

the words bore that meaning."[2] Of course, in construing the meaning of ambiguous words, "the meaning of the words is to be gathered from the vulgar import, and not from any technical legal sense.[3]

An imputation none the less fulfils the requirements of the clause because it is safaguarded by the use of such cautious expressions as "I think," "I understand," or "I hear so." These are, on the other hand, meaningless qualifications answering the same purpose as "I heard a bird sing that you had committed a felony" or "I dreamt so."[4]

Explanation 4.

5679. What is Harming the Reputation.—This explanation is intended to define the term "harm" as applied to reputation in connection with the definition of this offence. It does not, however, cover all cases in which defamation may be committed—for the actual harming of one's reputation is by no means necessary for the purpose of the offence. Moreover, as Straight, J., said: "That explanation does not apply where the words used and forming the basis of a charge are *per se* defamatory. When an expression, used verbally or in writing, is doubtful as to its significance and some evidence is necessary to decide what the effect of that expression will be, and, whether it is calculated to harm a particular person's reputation, it is possible that the principle enunciated in explanation 4 of section 499 might, and would, with propriety be applied."[5] But cases are conceivable in which the words are defamatory, though they do not fall within the terms of this explanation. Such was held to be the effect of the words written by the accused with reference to the prosecution: "Mrs. McCarthy will take no notice of anything written by H. G. Scott, he already having shown himself a coward, dishonest man, and something worse than either, which the Court held to be *per se* defamatory, apart from this explanation.[6]

5680. So far, however, as this explanation goes, it is comprehensive enough to comprise most cases of defamation. For even in the last case, the words used could not but have been believed by the speaker to lower the complainant's moral and intellectual character in the estimation of others, and that is sufficient for the offence. The character may be lowered "directly or indirectly" by the imputation—that is to say, the imputation may either in express terms hold the other up to infamy or the words used may have that effect though they did not expressly convey that impression. They do not suggest that the person libelled should himself be direct means of publishing the libel to others.[7]

5681. The object of this explanation is to indicate the general tenour of the harm to a person's reputation which enters into the definition of "defamation." As such, it mentions that person's character with reference to his (*i*) physical, (*ii*) moral, or (*iii*) intellectual capacity, (*iv*)

(2) *Capital and Counties Bank* v. *Henty & Sons*, 5 C. P. D. 514, O. A. 7 App. Cas., p. 777; *Kuppusawmy* v. *Doraiswami*, 19 M. L. J. R. 714 (717).

(3) *Per* Buller, J., in *Colman* v. *Godwin*, 3 Doug 91. (*Earl of*) v. *Mordant*, 1 Lev. 277; to the same effect, *Townshend* (*Lord*) v. *Dr.*

(4) *Per* North, C. J. in *Petersborough Hughes*, 2 Mod. 166.

(5) McCarthy 9A, 420.

(6) *Ib.*

(7) *Taki Husain*, 7 A. 205; *Sankara*, 6 M. 381.

with reference to his caste or creed, and (*v*) credit. In every case the standard it prescribes is the variable standard of "others"—such "others" being men who come in contact with him whether socially or in business. With regard to the imputation affecting one's body, the explanation merely refers to a state when his body is described as loathsome or in a disgraceful state. Such would be the case where it is alleged that a person is suffering from leprosy, plague, cholera, small-pox or a venereal disease. These words are not intended to be used in their figurative sense as, for instance, in the case of a Hindu who has been outcasted for partaking the forbidden food, or who has otherwise rendered himself ritually loathsome. But such person may, however, complain if the imputation has lowered him in the estimation of his caste. But it will not affect his "moral or intellectual character." These words are intended to refer to the sense of morality and intellectual capacity, affected by one's being called a liar, a dishonest man a fool and incapable or the like. So to charge a man with bigamy would be defamation, if bigamy is an offence in his case, for it would then affect his moral and in fact he would be then charged with having committed a crime, and since such an accusation lowers a person's moral character, an imputation to that effect is defamatory.

Harm to Caste.

5682. So a person may suffer in his reputation by being lowered in the estimation of his castemen. Such would be *prima facie* the case if he is declared an outcaste for doing an act obnoxious to the orthodox community.(8) Such was the case of the prosecutor who having attended the solemnization of a Hindu widow marriage forbidden by his caste, the accused who was his *guru* or spiritual guide, published a notice broadcast declaring him to be an out-caste and forbidding the accused's disciples and the public of the town to associate with him until he obtained his absolution. It was held that the publication constituted this offence.(9) So where the accused falsely published a circular stating that the complainant had been outcasted on account of his having gone to England for education, the Court held the accused guilty though his act was found to be the outcome of an overzeal to preserve the purity of his caste and was actuated by no malice towards the complainant.(10) But the same view was taken in a converse case in which one Bachcha, being disappointed for not having been invited to officiate at a religious ceremony at the complainant's house, falsely gave out that he was a *Kori Chamar*, which scared the other priests from visiting his house for that purpose.(11)

This clause has led to a crop of cases all arising out of caste disputes and the alleged transgression of its unbending mandates. So where the complainant was put out of caste by a *panchayat* of his caste fellows on the ground that there was an improper intimacy beween him and a woman of his caste, and some of whom circulated a letter to the members of their caste generally, stating the fact of the complainant's excommunication and the reason therefor and requesting all castemen to refrain from dining with him or receiving him into their houses,

(8) *Sankara*, 6 M. 381.
(9) *Sankara*, 6 M. 381; *Ramanand*, 3 A. 664.
(10) *Makund Ram*, 6 A. L. J. 472, 2 J. C. 226.
(11) *Bachcha*, 6 I, C. 876.

the statements were held to be defamatory and the undue publicity given and the trivial occasion taken advantage of for that purpose, were held not to save them under any of the exceptions.[12] In another case, the complainant, a Brahmin, who had been put out of caste, was readmitted into it by the executive committee of the caste after the performance of expiatory ceremonies. This re-admission was not approved of by the accused, who formed a faction of the caste, who after an interval of six months distributed in the bazar to all classes, a leaflet describing the complainant as *doshi* (or sinner), which carried with it the penalty of excommunication from society. It was held that the indiscriminate circulation of the leaflet constituted defamation.[13]

5683. But neither this clause nor anything else in this explanation refers to a social dislike unconnected with the caste or calling of the accused. For instance, the killing of kine is wholly revolting to the religious and social instincts of Hindus. Where, therefore, the accused gave out that a Mahomedan who lived amidst Hindu surroundings, had killed a cow in his own compound, whereupon he was subjected to social denunciation, and who then complained of this offence, it was held that this explanation did not bring his case within the definition of the offence, inasmuch as such imputation could not be said to lower his moral or intellectual character, or to lower his character in respect of his caste or calling or to lower his credit. It was merely an imputation that he had done an act harmless in itself, but annoying to his neighbours.[14] The case would have been, of course, different if the accused had charged the complainant with killing a pig instead of a cow, in which case he would have suffered in respect of his caste. So it would seem if a person were to call a European a Eurasain, half-caste, or a pickaninny, the latter could not be said to suffer in his caste, though the epithet might be resented by him as insulting to him.

5684. The question of caste defamation is intimately connected with the question of privilege, and as often as there is the accusation of this offence, there is the defence of justification. The two questions are indeed, so intimately connected with each other that they will have to be rediscussed in the sequel (§§ 5773-5781).

Harm to Credit or Calling.

5685. Defamation affecting one's credit or calling may equally affect one's intellectual or moral character. The clauses are not thus mutually exclusive. For a merchant may be defamed by attacking his honesty or capacity for business as much as by detracting his financial stability. But such an imputation must be unequivocal, and at least used in a defamatory sense. For instance, if a person merely says: "I will not receive any cheques drawn on any of the branches of the Capital and Counties Bank," the inference is far fetched that the speaker intended any reflection upon the solvency of the Bank.[15] But the case would have been different if the speaker had added "for they cannot be expected to meet

(12) *Ramanand*, 3 A. 664.
(13) *Thiagaraya* v. *Krishnaswami*, 15 M. 214.
(14) *Sikandar Khan* v. *Jammu*, 5 C. P. L. R. (Cr.), 53.
(15) *Capital and Counties Bank* v. *Henty and Sons*, 5 C.P.D. 514, O. A. 7 App. Cas. 741.

all their liabilities." It is not defamatory to publish the fact that a person is indebted to another and the extent of his liability to him.(16) So where the creditor placarded the fact that the debtor's goods should be sold for payment of his debt, and the debtor, a solicitor, thereupon complained of undue publicity given to his financial strait which had the effect of injuring his practice, Bramwell, B., told the jury that in his opinion this was no libel, "because it was not libellous to publish of another that he owed money" and the jury returned a verdict of not guilty.(17) But this does not mean that one is licensed to proclaim another's indebtedness without necessity. For if a person had once become bankrupt, it is no reason to remind others of his misfortune years afterwards when his credit was thoroughly rehabilitated.

5686. Publication of Truth for Public Good.—The stringent provisions of the definition before set out would be unworkable, were it not for the salutary rules which the section recognises as special exceptions to criminal liability. Of these the first exception recognises the publication of truth as a sufficient justification if it is made for the public good. In this respect, the rule coincides with English Law as amended by Lord Campbell's Act, 1843,(18) which runs as follows:—

Exception 1.

"6. On the trial of any indictment of information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matter charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published. To entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally denying the whole thereof. If after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the Court in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea and by the evidence given to prove or disprove the same: Provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: Provided also, that in addition to such plea, it shall be competent to the defendant to plead a plea of not guilty: Provided also that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment, or information for defamatory words or libel."

5687. Under this provision the plea in defence would be a sufficient answer if the accused justified his libel on the ground that (*i*) it was true, and (*ii*) that its publication was for the public benefit, but (*iii*) such defence cannot be inquired into unless it is expressly pleaded. In this respect the Indian rule is not different for though there is no express provision in the Procedure Code compelling the accused to expressly plead

(16) *Coghlan*, (1865) 4 F. & F. 316.
(17) *Coghlan*, (1865) 4 F. & F. 316.
(18) 6 & 7 Vict., c. 96, s. 6. The law, as previously administered, did not admit truth as a justification; *Burdett* 4, B. & A. 95: *Brigstock*, 6 C. & P. 184; *Lake* v. *Hatton*, 11 Mod. 99, 5 Coke 125; *De Libellis Famosis*. It was even said that "the greater the truth, the greater the libel." And this maxim still remains good, except as modified by the Statute

his justification on the ground of truth, it is implied in section 106 of the Indian Evidence Act,[19] and this is what was probably meant by Straight, J., who said: "As a matter of practice, I must point out to the Judge that he should have required the counsel for the accused, distinctly and separately to put to Badrul Hasan (the complainant) in cross-examination, each and all of the matters upon which evidence was to be produced on the other side. Indeed, if an advocate fails to do this, it is a subject for serious consideration whether he should subsequently be allowed to tender proof as to the material incidents of which he has not cross-examined[20]. Of course, this rule of practice does not go far enough, and so far as it goes, it is apt to be abused. For to be kept within limits it requires that the accused shall cross-examine *only* on the points upon which he relies in his defence. It does not enable him to direct a general attack upon the character of the prosecutor, and thus defame him in Court in the guise of cross-examination, and further blast the very reputation for the protection of which he had come to Court.[21]

5688. Truth for the public benefit is then a sufficient justification of this offence, both under the English Law as well as under the Code. But under neither systems is truth any justification in case of defamation of the state, called sedition[22] or of one's religion.[23] And in a civil proceeding under both the systems, truth alone, apart from its public benefit, is a sufficient justification. This rule was recommended by the first Law Commissioners for adoption in the Code (§§ 5628-5629), but the Legislature considered its extension unjustifiable, unless it is published for the public benefit.

5689. What is Truth?—There must be then truth in the first place and this suggests the question what is truth? It is apprehended that where truth is set up as a defence it must extend to the entire libel. It is not sufficient that only a part of the libel is true, though this may be some mitigation in a civil suit for damages,[24] though it has no effect in a criminal proceeding. But the truth of an allegation need not be literally proved, for it will suffice if it is proved in substance. So where the accused was indicted for publishing a libel on the prosecutor contained in the following words: "L., B. and G. are a gang who live by card-sharping," and the accused justified the libel giving several specific instances in which persons named had been cheated by the trio at cards. Cockburn, C. J., held that it was sufficient to sustain the plea that two specific instances had been proved in substance, and that it was not necessary to prove the other instances alleged.[25] In this case the accused had proved two specific instances of cheating, which is sufficient to constitute a habit, but if he had only proved one instance, the verdict might have been different. So where the plaintiff was characterized a "libellous journalist," proof that he had libelled one man who had recovered from him £100 damages was held insufficient.[1] So where the libel was headed "How lawyer B

(19) Act I of 1872, s. 105.
(20) *Dhum Singh*, 6 A. 220.
(21) S. 500, Comm.
(22) S. 124; *Duffy*, 9 Ir. L. R. 329; *O'Brien*, 12 Ir. L. R. 29; *M'Hugh*, (1901) 2 Ir. L. R. 569.
(23) S. 298.
(24) *Per* Tindal, C. J., in *Clarke* v. *Taylor*, 2 Bing N. C. 664; *McGregor* v. *Gregory*, 11 M. & W. 287; *Churchill* v. *Hunt*, 2 B. & Ald. 685; *Roberts* v. *Brown*, 10 Bing. 519 *Fleming* v. *Dollar*, 23 Q. B. D. 388.
(25) *Labouchere*, 14 Cox. 419.
(1) *Wakley* v. *Cooke and Healey*, 19 L. J. Ex. 91.

treats his clients" followed by a report of a particular case in which one client of lawyer B had been badly treated, it was held that proof of *one* instance did not justify the heading which suggested that B generally treated his clients badly.(2) So the statement that the plaintiff, a proctor, had three times been suspended from practice for extortion is not justified by proof that he had been once so suspended.(3)

5690. So where the defendant had published an article exposing the "homicidal tricks of those imprudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pill, and that several of the rotgut rascals had been convicted of manslaughter and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses" adding that the plaintiff's system was "one of wholesale poisoning," and it was proved at the trial that the plaintiff's pills, when taken in large doses, as recommended by the plaintiffs, were highly dangerous, deadly, and poisonous, and that two persons had died in consequence of taking large quantities of them, and that the people who administered these pills were tried, convicted, and imprisoned for the manslaughter of these two persons, it was held a sufficient justification, although the expressions "scamps," "rascals" and "wholesale poisoning" had not been fully substantiated, though the main charge and gist of the libel had been amply sustained.(4)

The defendant-company from time to time published by way of warning notices of persons convicted of travelling without a ticket. As such, they published a notice stating that the plaintiff had been convicted of travelling without a ticket and sentenced to a fine of £1 or three weeks' imprisonment in default. As a matter of fact the period of imprisonment in default of payment of fine was only a fortnight and not three weeks as alleged. But the error was held to be immaterial as it could not have made any difference in the effect which the notice would produce on the mind of the public.(5) But the error was held to be material where the plaintiff who had been convicted of a breach of a bye-law and fined one shilling was described as having been fined one shilling, or in default to imprisonment for three days WITH HARD LABOUR, the last three words being printed on a separate line in large capital letters.(6) So where the defendant described the plaintiff as having challenged his opponent to a duel, and then spent the whole of the night preceding in practising with his pistol, killing his opponent, for which he was guilty of murder, proof that the plaintiff had killed his opponent and had been tried for murder was insufficient, for the charge of pistol practising was considered a separate and substantial charge and it was not justified.(7)

Only Truth of Libel must be Proved.

5691. Then again, it is no answer to a charge to prove the truth of one imputation, when the imputation complained of is different. For instance, if a person charged another for being a habitual seducer of women, proof that he had been convicted of theft or other offences would be no justification, but rather an aggravation of the crime. So

(2) *Bishop* v. *Latimer*, 4 L. T. 775.
(3) *Clarkson* v. *Lawson*, 6 Bing. 266.
(4) *Morrison* v. *Harmer*, 3 Bing. N. C. 707; *Edsall* v. *Russell*, 4 M. & Gr. 1090.
(5) *Alexander* v. *North Eastern Ry. Co.*, 34 L. J. Q. B. 152.
(6) *Gaynn* v. *S. E. Ry. Co.*, 18 L. T. 738; *Biggs* v. *G. E. Ry. Co.*, 16 W. R. (Eng.) 908.
(7) *Helsham* v. *Blackwood*, 11 C.B. 128.

where the complaint relates to a charge made against himself, the accused cannot justify it by proving its truth against his servant. As A. L. Smith, L. J., said: "He puts on record what in substance amounts to a statement that the plaintiff's men are rogues, but not the plaintiff himself. It is like pleading to a statement of claim, alleging that the defendant had said the plaintiff stole a pair of boots, that what the defendant said was that the plaintiff's footman stole the boots, and that was true."(8) From this it follows that the accused justifying his libel cannot both deny as well as justify it. He could not be heard to say: "I am charged with calling B a knave; I say I never said it, but if I did I was right."

As Lord Coleridge, C. J., puts it(9) adopting the words of Byles, J.(10): "The law is plain that, if you wish to dispute the sense given to the words in the libel, you must do so by the plea of not guilty, and if you wish to justify, you must confess and avoid." This rule is not based upon any artificial rule of English pleading but upon the sound sense recognized in another connection that the same person cannot be heard to affirm and deny at the same time; he cannot blow hot and cold. A libeller cannot be permitted to set up hypothetical defences, the success of which must depend upon the truth of one out of two or more inconsistent statements. Nor can he materially vary the complainant's version and then offer evidence to justify it. For such evidence would be in proof of a statement never alleged, and it can have no relevancy in justifying the statement alleged, but not admitted by the accused. For instance, if A complained against B for having charged him with theft of some tablets excavated in Asiatic Turkey; B could not be heard in defence to say that he had only said that the men employed by A had stolen such tablets and that he was prepared to prove that fact. Such defence amounts to a denial of A's charge and it does not let in evidence of the theft.(11)

Existence of Rumour is No Defence.

5692. Then again what is admissible under this exception is proof of the *truth* of the libel and not of its persistency. The fact that a certain statement is in every body's mouth is no proof of its truth. It may, indeed, be the very reverse, and at any rate, it is inadmissible to establish the defence of justification under this exception. For if A says that the complainant B is insolvent, it is no justification for B to repeat the statement either in a qualified or unqualified form. He cannot, for instance, go about telling his friends. "A says that B is insolvent," and it is no defence to him that A had in fact told him so.(12) For A may have told a lie, but would that justify B in repeating it? A person who hears a libellous statement made concerning another, is at least bound to take ordinary precaution of keeping it to himself till he is convinced of its truth. He has no right to take it for granted that it is true, and thus give a wider publicity to a calumny which, but for his publication might have died with its orginator. So it is agreed that a previous publication by another of the same defamatory words is no justification for their repetition; still less is it any evidence of their truth.(13) Each repetition is a fresh defamation, and the accused by

(8) *Rassam* v. *Budge*, (1893) 1 Q. B. 571 (576, 577).
(9) *Rassam* v. *Budge*, (1893) 1 Q. B. 571 (574, 575).
(10) In *Bremridge* v. *Latimer*, 12 W. R. (Eng.) 878 (879).
(11) *Rassam* v. *Budge*, (1893) 1 Q. B. 571 (576); following *Bremridge* v. *Latimer*, 12 W. R. 878 (879).
(12) *M'Pherson* v. *Daniels*, 10 B. & C. 263.
(13) *Newman*, 22 L. J. Q. B. 156.

repeating A's words has made them his own, and is as legally liable as if he had invented the story himself. "To succeed in the action, the defendant must not merely show that A did in fact say so, but must go on to prove that every statement which A is reported to have made is true in substance and in fact."(14) But if he proves its truth the fact that he heard it from A is immaterial, for what is material is its truth and not the source of its publication.

5693. Publication must be for Public Good.—Secondly, no amount of truth will justify a libel unless its publication was for the public good. This is an essential part of the rule, and one without which truth goes for nothing. The question whether the publication was or was not for the public good is declared to be a question of fact: and it is dependent upon the matter published, the nature, occasion and extent of the publicity and the actual good thereby accomplished. For example, it may be for the public good to publish a fact, but it may not be for the public good to give it undue publicity, in which case its publication could not be justified under his exception and on the ground that what the accused had published was true and that its publication was for the public good. The complainant had been put out of caste by a *panchayat* of his caste-people, on the ground of his alleged improper intimacy between him and a woman of his caste, whereupon the accused who were members of the *panchayat*, circulated a letter to the members of their caste generally, stating that the complainant and the woman had both been put out of caste and the reason for the same, and requesting the members of the caste not to receive them into their houses or to dine with them. It was held that though the *panchayat* had acted within its rights, and so would have been probably the accused if they not only contented themselves by circulating the fact of the complainant's excommunication and the reason therefor, but they went out of their way in suggesting that the complainant had committed an offence by having improper relations with the woman, and in saying so they had brought themselves within the penal visitation of the section.(15)

In another case the prosecutor (N) had similarly incurred the social displeasure of his caste people by attendinng a widow-marriage which though legal(16) was opposed to the views of the orthodox community and whereupon his *guru* S published a circular proclaiming N an outcaste and forbidding his disciples and the public in general to associate with N until he had duly atoned for his sin. He also sent a registered postcard of similar purport to N. It was held that though the accused's publication to his disciples was privileged, his publication of the fact to the complainant in an open postcard which might have been read, even by those who were not his disciples, rendered his act criminal, by reason of the undue publicity given to the sentence passed on N.(17) In delivering his judgment, Muttusamy Aiyyar, J. referring to the words of this exception, said: "The first exception is, no doubt inapplicable to this case, and it cannot be said that the denunciation of an act expressly sanctioned by the Legislature, as the widow-marriage is by Act XV of 1856, is conducive to public good within the meaning of the Indian Penal Code. It seems to me that the act denounced must be some unpermitted act, and that the

(14) Odger's Libel, (4th Ed.), 178.
(15) *Ramanand*, 3 A. 664.
(16) Act XV of 1856.
(17) *Sankara*, 6 M. 381; *Madanjit*, 4 Bur. L. T. 48, 9 I. C. 775.

good contemplated, must be that of the general public as contra-distinguished from what is regarded as a spiritual benefit by a particular sect."[18] The learned Judge then went on to add that the act of the accused though not protected under this exception, was still protected under exception 7.

5694. The view that undue publicity given to truth takes the case out of this exception, has been followed in Bombay by Jardine, J., in a case in which the accused, who was a Municipal Commissioner of Thana wrote to the Secretary of the Municipality, asking him why the Municipality was employing the complainant as its Inspector, for he was a dismissed servant of the Local Board, "and it is understood that he is also dismissed from the Forest Department and that the said Inspector is also fined by the Local Board." Before the Municipality could take any action on his letter, the accused published the letter in a newspaper and thereupon the complainant prosecuted him both for sending the letter to the Secretary as well as to the newspaper. The imputations made were true and held to have been made in good faith, but nevertheless the accused was convicted because of the undue publicity given to them.[19]

The publication of a private communication in a newspaper has ordinarily been regarded as sufficient to forfeit the benefit of this exception, unless there are other weighty reasons to justify it. But the fact that a certain matter is of public interest, is not alone sufficient to publish it in the papers; nor is such publication privileged because it purports to be a report of the proceedings of a public body. The defendants published in their newspaper at Manchester a report of the proceedings of a meeting of the board of guardians for a poor law union at which *ex parte* charges were made against the plaintiff, who was the medical officer of the union workhouse, of negligence in not attending to the pauper patients when sent for. The defendants justified their publication on the ground of privilege, alleging that being a report of the proceedings, it was as privileged as the publication of a judicial or parliamentary proceeding. But the Court of Appeal[20] held that though the matter was certainly one of public interest, still that alone did not justify its publication in the public press - still less because the complaint was *ex parte* and had not been till then inquired into and was in fact untrue.[21] But if it was untrue, its publication could not be defended on the ground of public good, for it can never be conducive to public good to publish a falsehood.

What is Public Good ?

5695. But if the imputation made is true, it may then be protected if it is made for the public good. This raises the question, what is public good. Primarily the term "public good" implies good of the public which term has been defined to include any class of the public or any community.[22] It would, of course, justify the publication of matters for the good of the State, Government and other public institutions, such as the Army and Navy and the Church, public justice and the departments of public instruction and public works and in fact all departments in which public servants

(18) *Sankara*, 6 M. 381; *Madanjit*, 1 Bur. L. T. 48, 9 I. C. 775.

(19) *Janardhan*, 19 B. 703; following *Pursell* v. *Sowler*, 1 C. P. D. 781, O. A. 2 C. P. D. 215; *Sankara*, 6 M. 381 (306); *Thiagaraya* v. *Krishnaswami*, 15 M. 214 (217); followed in *Leandro Mascarenhas*, (1895) B. U. C. C. 700 (771).

(20) Cockburn, C. J., Mellish, L. J., Baggallay, J. A., and Bramwell, J. A.

(21) *Per* Mellish, L. J., in *Purcell* v. *Sowler*, C. P. D. 215 (221, 222).

(22) S. 12.

are employed,[23] whose acts and proceedings are of public importance, so that the publication of a truthful imputation concerning them should be *prima facie* for the public good. So in England a criticism directed against the conduct of public men, such as Ministers, Generals, Judges and members of public bodies, has been held to be privileged. But besides these there are others who are equally within the rule. Such are, for instance, authors, actors, lawyers, doctors, and in fact all other professional men whose acts concern the welfare of the public, so that the publication of truth concerning them would be protected if it was for the public good.

Again, a subject may become one of public interest if the public or any section of it become interested in it. Such, for example, may be the question, whether Hindus returning home from Europe should be re-admitted into the caste, or whether marriage expenses should not be curtailed, or whether widow marriage should be tolerated, or whether converts to other faiths should be re-admitted within the fold of Hinduism, in all of which cases it should be justifiable to publish facts bearing upon the question. But in such cases it would not legalize the publication of lampoons by persons under no legal or social duty or obligation to contribute to the discussion. The question of privilege is then intimately bound up with the interest of the community, and it may be that the publication of one person was privileged, though it did not justify the same publication by another.

5696. But the rule is different if the matter be of national importance in which all persons have equally a right to feel interested. Such was the case of the defendant who had published a libel upon the plaintiff, a naval architect in connection with his plan for converting the old wooden line of battleships of the British Navy into ironclad turretships. The libel complained of was in fact a report prepared by the defendant, subjecting the plaintiff's plan to a scientific criticism, which concluded with the following words upon which alone the charge of libel was based. "These plans would have no weight whatever from the known antecedents of their author, but they derived weight from the approval of Mr. Watts, the late Chief Constructor of the Navy." It was contended that these words contained an innuendo that the plans submitted by the plaintiff were worthless. The Court held that the innuendo made was privileged, on the ground "that every man has a right to discuss freely, so long as he does it honestly and without malice, any subject in which the public are generally interested, to state his own views and to advance those of others for the consideration of all or any of those who have a common interest in the subject, and that, whilst he does so, he has a privilege attaching to such right of free discussion, of the same character which has been held to attach in numerous instances in which liberty of speech has been allowed upon grounds of public and social convenience, where the speaker or writer and the person or persons addressed have had a duty or interest in common, the existence of which is held to rebut the inference of malice."[24]

Public Interest Distinguished.

5697. It will be observed that where a matter is one of public interest, it is not even necessary that the imputation should be true if it is made in good faith. This is exceptions 2 and 3 (§§ 5698-5710). The salient difference

(23) S. 21.

(24) *Per* Brett, J. cited with approval by Willes, J., in *Henwood* v. *Harrison*, L. R. 7 C. P. 606 (621).

between those exceptions and this would then appear to be this—that while the imputation in this case must be true, good faith being immaterial, the imputation protected by those exceptions must be made in good faith, it being then immaterial, whether it was or was not true. It then follows that if the publication was both true and made in good faith, it is immaterial if it was also malicious and made by the maker with no thought to the public good. But if it is not true, then good faith necessarily implies the absence of malice and the presence of a certain degree of honesty.[25]

5698. Criticism of Public Servants.—This is especially necessary where the person affected by the imputation is a public servant. As has been elsewhere remarked, public servants are an object of special solicitude on the part of the legislature, for the nature of their duties enjoins observance by them of a higher code of ethics, as it entitles them to a special measure of protection. So the Procedure Code prescribes a summary remedy for taking security for keeping the peace from a person who "disseminates or attemps to disseminate, or in anywise abets the dissemination of any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code.[1] And since the term "defamation" in the Procedure Code has been obviously used in the sense here defined, it follows that though the remedy there prescribed is summary, the exceptions to which the accused may appeal in each case are the same. Indeed, so far as regards this exception, there is nothing in it which would not equally apply to a civil suit for damages. So Couch, J., referring to this exception and exception 9, said: "These are provisions of the criminal law; but the same rules ought to be applied to civil proceedings for defamation; and where a person would not be punishable under the criminal law, he ought not to be liable to pay damages to the person upon whose conduct or character he has expressed an opinion or made an imputation."[2]

Exception 2.

These observations were made in a case in which the plaintiff E. I. Howard, Director of the Public Instruction in the Bombay Presidency, had sued the printer of the *Times of India* for defaming him in a series of articles in which the defendant accused the plaintiff of prostituting his official position for the purpose of securing private gain made on the sale of school books, of which he had improperly appropriated the copyright. The defendant justified the publication on the ground of truth, and at any rate as made *bona fide* and for the public good adverting to which the learned Judge said: "Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander. A writer in the public press has the same right as any other person, and it is his privilege if indeed, it is not his duty, to comment on the acts of public men which concern not himself only but which concern the public and the discussion for which is for the public good. And where a person makes the public conduct of a public man the subject of comment and it is for the public good, he is not

(25) S. 52.
(1) S. 108 (*c*), Cr. P. C.
(2) *Howard* v. *Mull*, 1 Bom. H. C. R. (App.) 85 (91).

liable to an action if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no wilful misrepresentation of fact or any misstatement which he must have known to be a misstatement if he had exercised ordinary care."(3) Applying these principles the Court found that the defendant had given no evidence of the truth of the imputation and disbelieving the evidence as to the writer's good faith, it awarded Rs. 2,500 damages to the plaintiff, adding: "A person whether the publisher of a newspaper or otherwise, unless he acts in good faith, cannot, by saying that he is seeking for a public inquiry into the conduct of a public man, exempt himself from liability for publishing matter of a defamatory nature."(4)

So in another case, the accused, the editor of a local newspaper, published an article referring to the rule for admission into the public service and complaining of the Collector having employed a clerk in the following words: "Has his (the complainant's) character been inquired into? Does no one remember that this very man was sent by the Subordinate Judge of Sholapur to be prosecuted? Are not the proceedings instituted by the Subordinate Judge to be found on the record?" The Magistrate found that it was literally true that the complainant had been prosecuted, but it was equally true that the prosecution had, to the accused's knowledge, been withdrawn, whereupon M. Melvill and F. Melvill, JJ., held that although the statement made by the accused contained only the truth yet it contained only half the truth, and it was not for the public good that an imputation should be conveyed by a statement which was misleading because it was incomplete."(5) Good faith does not imply merely the absence of ill-will, for there may be neither ill-will nor good faith.(6) And this exception requires the presence of good faith which presupposes a reasonable degree of care and caution in making an imputation which is on its face libellous. In such cases, the accused may not be able to establish the truth of his imputation, but he must at least show that he had reasonable grounds for publishing it. Failing to show himself truthful, he must at least show that he was an honest blunderer and not merely a reckless gossip.

5699. What Opinion is Protected?—But this does not mean that the imputation may be based upon nothing, or that if it is alleged to be based upon a fact it is protected even though the fact alleged is not a fact. For what this section is enacted to protect is an "opinion" and not a statement of fact, though it may be even in the form of an opinion. And so if an utterance contained both a statement of fact as well as an expression of opinion, the latter cannot be justified unless the former is proved. For as Kennedy, J., said: "A comment cannot be fair which is built upon facts which are not truly stated."(7) So it was said in another case: "That a fair and *bona fide* comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication, is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and *bona fide*

(3) *Howard* v. *Mull*, 1 Bom. H. C. R. (App.) 85 (91).
(4) *Howard* v. *Mull*, 1 Bom. H. C. R. (App.) 85. p. 97.
(5) *Kakde*, 4 B. 298.
(6) *Palani Asari*, (1882) 1 Weir. 613.
(7) *Joynt* v. *Cycle Trading Co.*, (1904) 2 K. B. 292 (294).

manner on the supposition that the facts were true. If the facts, as a comment upon which the publication is sought to be excused, do not exist, the foundation of the plea fails.[8]

This was emphasized by Lord Herschell, L. C. who in delivering the judgment of the Privy Council said:[9] "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."[10] These observations occur in a case in which the appellants published a libellous attack upon the respondent who was the Resident Commissioner in Zululand, in their paper called the *Natal Witness* in which they charged the respondent with incompetency to discharge the duties of that office adding that from information received, if correct, the respondent had maltreated, abused and assaulted some Zulu chiefs. In a later issue of the same paper, the appellants returned to the attack adding that the fuller details since received confirmed their previous information. But, as a matter of fact, the appellants had received no information, and the Privy Council then held that as the opinion expressed by the appellants was alleged to be founded upon facts, it could not be justified unless the facts alleged were proved.[11]

5700. Of course, as already observed (§ 5691) where what is required to be proved is a fact, its proof cannot be dispensed with or excused by proof of a rumour howmuchsoever persistent, though if the fact was falsely stated by the informer, the person receiving it without verification though after reasonable scrutiny, may well plead justification. The accused published a report, stated to be "From inquiries made by our reporter," that the mother of a deceased lady had applied for the exhumation of her body, because she had been killed by her husband about whose cruelty to her it contained a graphic description. It was proved that the reporter upon whose inquiries the whole report was alleged to be based, had made no inquiry at all: he had merely read certain affidavits made *ex parte* which were in fact wholly false. It was held that the accused was not justified in publishing the libel and he was fined £50.[12] So where the accused published a book entitled "Letters from a staff officer in the Crimea" in which he observed that Lord Cardigan was not present when most needed, owing to his horse taking fright, swerving and galloping to the rear, but in a note it was added that the author had relied on statements furnished by officers actually engaged in the charge, but as the excellence of Lord Cardigan's horsemanship is unquestionable, the idea that his horse ran away with him is no doubt erroneous. There was no evidence that the statements were based upon the account given by

(8) *Lefroy* v. *Burnside* (No. 2) 4 L. R. Ir. 556 (565, 566).
(9) *Davis* v. *Shepstone*, 11 App. Cas. 187 (190).
(10) *Ib.*
(11) *Ib.*, at pp. 190, 191.
(12) *Andrew Gray*, 26 L. J. P. 668.

any such officer, and the Court of Queen's Bench thereupon held the statement to be libellous.(13)

So where a Dublin newspaper asserted that the plaintiff who was the manager of the Queen's Printing Office in Ireland had corruptly supplied *Freeman's Journal* with official information and surreptitious copies of official documents, it was held that the defendant having failed to prove that fact, could not fall back upon fair comment and *bona fide* belief that such information got in advance of other papers could not have been otherwise obtained.(14) The same principle underlay the case of the defendant who wrote "A History of New Zealand" in which he charged the plaintiff, a lieutenant in the Kai Iwi cavalry with having charged at some women and young children who were harmlessly hunting pigs and cut them down gleefully and with ease, that he had dismissed a subordinate who protested against his barbarity and that he was ever afterwards nicknamed by the Maoris as "Koburn" (the murderer). The defendant justified these facts on the ground that they had been reported to the Governor of New Zealand by a hearsay witness who forwarded a copy of it to him. Huddleston, B., told the jury that it was no defence whatever that the charges were made in the *bona fide* belief that they were true and without any malice towards the plaintiff.(15) An Indian Judge would have said that there was no good faith in publishing defamatory statements professedly hearsay. So where the defendant stated that the Marquis of Salisbury had given the plaintiff a cheque to be used "in connection with the so called fair trade meeting of the unemployed which preceded the riotous meetings in Trafalgar Square," Huddleston, B., held that there was no defence for the statement except an absolute justification.(16)

5701. It is thus clear that law discriminates between a mere comment and a statement of fact, and that where the one is based upon the other the latter must be positively proved, otherwise the comment cannot be justified. But if the fact is proved, it does not necessarily follow that the comment is then justifiable, for even (*i*) the comment must be made in good faith and (*ii*) it must be confined to (*a*) the conduct of a public servant, or (*b*) to his character so far as it appears in that conduct. And a line must be drawn between hostile criticism on a man's public conduct, and the motive by which that conduct may be supposed to have been influenced; there is no right to impute to a man in his conduct as a citizen, even though it be open to disapprobation any base, sordid, dishonest or wicked motive, without any just cause for any such imputation. Any mistaken belief in the existence of any such motive is no justification and will be no defence to a charge of defamation.(17)

(i) Opinion must be Fair and Honest.

5702. The first implies that the opinion expressed is fair and honest, though it may be otherwise erroneous. "It is always for the Judge to say whether the document is capable in law of being a libel. It is,

(13) *Calthorpe*, 27 J. P. 581.
(14) *Lefroy* v. *Burnside*, (No. 2), 4 L. R. Ir. 557.
(15) *Bryce* v. *Rusden*, (1886) 2 T. L. R. 435; *Brenon* v. *Ridgway*, (1887) 3 T. L. R. 592.
(16) *Peters* v. *Bradlaugh*, (1888) 4 T. L. R. 467.
(17) *Hiranand*, 76 I. C. (S.) 230.

however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to show that it is a libel, *i.e.*, that it travels beyond the limits of fair criticism, and therefore it must be for the Judge to say whether it is capable of being so interpreted. If it is not, there is no question for the jury, and it would be competent for him to give judgment for the defendant."(18) "What is the meaning of a 'fair comment'"? said Lord Esher, M.R.; "I think the meaning is this: Is the article, in the opinion of the jury, beyond that which any fair man, however, prejudiced, or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say, what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case.... Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: Would any fair man, however exaggerated or obstinate his views, have said that which this criticism has said."(19)

"The criticism is to be 'fair,' that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls 'fair' and although we cannot find in any decided case an exact and rigid definition of the word 'fair,' this is because the Judges have always preferred to leave the question what is 'fair' to the jury ....It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism."(20) "The comment must be such that a fair mind would use under the circumstances, and it must not misstate facts because a comment cannot be fair which is built upon facts, which are not truly stated, and further, it must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputation."(21)

5703. An opinion cannot be held to be honest and fair or given in good faith if instead of attacking the work, it attacks the individual by ascribing to him base and sordid motives or drags into the discussion the events of his past and private life, the only object of which could be the gratification of private malice. So Cockburn, C.J.,

(18) *Per* Collins, M. R. in *McQuire* v. *Western Morning News Co.*, (1903) 2 K. B. 100 (108, 111, 112): *Kookey* v. *Edeveain*, (1897) 14 T. L. R. 34.

(19) *Merivale and Wife* v. *Carson*, 20 Q. B. D. 275 (280, 281).

(20) *Ib.*, *per* Bowen, L. J., pp. 283, 284; to the same effect, *Wason* v. *Walter*, L. R. 4 Q. B. D. 73 (96).

(21) *Per Kennedy*, J., in *Joynt* v. *Cycle Trade Publishing Co.*, (1904) 2 K. B. 292 (294); *Fernandez*, 13 Bom. L. R. 1187, 12 I. C. 971, 12 Cr. L. J. 595.

said: "A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be open to ridicule or disapprobation, base, sordid and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statement, but that his belief was not without foundation....I think the fair position in which the law may be settled, is this: That where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that the jury shall say that the criticism was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore, justified in assailing his character as dishonest."(22) An article published in the *Saturday Review* imputed to the plaintiff a motive that in advocating the evangelization of China in his paper the *British Empire*, he was anxious only to increase the circulation of his own paper and so put more money into his own pocket; that he was an imposter, and that he had issued a list of fictitious subscribers to induce others to subscribe. The jury found that the writer honestly believed the imputations contained in the article to be well founded, but the Court held the proper limits of fair criticism to have been exceeded.(23)

5704. The same view was taken in the case of the *Hampshire Advertiser* which imputed to the plaintiff who was the ex-mayor of Winchester, partiality, and corruption and ignorance of his duties as mayor and justice of the peace for the borough, whereupon Parke, B., held the libel proved adding that while "every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commendatory a cloak for malice and slander; but any imputation of wicked or currupt motives is unquestionably libellous."(24) Cockburn, C. J., gave a similar direction to the jury in the case of the plaintiff, a Q. C. and a Member of Parliament who being appointed Recorder of Newcastle, the *Law Magazine and Review* declared it to have been a reward for the plaintiff having steadily voted for his party, whereupon Cockburn, C. J., told the jury that while a public writer was fairly entitled to comment on the distribution of Government patronage still he was entitled to assert that there had been a corrupt promise or understanding that the plaintiff would be thus rewarded if he always voted according to order. The jury gave a verdict for the plaintiff, but the damages awarded was only 40*s*.(25)

The plaintiff who falsely described himself as an M. D., advertised a new cure for consumption which he claimed to have invented. The *Pall Mall Gazette* denounced him as a quack and an impostor like

(22) *Campbell* v. *Spottiswoode*, 32 L. J. Q. B. 199; to the same effect, *per* Vaughan Williams, L. J., in *Joynt* v. *Cycle Trade Publishing Co.*, (1904) 2 Q. B. 292 (298).

(23) *Campbell* v. *Spottiswoode*, 32 L. J. Q. B. 199.

(24) *Parmiter* v. *Coupland*, 8 L. J. Ex 202.

(25) *Seymour* v. *Butterworth*, 3 F. & F. 372.

"scoundrels who alter, base and forge coin." There was evidence that the plaintiff held only an American diploma and that his publication contained statements that were fallacious, delusive, exaggerated, and alarming. Cockburn, C. J., directed the jury that if the defendant really believed that the plaintiff's system of treatment was worthless "then he had a right to maintain that it was so; and that, even if in drawing inferences of imposture and bad intention he fell into error, yet if he wrote honestly, and with the intention of exercising his vocation as a public writer fairly and with reasonable moderation and judgment, he is entitled to the verdict."(1) A public writer is not to be held liable for failing to prove all he has written to the letter: it is a question for the jury whether, under the circumstances, misstatements contained in a commentary or criticism were made recklessly, and with a want of ordinary care and caution.(2) On this ground cases have been decided in which rasping criticism of public servants has been held to be justifiable, though it was couched in a language all of which could not be literally justified.

(ii) Personal Attack Not Privileged.

5705. But as has been already observed, a fair criticism does not justify a personal invective. So Crompton, J., said: "It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to be true. If this were so, a public man might have base motives imputed to him without having an opportunity of righting himself.(3) So, in the same case, Cockburn, C. J., said: "Public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion or dishonesty, that he is therefore justified in assailing his character as dishonest."(4) This is exactly what is here enacted. It is not defamation to attack the *conduct* of a public servant in the discharge of his *public* functions, and in doing so one may even attack his character, but it must be only so far as it appears in that conduct. For instance, it is perfectly legitimate to pass strictures upon the severity of sentences passed by a judge attributing it to his inexperience, but it would be wrong to attribute it to his racial prejudice unless there is some other fact to support that inference (§§ 5686-5688).

5706. Indeed, it will often happen that criticism, though otherwise *bona fide*, is couched in language which is susceptible of being con-

(1) *Hunter* v. *Sharp*, 4 F. & F. 983.
(2) *Per* Erle, C. J., in *Turnbull* v. *Bird*, 2 F. & F. 526.
(3) *Campbell* v. *Spottiswoode*, 3 B. & S. 369 (779); *Bryce* v. *Rusden*, 2 T. L. R. 435; *Parmiter* v. *Coupland*, 6 M. & W. 107.
(4) *Campbell* v. *Sporttiswoode*, 3 B. & S. 369 (776).

strued as defamatory. But in such a case, some allowance must be made for human infirmity and the warmth of feeling aroused by the discussion. In that case, those who fill "a public position must not be tóo thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them, and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties."(5)

5707. So even a private question may become a public question if the attention of the question is directed to it. So where the defendant presented a petition to Parliament praying for the removal of a Judge on the ground that he had thirty-two years before, when a barrister, falsely pledged his honour for the purpose of deceiving an election committee of the House of Commons, the question referred to in the petition became a matter of high public concern on which all newspapers were justified in commenting and in severe terms.(6) So a private question may become a public one if the public are called upon to support it. The prosecutor Dr. Hall of Allahabad, inserted an advertisement inviting public subscriptions to his eye hospital. The accused, who was the editor of the *Indian Medical Gazette*, stigmatized this advertisement as unprofessional, adding: "The medical transactions of the institution are set forth in the advertisement. The advertiser is certainly entitled to be congratulated on his marvellous success; but it is hardly consistent with the feelings and usages of the medical profession to herald them forth in this fashion. We are not surprised to find that the line he has elected to adopt has not met with the approval of his brother-officers serving in the same province, and we have no hesitation in pronouncing his proceedings in this matter unprofessional." Hall prosecuted the editor and publisher of the paper who justified their libel under exceptions 1, 3, 6, and 9, and Stuart, C. J., held that though Hall's eye infirmary was private, he had made it a public question by his advertisement for public subscription and he had, moreover, further submitted it to the judgment of the public within the meaning of exception 6 and the publication was, moreover, held to be protected by exception 9.(7) So the presentation of a petition to Parliament against quack doctors is a matter for public comment,(8) and so is also the appointment of an individual to an office under Government.(9)

5708. So the public career of a member of Parliament, or of any candidate for Parliament, is a matter of public interest in the constituency, but not his private life and history. As Denman, C. J., said: "However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate.(10) So the capacity

(5) *Per* Cockburn, C. J. in *Seymour* v. *Butterworth*, 3 F. & F. 372 (376, 377).
(6) *Wason* v. *Walter*, L. R. 4 Q. B. 1.
(7) *McLeod*, 3 A. 342.
(8) *Dunne* v. *Anderson*, 3 Bing. 88.
(9) *Seymour* v. *Butterworth*, 3 F. & F. 372; *Turnbull* v. *Bird*, 2 F. & F. 508; *Lefroy* v. *Burnside* (No. 2), 4 L. R. (Ir.) 556.
(10) *Duncombe* v. *Daniell*, 8 C. & P. 222.

of a naval architect who had prepared a plan for adoption by the Admiralty, was held to be a matter of public interest so that a report thereon of the Board of Admiralty is privileged.(11) So evidence taken before a Royal Commission is a matter *publici juris* and everyone has a perfect right to criticise it.(12) So a public meeting convened whether to deliberate or to hear an address, is a matter of public interest justifying a fair comment on the conduct thereat of all persons who take any part therein.(13) A question may thus become public not only by reason of its character and importance to the community, but by the fact of its having been submitted to the public judgment. So the working of all public institutions such as colleges and schools, hospitals and hotels, serais, railways, post office and the telegraph, municipalities, district councils and local boards, asylums and homes are matters of public interest so that persons connected therewith or writing thereon may be the subject of this exception. So in England it has been held that the management of the poor and the administration of the poor-law in each local district, are matters of public interest,(14) so is the official conduct of a way-warden,(15) but a private trust is not such a matter(16) though a public benevolence such as a Hindu or Mahomedan endowment, or the Christian church or charity are such matters.(17)

5709. Criticism on Public Question.—In this, as indeed, in all other respects, the rule is the same whether the subject of criticism be a public servant or a public question. It may even be added that the true rule rather relates to the public question than to the person whether a public servant or otherwise. For an opinion respecting the conduct of a public servant in the discharge of his public functions is really an opinion touching a public question within the meaning of Exception 3. This was evidently present in the minds of the draftsmen who referring to this exception wrote: "There are public men who are not public functionaries; persons who hold no office may yet take a very active part in urging or opposing the adoption of measures in which the community is deeply interested. It is clear, therefore, that every person ought to be allowed to comment in good faith on the proceedings of these volunteer servants of the public, with the same freedom with which he is allowed to comment on the proceedings of the official servants of the public."(18) Consequently, the rules applicable to public servants apply equally to all persons concerned with any public question. Such a question must, it is apprehended, be one in which the public are interested. It must in fact be a question affecting the public good (§§ 5686-5689, 5695)—a question which relates to the Government or any of its public departments, its relations with its allies, tributaries and foreign countries, its act and measures, plans and policy, the laws proposed and enacted, the collection of taxes, and indeed all matters which affect the public welfare,

Exception 3.

(11) *Henwood* v. *Harrison*, L. R. 7 C. P. 606.

(12) *Per* Wickens, V. C., in *Mulkeru* v. *Ward*, L. R. 13 Eq. 622.

(13) *Davis* v. *Duncan*, L. R. 9 C. P. 396.

(14) *Per* Cockburn, C. J., in *Purcell* v. *Sowler*, 2 C. P. D. 218; *South Hetton Coal Co.*, v. *North Eastern News Association* (1894) 1 Q. B. 133.

(15) *Harle* v. *Catherall*, 14 L. T. 801.

(16) *Wilson* v. *Fitch*, 41 C. 363.

(17) *Kelly* v. *Tinling*, L. R. 1 Q. B. 699; *Booth* v. *Briscoe* 2 Q. B. D. 496, *Gathercole* v. *Miall*, 15 L. J. Ex. 179; *Walker* v. *Brogden*, 19 C. B. N. S. 65.

(18) Note R.

the society in general or any section of it in particular or any subject such as the religion or religious or social usages and practices of a class or community, all of which are public questions within the meaning of this Exception.

5710. The rules that govern the criticism of public questions or of persons in relation to such questions require that (*i*) if the criticism be an expression of opinion merely, it must be fair and honest, but (*ii*) if it be alleged to be based upon a fact that fact must be proved. It is then no defence to say that though the fact was not proved, still the accused believed it *bona fide* (§§ 5699-5701).

5711. A person commenting on the conduct of a public man, must not asperse his private character except so far as it bears upon his public conduct, but otherwise the Court considers him entitled to considerable latitude. It is not, indeed, necessary that the comment must be true, but what is necessary is that it must be plausible and not malicious. The law is that, where a matter is of public interest, the Court ought not to weigh any comment on it in golden scales, that some allowance must be made for heated passion and what the writer might consider righteous indignation. The fact that the language was exaggerated, or even grossly exaggerated does not make the comment necessarily unfair, if it was such as any fair man might have made in the circumstances.[19] So where the accused published his view concerning a municipality that the members knew that there was not one among them fit to be a Chairman and that the Government had ordered that the Chairman should be a Revenue Divisional Officer, which was a fact, the Court acquitted the accused holding that his statement did not exceed the limit of fair comment.[20]

Exception 4.

5712. Publication of Judicial Proceedings.—The policy which dictates the exemption of criticisms on matters of public moment, also dictates the exemption of the publication of proceedings of a Court of Justice, which are also exempted under English law. "A fair account of what takes place in a Court of Justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in Court; and the proceedings are under the control of the Judges. The inconvenience, therefore arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity."[21] "The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great.[22]

(19) *Merivale* v. *Carson*, 20 Q. B. D. 275 (280): *Edmondson* v. *Birch & Co., Ltd.* (1907) 1 K. B. 371 (380); *Murlidar* v. *Narayandas*, 8 S. L. R. 143, 27 I. C. 205.

(20) *Subroya* v. *Abdul Kadar*, (1914) M. W. N. 351, 23 I. C. 725.

(21) *Per* Lord Campbell in *Davison* v. *Duncan*, 2 E. & B. 229 (231).

(22) *Ib., Per* Wightman, J. to the same effect per Lawrence, J., in *Rex* v. *Wright*, 8 T. R. 293 (298). "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings."

But in England the same rule is extended to the report of parliamentary proceedings.[23] "Otherwise," as Cockburn, C. J., asked, "where would be our confidence in the Government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the realm? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in Parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house?"[24]

These reasons are equally applicable to justify the exemption of the publication of proceedings of the Imperial and Provincial Legislative Councils, and of the local bodies such as the district councils and the municipalities. Indeed, the proceedings of all public bodies and tribunals are necessarily public and their publication would be privileged on that very ground apart from the rule here enacted. But apart from the rule, even the proceedings of a Court of Justice are not privileged in the two following cases: (*i*) when their publication is prohibited by the Court before whom the proceedings are pending,[25] and (*ii*) where the publication is obscene or blasphemous.[1] As to the first the Court now seldom prohibit the publication of proceedings before them,[2] though they undoubtedly possess that power.[3] But in the recent prosecution for sedition the Courts availed themselves of this power by prohibiting the publication of the seditious matter charged and the formula for the preparation of bombs disclosed in the course of judicial proceedings. But the legality of absolute prohibition in all cases may well be questioned, for in the words of Turner, L. J., the only power which the Courts possess is to prevent the publication of its proceedings *pending litigation*, except where the matter is obscene or blasphemous.[4]

The accused, Richard Carlile, was indicted for publishing Tom Payne's "Age of Reason," which was held to be a blasphemous attack on the founder of Christianity. He read the whole of it at his trial. After his conviction his wife published a full, true and accurate report of his trial entitled "The Mock Trial of Mr. Carlile," in which she republished the whole of the book "The Age of Reason" as a part of the proceedings at the trial. It was held that though the report was a true report of the proceedings, it was unlawful to publish even a correct account of the proceedings in a Court of Justice, if such an account contained matter of a scandalous, blasphemous or indecent

(23) *Wason* v. *Walter*, L. R. 4 Q. B. 73 (89).
(24) *Ib.*, p. 89.
(25) *Per* Turner, L. J., in Brook v. *Evans*, 29 L. J. Ch. 616.
(1) "*Evening News*," (1866) 3 T. L. R. 255.
(2) *Levy* v. *Lawson*, 27 L. J. Q. B. 282.
(3) *Brook* v. *Evans*, 27 L. J. Ch. 616.
(4) *Per* Turner, L. J., in *Brook* v. *Evans*, 29 L. J. Ch. 616.

nature.(5) Indeed, where the matter published is scandalous, blasphemous or indecent, its publication could only be justified as conducive to the advancement of learning. So such proceedings might have been published in a *bona fide* law report, and so again the scientific aspect of a question, howmuchsoever indecent in the popular eye, might be discussed in a medical magazine.

What is a Substantially True Report ?

5713. These are, however, exceptional cases. But otherwise the rule justifies the publication of all judicial proceedings, and it does not matter whether their publication was malicious, for if the publication is lawful, malice is immaterial. And so this exception does not require that the report shall be published in good faith, though it does require that it shall be substantially true. In this respect the English rule is coincident. For it has been held there that such a report need not be *verbatim*, and need not state all that occurred *in extenso*. It may indeed, be abridged or condensed, but in doing so it must not cease to be "substantially a fair account of what took place in Court."(6) And though "it is sufficient to publish a fair abstract,"(7) an abstract is not fair if it is partial or garbled, as where it suppresses the entire evidence of one material witness which would have told in the plaintiff's favour.(8) But the question whether the abstract is fair, is one of fact which must be left to the jury in each case.(9)

5714. A report may be substantially true, even though it is not a report of the whole proceedings. Such reports are issued by the press, of trials which continue from day to day, in which case the report of so much of the proceedings as has already taken place is equally protected.(10) But a *post facto* report of the proceedings cannot be true if it publishes proceedings only favourable to one party and omits all mention of it as affecting the other. So where the defendant set out at length the opening of the counsel for the prosecution, but entirely omitted the examination and cross-examination of the prosecutor, the only witness, merely saying that his testimony supported the statement of his counsel, the jury considered the report unfair and the plaintiff was awarded £10 damages.(11) The Judge's summing up is a distinct part of the proceedings,(12) and so is his judgment and decree which may then be separately published.

Comments on Judicial Proceedings.

5715. But there is a wide difference between a *report* of judicial proceedings and comments thereupon. The former is privileged if, apart from good faith, it is substantially true, but the latter is privileged only if it is made in good faith as a comment upon a matter of public interest. A sensational headline to the report is a comment, and if it is not justified may constitute a libel. The *Observer* published a true and correct

(5) *Mary Carlile*, 3 B. & Ald. 167.
(6) *Per* Lord Campbell, C. J., in *Andrews* v. *Chapman*, 3 C. & K. 289.
(7) *Per* Mellish, L. J. in *Milissich* v. *Lloyds*, 46 L. J. C. P. 406; *per* Byles, J., in *Turner* v. *Sullivan*, 6 L. T. 130.
(8) *Duncan* v. *Thwaites*, 3 B. & C. 580; *Rumney* v. *Walter*, 8 T. L. R. 256.
(9) *Milissich* v. *Lloyds*, 46 L. J. C. P. 404.
(10) *Lewis* v. *Levy*, 27 L. J. Q. B. 282; *Kimber* v. *The Press Association*, (1893) 1 Q. B. 65.
(11) *Pinero* v. *Goodlake*, 13 L. T. 676.
(12) *Millissich* v. *Lloyds*, 46 L. J. C. P. 404.

account of some proceedings in the Insolvent Debtor's Court, but headed it with the words "Shameful conduct of an attorney," which were not justified. It was held to be libellous.(13) In another case, a report of the hearing of a charge of perjury before a Magistrate was headed "wilful and corrupt perjury" and stated that the "evidence before the Magistrate entirely negatived the story of the plaintiff." The jury gave a verdict for the defendant, but the Court overruled it and entered a verdict for the plaintiff with nominal damages.(14)

So it was held to be libellous to publish a highly-coloured account of criminal proceedings mixed with the report's own observations and conclusions upon what passed in Court, headed "Judicial Delinquency" and insinuating that the plaintiff, described as "our hero," had committed perjury.(15) The same view was taken of a report of a trial which set out the speech of the counsel for the prosecution, and then added: "The first witness was R. P., who proved all that had been stated by the counsel for the prosecution," but owing to the absence of a piece of formal evidence in no way bearing on the merits of the case, "the jury, under direction of the learned Judge, were obliged to give a verdict of acquittal, to the great regret of a crowded Court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt."(16) The captain of a vessel was charged before a Magistrate with an indecent assault upon a lady on board his own ship. The defendant's newspaper published a report of the trial interspersed with comments of its own, in which the lady was commended and the guilt of the accused was assumed. It was held that the report as published was neither fair nor dispassionate.(17) Where a report contains both a report as well as comments, the fact that the report is true does not justify the comments which must be otherwise justified.(18) But where comments have to be made, it is not advisable to intersperse them with the report, for such a course may raise an inference that the report was only made with a view to justify the comments. So Lord Campbell, C. J., advised newspaper editors always to keep distinct their comments from reports, so that the two might be judged apart from each other.(19)

Jurisdiction Immaterial.

5716. It will be observed that all that the exception requires is that the proceeding must be of a Court of Justice, and that it must be substantially true. If these conditions are satisfied, it does not then matter whether the proceedings were of a Court possessing no jurisdiction,(20) or that they were *ex parte*, (21) or that the hearing was not in open Court but in the Judge's chambers (22) or in jail.(23)

(13) *Clement* v. *Lewis*, 3 B. & Ald. 702; *Bishop* v. *Latimer*, 4 L. T. 775; *Boydell* v. *Jones*, 4 M. & W. 446; *Flint* v. *Pike*, 4 B. & C. 473.

(14) *Lewis* v. *Levy*, 27 L. J. Q. B. 282.

(15) *Stiles* v. *Nokes*, 7 East. 493.

(16) *Lewis* v. *Walter*, 4 B. & Ald. 605; *Roberts* v. *Brown*. 10 Bing. 519.

(17) *Fisher*, 2 Camp. 563.

(18) *Stiles* v. *Nokes*, 7 East 493.

(19) *Andrews* v. *Chapman*, 3 C. & K. 288.

(20) *Usil* v. *Hales*, 3 C. P. D. 319; which overrules the contrary held in *McGregor* v. *Thwaites*, 3 B. & C. 24.

(21) *Usill* v. *Hales* 3 C. P. D. 319; *Kimber* v. *The Press Association*, (1893) 1 Q. B. 65.

(22) *Smith* v. *Scott*, 2 C. & K. 580.

(23) *Ryalls* v. *Leader*, L. R. 1 Ex. 296.

Exception 4.

5717. Report of Preliminary Judicial Inquiry.—And as the explanation makes it clear, the report is equally privileged, whether the proceeding be of a preliminary inquiry or investigation, or of a trial by a Court competent to adjudicate upon the subject-matter of the proceeding. At the same time it does not extend to an inquiry held *in camera*, as for instance, in a case of rape or the like, in which the Magistrate might deem fit to hold a preliminary inquiry, and even his proceedings with a view to commitment may be so conducted.(24)

Mode of Publication Immaterial.

5718. Subject to the two qualifications, the rule applies equally to all publications, whether in a newspaper, pamphlet or book form. As Hannen, J., put it: "A newspaper has no greater privilege in such a matter than an ordinary person—any person is privileged in publishing such a report if he does so merely to inform the public."(25) The complainant had been the priest of a temple in Pedana. He was convicted of the theft of idols in his charge. Some years afterwards he laid claim to the same office, whereupon the accused who was a trustee of the temple sent the complainant a postcard reminding him of his conviction, whereupon he prosecuted him but the Court held the case met by this exception.(1)

5719. Report of Non-judicial Public Proceeding.—This section enacts no rule for exempting the publication of reports of non-judicial proceeding though the publication of such reports is unusual. In England, at common law, reports of judicial and parliamentary proceeding were also privileged, but the narrowness of common law was relieved by Statute, (2) which exempts a fair and accurate report of the proceedings of a public meeting in a newspaper for the information of the public; a public meeting being defined to be "any meeting *bona fide* and lawfully held, for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted." It is apprehended that the same rule is likely to be observed in this country, though such publication may not be strictly defensible under any single exception.

5720. In England, an absolute privilege is moreover conceded to members of Parliament, Judges, jury, party, counsel and witnesses who cannot be prosecuted for words spoken or written in that capacity. The freedom of speech and debates or proceedings in Parliament, was declared by the Bill of Rights(3) and a fair and accurate report of any such speech or proceeding, may be published in the same manner and to the same extent as a report of a judicial proceeding.(4) The only

(24) This explanation was evidently intended to mark a departure from the law as laid down in *M'Gregor* v. *Thwaites*, (1824) 3 B. & C. 24, since overruled in *Usill* v. *Hales*, 3 C. P. D. 319.

(25) *Salmon* v. *Isaac*, 20 L. T. 885 (886), to *per* Bramwell, L. J. in L. J. 5 Ex. D. 56; "I do not think the public press has any peculiar privilege."

(1) *Singaraju*, 26 M. 464.

(2) First by s. 2, Newspaper Libel and Registration Act, 1881 (44 & 45 Vict., c. 60); now by the Law of Libel Amendment Act, 1888 (51 & 52 Vict., c. 64), s. 4.

(3) 1 Will. Mary, St. 2, c. 2, which, however, only declared the common law; *Fielding* v. *Thomas*, (1896) A. C. 600 (612).

(4) *Wason* v. *Walter*, L. R. 4 Q. B. 73.

corresponding institutions in this country are the Imperial and Provincial Legislative Councils, and the question may arise whether the same immunity is possessed by the speeches and proceedings of those bodies. They are the recent creation of Statute which confers no similar immunity upon their proceedings, and this section does not refer to them. It would thus appear that they enjoy no special privilege as regards the speeches delivered therein and those who report their proceedings do so at the risk of having to justify under the general exceptions or any of the ten exceptions to this section.

5721. Comment on Cases.—The right of the public, to comment on cases and on the persons connected therewith, equally follows the course of English decisions,(5) according to which every one has a right to discuss fairly and *bona fide* the administration of justice as evidenced at this trial. It is open to him to show that error was committed on the part of the Judge or jury; nay, further, for myself I will say that the Judges invite discussion of their acts in the administration of the law, and it is a relief to them to see error pointed out, if it is committed; yet whilst they invite the first discussion, it is not open to a journalist to impute corruption."(6) The right of the public to such discussion, however, only arises when the case is decided and not when it is *sub judice*; any comment at that stage would be contempt of Court as having a tendency to prejudice the due administration of justice. "The essence of the offence," said Lord Alverstone, C.J.: "is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on."(7) "It is the pride of the constitution of this country," said Lord Kenyon, C.J., "that all cases should be decided by jurors, who are chosen in a manner which excludes all possibility of a bias, and who are chosen by ballot, in order to prevent any possibility of their being tampered with. But, if an individual can break down any of those safeguards, which the constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And, therefore, I cannot forbear saying that, if the publication be brought home to the defendant, he has been guilty of a crime of the greatest enormity."(8) But it is one thing to level wholesale criticism against a Judge or jury, in regard to proceedings pending in his Court, and addressing him a reasonable argument or expostulation, against a judicial act as contrary to law or the public good in which case no Court could or would treat as contempt of Court.(9)

Exception 5.

5722. But the exception here enacted only lets in the right of criticism after the case is decided. It does not however, limit that right to any particular period afterwards. But it is evident that in order

(5) *Daw* v. *Eley*, L. R. Eq. 49; *Sullivan*, 11 Cox 57; *White*, 1 Camp. 359 *note* and cases, *post*.

(6) *Per* Fitzgerald, J., in *Sullivan*, 11 Cox 57.

(7) *Tibbits and Windust*, (1902) 1 K. B. 77 (88).

(8) *Jolliffe*, 4 T. R. 285 (289); cited with approval by Lord Alverstone, C. J., in *Tibbits and Windust*, (1902) 1 K. B. 77 (86).

(9) *Per* Lord Russell, C. J., in *Gray*, (1900) 2 Q. B. 36 (40).

to be a criticism delivered in good faith, it must be made as soon as the case is decided or within a reasonable time afterwards. And since the right arises as soon as the case is decided, the critic need not await the chances of an appeal, though, he is necessarily silenced as soon as the appeal is filed, for the case is then again, *sub-judice*. But otherwise, the comment may relate to any case and be made at any time. The words "civil case" would apparently include also a revenue case which is a case of a civil nature. And the word "case" is wide enough to include any judicial proceeding, original or appellate, revisional or in review.

5723. But the comment must be confined to the merits of the case, including the conduct of parties or their agents and witnesses thereto. Now since the expression of such opinion must be made in "good faith," it follows that it must be fair and honest, based upon reason or discussion and not merely declamation and invective, written not with the view to advance public good, but solely to bring into contempt and hatred the administration of justice, or to injure the character of individuals.(10) So it is no fair comment to say that the prisoner was acquitted, though he was really guilty,(11) though, of course, it would be fair to give reasons showing on what points the Judge had erred and why there had been a failure of justice. So again, the critic may lament the state of the law the administration of which leads to such startling results, but he cannot direct his shafts personally against the Judge calling him a knave or a fool, or implying as such, though it is quite different to say that the Judge had misunderstood or misapplied the law or omitted to consider or apply it correctly. Such criticisms are daily made in the public press, and though they have a remote tendency to bring the administration of justice into contempt they are not defamatory, because they are equally protected by this exception and Exception 2. So a newspaper may comment on the conduct of Magistrates for dismissing a case without hearing the whole of the evidence, or in committing the prisoner for trial on insufficient evidence, but it must not impute that in doing so the Magistrates acted deliberately and consciously from political motives.(12) So where a party or person charges the Judge of bribery or other malpractice, he can only justify it by proving the charge. The accused who was a defendant in a civil suit pending before a Munsiff, presented a petition to the Deputy Commissioner, charging the Munsiff with conspiracy with the plaintiff to get up a false case in his Court, which he failed to prove, whereupon he was held to have been rightly convicted of this offence.(13)

5724. The comment may refer to parties, their agents and witnesses. But in each case, it must be made in good faith, that is to say, with due care and circumspection regard being had to the facts of the case. The maid servant of the plaintiff, a clergyman, gave birth to an illegitmate child of whom she asserted the plaintiff to be the father.

(10) *White and another*, 1 Camp. 359, *note*.

(11) *Riskallah Bey* v. *Whitehurst and others*, 18 L. T. 615; *Lewis* v. *Walter*, 4 B. & Ald. 605.

(12) *Hibbins* v. *Lee*, 4 F. & F. 243.

(13) *Kirpa Ram*, (1887) P. R. No. 21; following *Ali Khan* v. *Malik Taran Khan*, (1879) P. R. (Civil) 16.

She took out an affiliation summons against him, but it was dismissed for want of corroboration. The defendant inserted letters and articles in his paper upholding the girl's story and alluding to the plaintiff as a "gay deceiver." He was held to be liable to pay the £ 2,000 damages assessed.(14) A complained against B under section 506, of which B was convicted and bound down under section 106 of the Procedure Code. Shortly after the disposal of this case B's pleader asked B the real cause of his dispute with A, and B said that A had taken offence at a caste feast, where some of B's party had declared that A's daughter-in-law had eloped with somebody. A was informed of this statement made by B, and he prosecuted him for defamation, but the Court held that his intention in making the statement was not to harm the reputation of A, and that it was made at a time when the legal relationship between B and his client subsisted, and that B was not therefore guilty of this offence.(15)

The *Morning Post*, commenting on a trial, said of a firm of attorneys, "Messrs. Quirk, Gammon, and Snages, were fairly equalled, if not undone." The reference was to the notorious firm of pettifogging attorneys of that name in the novel "*Ten Thousand a Year.*" This account of the attorneys was exclusively taken from the speech of the defendant's counsel, and no allusion was made to the evidence subsequently adduced to rebut his statements. It was held that the comment was too one-sided to be fair.(16) So while a newspaper may comment on the evidence given by any particular witness, in any enquiry on a matter of public interest, he may not go the length of declaring such evidence to be "maliciously or recklessly false," or that a witness had perjured himself,(17) and in any case no one is justified in commenting upon a person or document who was not examined, or which was not filed as evidence in the case,(18) for the word "witness" means a person called and examined and not merely a person called as a witness.

Privilege of Party to Judicial Proceeding.

5725. This clause merely protects a *bona fide* comment made respecting the conduct of a party, witness or agent. It has no reference to the protection in some measure enjoyed by them. That protection arises under exception 9 where the subject will be found discussed.

Exception 6.

5726. Literary Criticism.—The sixth exception also enunciates a rule in conformity with English law. Indeed, the rule may be said to be the logical deduction of that which protects comments made on matters of public interest. But this section is intended to specially refer to literary and dramatic criticism, which sanctions the use of language which could not be ordinarily endured, but which is nevertheless subject to the same rule, namely,

(14) *Roberts* v. *Owen and others*, (1888) 5 T. L. R. 11.
(15) *Bhagirath*, 13 C. W. N. 1087.
(16) *Woodgate* v. *Ridout*, 4 F. & F. 202.
(17) *Roberts* v. *Brown*, 10 Bing. 519; *Stiles* v. *Nokes*, 7 East 493; *Littler* v. *Thomson*, 2 Beav. 129; *Felkin* v. *Herbert*, 33 L. J. Ch. 294.
(18) *Helsham* v. *Blackwood*, 11 C. B. 111: *Andrew* v. *Gray*, 26 J. P. 663, *Hope* v. *Sir W. C. Leng & Co.*, (1907) 123 T. L. R. 243.

that it must be fair and honest. So Cockburn, C. J., said: "It was of the vast importance to literature, and through literature to good taste and good feeling, to morality and to religion, that work published for general perusal should be such as were calculated to improve and not to demoralize the public mind: and therefore it was of vast importance that criticism, so long as it was fair, reasonable, and just should be allowed the utmost latitude, and that the most unsparing censure of works which were fairly subject to it should not be held libellous."(19)

So Lord Ellenborough, C. J., said in another case(20): "Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." These views have received legislative sanction in this exception, the effect of which is to protect only fair literary criticism and not vituperation and abuse. This is clear from the fact that (*i*) the opinion protected must relate to the *merits of the performance*, as distinct from the capacity of the performer, unless the one is apparent from the other; and (*ii*) the opinion must be expressed in good faith. And in any case, no one is entitled to criticize a work which is not submitted to the judgment of the public.

Exception 6—Explanation.

5727. In the first place then the work must have been submitted to the judgment of the public. This does not imply that the author should have expressly invited criticism, for as is here explained: "A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public"—or in other words, such submission may be express or implied. This is evident from illustration (a), which is in accordance with the view of Cockburn, C.J., who said: "A man who publishes a book challenges criticism."(21) Therefore it is not defamation to criticize a published work whether it has been expressly sent for review or not. So a speech delivered in public implies an invitation to the public to criticize it, and a similar invitation is implied in sending in a painting for public view or giving a public theatrical or musical performance.

So a person designing a public building invites criticism thereupon.(22) And so again a person who puts forward a new invention, such as a new and improved design, appeals to the public for approval, and he cannot complain of its disapproval. And as regards literary criticism, it is not necessary that the literary matter published should be a book, pamphlet or matter of a permanent character, for the writer of an article or letter in the public press invites criticism so far as

(19) *Strauss* v. *Francis*, 4 F. & F. 1114.

(20) *Tabart* v. *Tipper*, 1 Camp. 350.

(21) *Strauss* v. *Francis*, 4 F. & F. 1114.

(22) *Thompson* v. *Shackell*, Moo. & Mal. 187.

he is the writer of that article or letter, though it would not justify a general attack upon his character. At the same time wherever a man calls public attention to his own grievances, or those of others, whether by public speeches, or writing in the public press, he must expect to have his assertions challenged, the existence of his grievances denied, and himself ridiculed and assailed.(23)

5728. It may be added that in order to let in the right of the public to criticize, the performance need not be public, if it is submitted to the judgment of the public. For instance, an amateur dramatic club may give performances open only to its members and friends, in which case the performances are not open to public criticism though they would be so, if the club should invite subscription from the public for its maintenance and improvement.(24) But in the other case, the members of the club and those who pay for admission to the performances would be still entitled to criticize them, for the performances were then still submitted to their judgment. From this it is clear that "public" is an elastic term and does not necessarily mean the community at large, but also includes any section or class of the community to whose judgment a performance may be submitted, who alone may then be entitled to criticize it.(25)

(ii) Opinion must Relate to the Merits.

5729. But whether the performance be addressed to the public at large or to any section of it, the same salutary rule of criticism applies to each, namely, that it must be primarily confined to the merits of the performance, though the effect of such comments may injure the author's character. But that must not be its primary or even main object. The plaintiff published a novel which the *Athenaeum* described as "the very worst attempt of a novel that has ever been perpetrated", and commented upon its "insanity, self-complacency and vulgarity, its profanity, its indelicacy (to use no stronger word), its display of bad Latin, bad French, bad German, and bad English," and its abuse of persons living and dead. The case was withdrawn by the plaintiff after Erle, C.J., had summed up the case,(1) whereupon the defendants published another article stating that they had consented to the withdrawal of the case as the plaintiff would have been unable to pay their costs, had the verdict been in their favour. The plaintiff thereupon sued them again, but this time the verdict was given for the defendants.(2)

The late Mr. Ruskin was sued for libelling Whistler, the plaintiff, in an article which he published on the pictures in the Grosvenor Gallery, in which the following was complained of as being defamatory of the plaintiff. "For Mr. Whistler's own sake, no less than for the protection of the purchaser, Sir Coutts Lindsay ought not to have ad-

(23) *Odger* v. *Mortimer*, 28 L. T. 472; *Koenig* v. *Ritchie*, 3 F. & F. 413; *Veley*, 4 F. & F. 1117.

(24) *McLeod*, 3 A. 342.

(25) In *Gathercole* v. *Miall*, 15 L. J. Ex. 179; Pollock, C. B., said: "It is doubtful how far a book printed for private circulation only may be criticized" —but it is submitted that the question really depends upon considerations in the text.

(1) *Strauss* v. *Francis*, (No. 1), 4 F. & F. 939.

(2) *Strauss* v. *Francis*, (No. 2), 7 F. & F. 1107.

mitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of wilful imposture. I have seen and heard much of Cockney impudence before now, but never expected to hear a coxcomb ask 200 guineas for flinging a pot of paint in public's face." The jury considered the words "wilful imposture" as just overstepping the line of fair criticism and found a formal verdict for the plaintiff who was however, awarded one farthing damages and no costs.(3) The plaintiff was the professor of architecture in the Royal Academy, and was alleged to have invented a new design of architecture called "Boetian," which the defendant ridiculed, illustrating the absurdity of the conception by referring to the buildings designed by the plaintiff whom the defendant called "the Boetian professor." The latter sued for damages, but the verdict was for the defendant.(4) Here the fun was evidently justified because it did not descend to personality; and so in another case, where the plaintiff was caricatured as author bowing beneath the weight of his books, it was held to be no libel, though a personal caricature of him as he appeared in private life would have been so.(5)

5730. Indeed, in literary criticism as in the other cases considered under the foregoing exceptions, the rule is the same, namely, that if what is written or said is merely an expression of opinion and not a statement of fact, it will be protected if it is fair and honest, howmuchsoever strongly expressed it might otherwise be, but if it purports to be a statement of fact, then it could only be justified as a fact and not as a mere expression of opinion. For instance, the critic may pronounce a work to be dull, vulgar and degrading,—whether it is so in fact or not is a matter of opinion, and persons may honestly differ in their opinions—but to say that it is a plagiarism is not an expression of merely an opinion, but it is a statement of fact which must be proved.(6) But where there is no statement of fact but only a statement of opinion, the only thing required is that the criticism should be "fair" and not that it should be convincing or cogent. But it must be relevant(7) and not disclose in itself actual malice.(8)

So Lord Esher, M. R., said that the meaning of "fair comment" was this: "Is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit, if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case."(9) So where the critic misdescribed a play

(3) *Whistler* v. *Ruskin*, (1878) *Times*, Nov. 26th and 27th.
(4) *Soane* v. *Knight*, *Moo.* & Mal. 74.
(5) *Carr* (*Sir Jhon*) v. *Hood*, 1 Camp 355, *note*.
(6) *Joynt* v. *Cycle Trade Publishing Co.*, (1904) 2 K. B. 292 (297); explaining *McQuire* v. *Western Morning News Co.*, (1903) 2 K. B. 100.
(7) *Per* Collins, M. R. in *McQuire* v. *Western Morning News Co.*, (1903) 2 K. B. 100 (110, 112).
(8) *Ib.*, p. 112.
(9) *Merivale* v. *Carson*, 20 Q. B. D, 275 (280, 281).

as immoral, though there was in fact nothing immoral in it, the Court considered the critic to have overstepped the bounds of fairness.[10] Such was rightly held to be the case where the defendant wrote an article in the newspaper, advising an actor to return to "his old profession, that of a waiter." The actor had never been a waiter.[11] The same fate befell the writer who commenting on a flower show referred to an exhibitor as "a beggarly soul, famous in all sorts of dirty work," and one who used "tricks by which he and a few like him used to secure prizes," but who has now "broken in upon by some Judges more honest than usual."[12]

5731. But the case was held to be otherwise where the *Era*, the special organ of the theatrical profession, published an indignant article on the conduct of the prosecutor, a person wholly unconnected with the stage, in having got up a ball for his own benefit and calling it a "Dramatic Ball."[13] *The Western Morning News* in commenting on the plaintiff's play called "*The Major*" performed at Plymouth wrote as follows: "A three act musical absurdity, entitled '*The Major*,' written and composed by Mr. McQuire was presented last evening before a full house by the author's company. It cannot be said that many left the building with the satisfaction of having seen anything like the standard of play which is generally to be witnessed at the Theatre Royal. Although it may be described as a play '*The Major*' is composed of nothing but nonsense of a not very humorous character, whilst the music is far from attractive. This comedy would be very much improved had it a substantial plot, and were a good deal of the sorry stuff taken out of it which lowers both the play and the players. No doubt the actor and actresses are well suited to the piece, which gives excellent scope for music hall artists to display their talent. Among Mr. McQuire's company there is not one good actor or actress, and, with the exception of Mr. Ernest Braine, not one of them can be said to have a good voice for singing. The introduction of common, not to say vulgar, songs does not tend to improve the character of the performance, and the dancing, which forms a prominent feature, is carried out with very little gracefulness." The jury found that this was not a fair comment and gave a verdict for the plaintiff with £100 damages, but the Court of Appeal held that there was no evidence on which a rational verdict for the plaintiff could be founded, that if the comment was fair, that is, such as did not disclose actual malice, it was not for the jury to apply the standard of their own taste to the appreciation of the thing criticised, and to measure the right of the critic accordingly.[14] The same view governed the decision in the case of the plaintiff, a retail rag merchant, who issued hand-bills offering exceptionally high prices for rags, left-off clothes, kitchen-stuff dripping, old metals, old bottles and the like. The defendant reproduced this hand-bill in his paper and said that it encouraged servants to rob their masters, which was held to be a fair comment.[15]

(10) *Merivale* v. *Carson*, 20 Q. B. D., 275 (280, 281).

(11) *Duplany* v. *Davis*, (1886) 3 T. L. R. 184.

(12) *Green* v. *Chapman*, 4 Bing. N. C. 92.

(13) *Ledger*, (1880) Times, Jan. 14th.

(14) *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. 100 (112, 113).

(15) *Paris* v. *Levy*, 9 C. B. N. S. 342

5132. Censure by one in Authority.—All these are, however, cases of general privilege, that is to say, cases in which the public have an equal right to criticize. But cases may arise in which the right of criticism is limited only to a specified class of persons, which arises either on account of the jural relationship between the two persons, or on account of the necessity of the case. Exceptions 7 and 8 may be said to be instances of the one, while the other two exceptions are instances of the other. Of these, exception 7 continues the same privilege of criticism to a person in authority. This privilege arises from the legal position of one person in relation to the other, whether that position be conferred by law or created by contract, in either of which cases the legality of the right depends upon the same two conditions, namely, (*i*) that the censure must be on the *conduct* of the person within the scope of the critic's authority; and (*ii*) the censure must be passed in good faith.

Exception 7.

5733. In the first place, then the person claiming privilege must possesss authority over another. Such authority is conferred by law upon Judges and Magistrates over persons who are parties or their agents and witnesses in cases submitted to their arbitrament. In this respect the judiciary in this country does not possess the same unlimited power of criticism as the Judges in England, where the Judges of a superior Court possess an absolute immunity for words spoken in their office, though the words be spoken maliciously and were wholly irrelevant to or unwarranted by the issue.(16) This rule of common law is said to exist to secure the absolute independence of the Judges, and to prevent their being harassed by vexatious actions.(17) The rule extends to Judges of the Supreme Court of the Colonies,(18) but is, of course, in either case confined to words spoken or written as Judge in a matter within his jurisdiction.(19)

(1) Accused must be in Authority.

As Lord Esher. M. R., said: "No action lies for acts done or words spoken by a Judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. If a Judge goes beyond his jurisdiction a different set of considerations arise. The only difference between Judges of the superior Courts and other Judges consists in the extent of their respective jurisdiction."(20) This absolute immunity is held to be enjoyed by the English and Colonial Judges, whether sitting in open Court or at chambers(21) or in bankruptcy.(22) And such privilege is held to be possessed by the master of the Supreme Court,(23) Chairman

(16) 2 Hawk P. C. 1, ss. 1, 3, 9. 17; *Floyd* v. *Barker*, 12 Rep. 24; *Ashley* v. *White*, 1 Sm. L. C. (9th Ed.) 268 (274); *Calder* v. *Halket*, 3 Moo. P. C. 28; *Taaffe* v. *Downes*, 3 Moo. P. C. 36-n; *Groenvelt* v. *Burwell*, 1 Ld. Raym, 454 (468); *Anderson* v. *Gorrie and others* (1895) 1 Q. B. 668.

(17) *Per* Crompton, J., in *Fray* v. *Blackburn*, 3 B. & S. 576 (578); *per* Lord Esher, M. R., in *Anderson* v. *Gorrie*, (1895) 1 Q. B. 668 (670).

(18) *Anderson* v. *Gorrie*, (1895) 1 Q. B. 668.

(19) *Houlden* v. *Smith*, 14 Q. B. 841; *Calder* v. *Halket*, 3 Moo. P. C. 28.

(20) *Anderson* v. *Gorrie*, (1895) 1 Q. B. 668 (671).

(21) *Taaffe* v. *Downes*, 3 Moo. P. C. 36-*n*.

(22) *Dicas* v. *Lord Brougham*, 6 C. & P. 249; *Ryalls* v. *Leader*, L. R. 1 Ex. 296.

(23) *Pedley* v. *Morris*, 61 L. J. Q. B. 21.

of Quarter Sessions, [24] County Court Judges,[25] the Recorder of London,[1] the Vice-Chancellor of a University when sitting as a Judge in the University Court,[2] a Coronet,[3] a Courtmartial[4] and a Justice of the Peace.[5] But the same immunity does not extend to persons exercising merely quasi-judicial functions, such as members of the county Council transacting licensing business,[6] or those of a Jockey Club hearing a dispute[7]; and of course, it does not extend to a Magistrate's clerk,[8] who is not a judicial officer.

5734. The immunity enjoyed by the English and Colonial Judges is the outcome of common law which so far as it was applicable to this country has remained unaffected by the Code (§ 116, 117). But the question whether Judges of the High and other Courts possess the same immunity must now be answered with reference to the Judicial Officers' Protection Act,[9] which protects all Judges, Magistrates, Justices of the Peace, Collectors and other persons acting judicially against their being used in any Civil Court for any act done or ordered to be done by them in the discharge of their judicial duties, whether or not within the limits of their jurisdiction, provided that they at the time in good faith, believed themselves to have jurisdiction to do or order the act complained of. This enactment, however, leaves intact the liability of Judicial officers to a criminal prosecution for this offence, and the question may therefore arise whether an additional immunity conferred on the English Judges by the common law equally applies to Indian Judges—or, in short, whether this exception is subject to the rule of common law if it is applicable to India. Now the common law immunity applied to Judges is, for the same reason, equally applicable to counsel and witnesses appearing in a case, and in this connection the rule has been put to the test in several cases, but after considerable divergence the Courts of this country are now agreed that their immunity is no larger than what is permitted by this and the next two exceptions—which make no departure in favour of persons in authority, who must regulate their censure by the rule here enacted.

Authority may be Legal, Contractual or Social.

5735. Persons entitled to this qualified privilege must, however, be shown to possess authority over the person concerning whom the imputation is made. Such authority may be conferred or implied by law, as in the case of an official superior, or one whose duty places him in a position of authority in relation to the other, as for instance, police officer making investigation into a cognizable offence. The question whether the accused was a person in authority over

(24) *Skinner*, Lofft, 55.
(25) *Ryalls* v. *Leader*. L. R. 1 Ex. 296.
(1) *Hamond* v. *Howell*, 2 Mod. 218.
(2) *Kemp* v. *Neville*, 10 C. B. N. S. 523.
(3) *Thomas* v. *Churton*, 2 B. & S. 475.
(4) *Hodson* v. *Pare*, (1899) 1 Q. B. 455.
(5) *Jekyll* v. *Sir John Moore*, 2 B. & P. N. R. 341; *Home* v. *Bentinck*, 2 B. & B. 130; *Oliver* v. *Bentinck*, 3 Taunt 456; *Dawkins* v. *Lord Rokeley*, L. R. 7 H. L. 744.
(6) *Royal Aquarium* v. *Parkinson*, (1892) 1 Q. B. 431; *London County Council*, (1894) 71 L. T. 638.
(7) *Hope* v. *L'Anson*, 18 T. L. R. 201.
(8) *Delegal* v. *Highley*, 3 Bing. N. C. 950.
(9) Act XVIII of 1850.

another is one of fact, and he who relies upon this exception must establish it. Such relationship will, however, be presumed from the situation in which one person places himself under another, though the contract under which such relationship was created may not be proved. Such would be the case where the relationship of master and servant, husband and wife, parent and child, schoolmaster and pupil, preceptor and pupil, is once admitted or proved. Such is also the relation ship between members of a caste panchayat and the rest of the community.(10) So where the accused who was the *guru* of the caste to which the complainant belonged circulated a letter in the latter's village forbidding social intercourse with him as the complainant's wife had been caught with a man of a lower caste, it was held that the imputation was made in good faith for the protection of the social and spiritual interests of the community of which the accused was the *guru*, and so far as it implied a censure on the conduct of complainant's wife, it was justified by that authority which the accused was vested with as the spiritual head of the community. The case was then held to fall both under this as well as exception 9.(11)

The same view was taken in Bombay in a similar case in which, the accused, who was the headman of the caste of the complainant, issued a notice to the members of that caste, intimating that he had received a complaint that the complainant's daughter had committed adultery with a certain person named, and that he should therefore appear with his daughter to answer to the charge. The notice was issued in good faith on a complaint received, and the Court held the accused protected by this exception.(12) This view is in harmony with English law where the rule as here enacted is comprised in the wider rule thus stated: "The occasion had arisen if the communication was of such a nature that it be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When those two things coexist, the occasion is a privileged one, and the question whether it was or was not misused is an entirely different one."(13) Accordingly, a bishop's charge to his clergy is held privileged. although it contains defamatory matter;(14) so is a communication made by one director to another as to the misconduct of the company's auditor when acting as secretary of another company;(15) so are the reports of the directors and auditors of a company circulated among the shareholders.(16) The defendant was the governor of a public school to which the plaintiff supplied butcher's meat. Defendant told the steward of the school, whose duty it was to examine the meat, that plaintiff had been known to sell bad meat. His communication was held privileged.(17)

(10) *Nga Poona* 9 Bur. L. T. 136, 34 I. C. 325, 17 Cr. L. J. 213, *Bagamahar* 76 I. C. (N.) 393.

(11) *Basumati* v. *Budram Kolita*, 22 C. 46.

(12) *Bhikaji*, (1888) B. U. C. 387; *Sukratendra Swami*, 45 M. L. J. 116, 72 I. C. 165, 24 Cr. L. J. 325.

(13) *Hunt* v. *Great Northern Ry. Co.*, (1891) 2 Q. B. 189 (191).

(14) *Laughton* v. *Bishop of Sodor*, L. R. 4 P. C. 495.

(15) *Harris* v. *Thompson*, 13 C. B. 333.

(16) *Lawless* v. *Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262.

(17) *Humphreys* v. *Stilwell*, 2 F. & F. 590.

Authority may be Limited or Unlimited.

5736. The authority of one person over another may be limited or unlimited, and it may be limited as to time and place and to particular acts, in which case the censure must be passed within the scope of that authority. For instance, while an employer may censure his servant for negligence in his work, he could not invade his private life and pass a censure on his domestic relationship unconnected with his employment. So while the banker of the illustration would be within his right in censuring the cashier for matters done by him as cashier, he could not arrogate to himself the general authority to improve his morals by censuring him about his caste and on matters unconnected with his employment as cashier.

5737. Lastly, the censure may be severe, but it must be passed in good faith, that is to say, passed with due care and caution, having regard to the circumstances and necessity of the occasion. For instance, a statement may be privileged but it may forfeit that privilege by the manner of its publication. Such was the case of the accused who as *guru* or spiritual guide of the complainant, issued a notice, published broadcast, declaring him out of caste for having attended a widow-marriage, and the indiscriminate publication of which the Court held to be wholly unjustifiable.(18) This view is confirmed by the English cases in which publicity given to a person outside the privilege is held to destroy the protection to which the imputation is otherwise entitled. So if a libel is transmitted, written on a post card,(19) or unnecessarily transmitted by the telegraph,(20) the Court presumes that persons other than those to whom it was addressed read it, though this presumption may be rebutted by the plaintiff. So where the accused, a Sub-Inspector of Police, maliciously reported and got recorded the complainant's name in the Register of *Badmashis* (bad characters) subjecting him to surveillance, the Court held him *prima facie* guilty of this offence.(21) The defendants who were members of the town council, were convicted of libel for publishing in a newspaper a letter accusing the contractors of the borough gaol with scamping their work, though the same charge, if preferred at a meeting of the town council would have been privileged.(22) So while a petition to Parliament is privileged, that privilege is lost if the defendant hands a copy of the petition for publication in the newspapers.(23)

Exception 8.

5738. Complaint to Authority.—Again, it is clearly in consonance with sound public policy that persons aggrieved should have free recourse to persons in authority, and it has consequently been held that persons complaining in good faith against another to a person in lawful authority over him, cannot be proceeded against for this offence. The English rule in this respect is the same.

(18) *Sankaru*, 6 M. 381.
(19) *Robinson* v. *Jones*, 4 Ir. L. R. 391; *Chattel* v. *Turner*, 12 T. L. R. 360; *Beamish* v. *Dairy Supply Co. Ltd.*, 15 T. L. R. 484; *Sadgrove* v. *Hole*, (1901) 2 K. B. 1.
(20) *Williamson* v. *Frier*, L. R. 9 C. P. 393.
(21) *Abdul Razak* v. *Gauri Nath* (1910) P. W. R. 4, 5 I. C. 714.
(22) *Simpson* v. *Downs*, 16 L. T. 391; *Harb* v. *Catherall*, 14 L. T. 801.
(23) *Pierce* v. *Ellis*, 6 Ir. C. L. R. 55.

So Lord Campbell, C. J., observed: "In this land of law and liberty all who are aggrieved may seek redress, and the alleged misconduct of any who are clothed with public authority, may be brought to the notice of those who have the power and the duty to inquire into it, and to take steps which may prevent the repetition of it."(24) "To protect those who are not able to protect themselves is a duty which everyone owes to society."(25) Of persons in authority to whom an accusation is made, there are those who posses official authority, such as the King(1) and his Ministers,(2) both Houses of Parliament(3) and other officials of the State, civil(4) and military.(5) Besides these there are the Magistrates and Judges to whom all persons are entitled to represent their grievances if their cognizance falls within the scope of their authority.

So it has been observed: "When it comes to the knowledge of anyone that a crime has been committed, a duty is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of the crime; and if he states only what he knows and honestly believes he cannot he subjected to an action of damages merely because it turns out that the person as to whom he has given the information is, after all, not guilty of the crime."(6) But in this case, if the charge levelled by them is shown to be false, the complainant would be liable to a prosecution either under section 182 or 211. But the exception is not restricted merely to complaints made to a Magistrate, for a person in lawful authority over another may be any other person, such as those referred to under the last exception (§§ 5735-5737). So a person may prefer to the headman of a caste a complaint that another person belonging to that caste had outraged his religion. And so when A wrote to his fellow-castemen, enquiring whether B who had committed adultery with a woman of low caste, should still be considered in the caste, and adding that the enquiry held into his conduct in the village was perfunctory and unsatisfactory, he was held protected both by this exception as well as exception 10.(7) The same view was taken in another case in which the accused who were members of the Reddi caste stated to a *panchayat* of Reddis that the members of another caste (*Balijas*) were inferior to them and that all social intercourse with them should be stopped and that the village servants should not serve them.(8)

5739. In such cases, then, four points call for notice: (*i*) Was the complaint made to a person in authority over another with reference to the subject-matter of accusation; (*ii*) was the imputation an accusation, or something different; (*iii*) was it made in good faith; and (*iv*) is

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(24) *Harrison* v. *Bush*, 5 E. & B. 344 (349).

(25) *Jenoure* v. *Delmege*, (1891) A. C. 73 (77).

(1) *Hare* v. *Mellers*, 3 Leon. 138 (163).

(2) *Chatterton* v. *Secretary of State for India in Council*, (1895) 2 Q. B. 189; *Grant* v. *Secretary of State for India in Council*, 2 C. P. D. 445; *Das* v. *Secretary of State for India in Council*, L. R. 19 Eq. 509.

(3) *Lake* v. *King*, 1 Lev. 240.

(4) 2 Inst., p. 228; 4 Co. Rep. 14. See §§ 5736-5738.

(5) *Dawkins* v. *Lord Rokeley*, L. R. 7 H. L. 744; *Home Bentinck*, 2 B. & B. 130.

(6) *Per* Inglis Lord President in *Lightbod* v. *Gordon*, 9 Scotch Sess. Cas. (4th Series), 937, 938.

(7) *Kashinath*, 8 B. 168.

(8) *Venkata Reddi*, (1885) 1 Weir 575.

the complainant absolutely privileged, or is his privilege qualified by the terms of this section?

(i) What Persons are in Authority?

5740. Of persons in authority, some possess plenary powers to hear grievances, though they may not themselves possess authority, to redress the grievances. For instance, the King and Parliament, the Secretary of State and the Government of India are persons in authority over all their subjects, though they possess no direct means for redressing complaints made to them. But an accusation preferred to them does not on that account cease to be privileged. The same view may be taken of provincial governors who as representatives of the sovereign also possess that attribute of sovereignty. But judicial officers such as Judges and Magistrates and the Police are directly responsible for disposing of complaints made to them within their jurisdiction, and complaints so made would be protected, however libellous they might otherwise be. But they are only protected, if they are made to those who possess *lawful* authority over the person complained against, with respect to the subject-matter of the accusation. For instance, if A is a Magistrate in the district B, and C in the district D, a person suffering an injury from a person living in D, could not complain to A, for A is only in lawful authority in B, whereas the person charged resided at D; but if in such a case the accused absconded from D and took shelter in B, the complainant would be entitled to complain both to A and C.

5741. The question of *lawful* authority is therefore important, though it may at times raise knotty questions. For instance, suppose A is a third class Magistrate at B and the offence complained of is murder or rape, dacoity or arson, all exclusively triable by the Court of Session, in which A does not even possess the power of commitment, would the complaint to A be privileged? The question arose but does not appear to have been considered in England. In one case the defendant wrote a letter to the Home Secretary, complaining of the conduct of the plaintiff, a solicitor, as clerk to the borough Magistrates. The Home Secretary had no power or jurisdiction whatever over the plaintiff, for which reason the communication was held not to be privileged.(9) But the contrary was laid down in another case in which the defendant, an elector of Frome, petitioned the Home Secretary for the removal of the borough Magistrate for making speeches inciting to a breach of the peace, which was held to be privileged, although the petition should have been more properly addressed to the Lord Chancellor.(10)

So in another case, in which the defendant sent a letter to the Secretary of War, complaining against an officer in the army, of non-payment of a debt due to the defendant and asking him to exert his authority to prevail on the plaintiff to pay up, the Court considered the letter privileged as the Secretary of State had general authority over the plaintiff though no direct power or authority to order the plaintiff to pay his debt.(11) This was the *ratio decidendi* of the case in which the inhabitants of a district, in which the plaintiff was a teacher, prepared a memorial charging

(9) *Blagg* v. *Stuart*, 10 Q. B. 899.
(10) *Harrison* v. *Bush*, 25 L. J. Q. B. 25; to the same effect *Jenoure* v. *Delmage*, [1891] A. C. 73.
(11) *Fairman* v. *Ives*, 5 B. & Ald 642.

him with drunkenness and immorality, which they sent to the Local Superintendent of Schools. It ought strictly to have been sent to the trustees of that particular school in the first instance, and such trustees would then, if they thought fit, in due course forward it to the Local Superintendent who was then empowered to take action. It was held that though the memorial was erroneously sent in the first instance to the Superintendent, still it was privileged as the ultimate decision lay with him.(12)

This was presumably the view of Pollock, B., in a case in which the defendant addressed a libellous petition to the Privy Council against the plaintiff, a Sanitary Inspector appointed by the local authority but removable from his office by the Privy Council and whom Denman, J., awarded £350 which was upheld on appeal but on the ground that there was evidence of express malice; but the Court at the same time observed that the power of removal was not judicial, and apart from judicial proceedings there is a class of cases where complaints have been made to high officers of State, in which it has been held that statements made in such complaints are privileged, in the same manner as statements by masters relating to their servants.(13) This was again the view taken in holding libellous complaints against a local postmaster, addressed to the Postmaster-General, privileged.(14) The principle deducible from these cases, would then appear to be this: that where the authority petitioned has some jurisdiction in the matter, the petition is privileged whether such jurisdiction be immediate or ultimate, but where the authority possesses no jurisdiction at all over the subject-matter of the complaint, it is then no more privileged than if it had been published to any other man.

5742. This is all that the rule here enacts, and it has been so understood in the few cases in which its working has been tested. So where the right to a plot of land was in dispute between the complainant and the accused, and the latter in a petition to the Municipality about the land, stated that the complainant was convicted and sentenced to rigorous imprisonment, it was held that the statement to the Municipality, though true, was not privileged.(15) The same view was taken of a statement made by a party to the Registrar of Assurances.(16) So where a public servant, in the course of a departmental enquiry, stated to the Head of his department, that another subordinate in his department borrowed money from his superior officer, the statement was held to be defamatory if it was untrue,(17) and, it may be added, if it was made in good faith.

5743. But a person may *bona fide* believe a person to possess jurisdiction which in fact he does not possess. In that case, the accused might be protected under any of the general exceptions,(18) and it may be even a circumstance for mitigation but it would not then be protected by this exception.

(12) *McIntyre* v. *McBean*, 13 Upper Canada Q. B. R. 534.
(13) *Proctor* v. *Webster*, 16 Q. B. D. 112 (114).
(14) *Woodward* v. *Lander*, 6 C. & P. 548; *Bannister* v. *Kelty*, 59 J. P. 793.
(15) *Ramasami* v. *Ramachandrudu*, (1895) 1 Weir 612.
(16) *Krishnamal* v. *Krishnaiyangar*, 3 M. L. J. 50, F. B. 15 I. C. 652.
(17) *Krishna Rao* v. *Appaswami*, (1891) 1 Weir 585 (586).
(18) *E.g.*, ss. 76, 79.

(ii) Accusation.

5744. Again, even if the person appealed to possess the requisite authority, it does not thence follow that the complaint is privileged under this clause. For, if it is something more than an accusation and something short of *bona fide*, it would not be privileged. The term "accusation" means a charge or formal complaint that some person has committed an offence.(19) The offence committed need not be punishable under the Code, and it may be punishable under a special or local law, or it may be merely a religious or moral or social delinquency not punishable by law, but in each case the accusation must suit the authority before whom it is formulated; otherwise the accuser cannot appeal to this exception for protection. An Irish Coroner sent a report of an inquest held by him on the body of an outdoor pauper, to the Chief Secretary of Ireland, at which the plaintiff who was the relieving officer had given evidence. He mentioned in this report that the Parish priest had publicly stated in Court that the plaintiff had perjured himself. It was held that this portion of the report, at all events, was not privileged, as the Chief Secretary could have no interest in hearing the opinion of the Parish priest about the plaintiff's evidence.(20) A police officer is equally guilty of defamation if he maliciously makes to his superior officer, a defamatory report against any person, unless he can show that he is protected by some special statutory privilege which the Legislature has created in his favour.(21)

5745. An imputation may contain an accusation as well as vituperation, in which case the former would be separated from the latter and held privileged, though the latter would be unprivileged,(22) and it will be read along with the former for the purpose of considering whether the whole was made in good faith.(23) But in considering the effect of such words, regard must be had to the mode of expression common amongst persons of the class to which the accused belongs, the warmth of his feeling, and the meaning he really intended to attach to the words used by him.(24)

(iii) Accusation must be Made in Good Faith.

5746. Lastly, the accusation must be made in good faith. Now, there can be no good faith, where there is express malice or evidence of culpable negligence or recklessness in the dissemination of the libel. Otherwise the question must be decided according to the circumstances of each case. As Parke, B., said: "If fairly warranted by a reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."(25) The defendant petitioned the House of Commons against the plaintiff, charging him with extortion and oppression in his office of Vicar-General to the Bishop of Lincoln. Copies of his petition were only distributed amongst members of Parliament, and to no one else. It was held

(19) S. 4 (*h*), Cr. P. C.
(20) *Lynam* v. *Gowing*, 6 L. R. Ir. 259.
(21) *Abdul Razak* v. *Gauri Nath*, (1910) P. W. R. 4, 5 I. C. 714.
(22) *Warren* v. *Warren*, 1 C. M. & R. 251; *Jacob* v. *Lawrence*, 4 L. R. Ir. 579.
(23) *Pearson* v. *Lemaitre*, 12 L. J. Q. B. 253.
(24) *Per* Lord Esher, M. R. in *Nevill* v. *Fine Arts, etc., Co.*, (1895) 2 Q. B 156 (168).
(25) *Toogood* v. *Spyring*, 1 C. M. & R. 181 (193).

that though the petition contained matter which was false and scandalous, still, since the defendant had only circulated it amongst the members of Parliament to whom he applied, it was privileged, and not the less so because he had got it printed; for, though the printing was a publication to the printers and compositors, still it was the usual course of proceeding in Parliament.(1)

The plaintiff had been a clerk to a board of guardians, and claimed a sum of money as due to him. At a meeting of the board, it was proposed that the plaintiff be paid £89 odd, in full settlement of his claim, to which the defendant, a member of the board, moved an amendment to the effect that he be paid only £39 odd, and in his speech he referred to the "defalcations of an unfaithful servant." When this was said, the press reporters were present as usual at all meetings of the board, and there were also present some other persons besides members of the board. But it was held that the occasion was privileged, in spite of the presence of the outsiders; for it was the duty of the defendant to speak out then and there, or the resolution would have been carried and the money voted.(2) But the case would have been otherwise, if the defendant had himself invited outsiders and the reporters and then made defamatory comments in their hearing.(3) The Justices were about to swear in the plaintiff as a paid constable, when defendant, a parishioner, came forward and stated that the plaintiff was an improper person to be a constable. It was held that the fact that other persons besides the Justices were present as usual, did not destroy the privilege attaching to such a *bona fide* remark.(4) In such cases, the question of good faith depends not upon the concourse of persons present but upon the question whether there were more persons present than necessary, and whether the charge made by the accused before them was made recklessly and unwarrantably.(5) So a person may be privileged as against A, but if he drags in others to support his case against him, he could not claim privilege against them if reference to them was irrelevant. Suppose, for instance, a person were to charge A for taking a bribe, could he be heard to say that the holders of that office were all bribe-takers—so were B, C and D before him?

5747. Statements Made in Self-defence or Defence of Another.—

Exception 9.

As compared to the last, the ninth exception is of wider application, and indeed, it embraces all cases arising under Exception 1. In order to justify a statement under this exception, it is not necessary to show that it is true: all that it is necessary is that the accused honestly believed it to be true and that it was published in self-defence or in the interest of the public. It is founded on the leading English precedent in which the same rule was thus stated by Parke, B.: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the

(1) *Lake* v. *King*, 1 Lev. 240.
(2) *Pittrad* v. *Oliver*, (1891) 1 Q. B. 474.
(3) *Parsons* v. *Surgey*, 4 F. & F. 247.
(4) *Kershow* v. *Bailey*, 17 L. J. Ex. 129.
(5) *Padmore* v. *Lawrence*, 11 A. & E. 380: *Boxsins* v. *Goblet Freres*, (1894) 1 Q. B. 842.

conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within narrow limits."(6)

So Lord Campbell, C.J., said in another case(7): "A communication made *bona fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable." "The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not."(8) Of course, the rule applies all the more if both the maker of the imputation and its receiver have a common interest in the subject-matter of the communication.(9) But the mutuality of such interest is by no means necessary, though where it exists, it strengthens the occasion for privilege. At the same time, it is understood that the communication is not absolutely privileged because it was the duty, or in the interest of the maker to publish it—for the publication must be made in good faith—which restricts the operation of the rule both as regards the manner of publication and the person to whom it is published. As to the latter, the English rule requires that the publication must be confined only to the person who has a corresponding interest or duty, and this would necessarily be the case, if the publication is made in good faith, of which the two illustrations appended to the exception furnish apt instances.

5748. Again, the English rule requires that the defendant himself should have some interest or duty in making the imputation, while the rule under consideration allows that such interest need not be confined to the maker of the imputation, for it may be made with impunity even if it is made for the protection of the interest of another person or for the public good. But since in such cases, he must be under some duty to that other person or the public, the result in each case is the same and the rule here enacted must not be understood to be wider than the corresponding rule of English Law.

5749. The two questions then that arise under each rule are (*i*) was the imputation made in the interest of some one, and (*ii*) was it made in good faith.

(i) What "Interest" is Necessary?

5750. As regards the first, the word "interest" is obviously used to refer to such interest as a person possesses in his property, character, reputation or the like. But besides such personal interest which a person possesses in his own affairs, there is an interest which a person possesses in the

(6) (1834) *Toogood* v. *Spyring*, 1 C. M. & R. 181 (193).

(7) *Harrison* v. *Bush*, (1855) 5 E. & B. 344 (348).

(8) *Per* Lindley, L. J., in *Stuart* v. *Bell*, (1891) 2 Q. B. 34 (1346).

(9) *Per* Lopes, L. J. in *Hunt* v. *Great Northern Ry. Co.*, (1891) 2 Q. B. 189 (192).

affairs of the other persons and in the public generally which cast on him a duty to publish facts and opinions which law equally recognizes as a ground of protection. The "interest" protected is then an interest the protection of which it is his moral or social duty and it may be either of a public or private nature. But in any case, it is essential that the interest must be in the *matter* communicated, and not merely in *making* it. For instance, while counsels are entitled to comment upon the evidence adduced in a case in which they are instructed, such comments by a by-stander would be wholly gratuitous and unprotected, because while the former have an interest in the case, the latter has no such interest.(10) The plaintiffs, who were architects, had been employed by a committee to effect the restoration of a church at Skirlaugh. The defendant, a clergyman of the Church of England, wrote to a member of the Committee: "I have seen in *The Hull News* that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan, and can show no experience in Church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" The writer was neither the patron nor the minister of the Church, nor a member of the committee appointed to effect its restoration, nor even a parishioner, nor was there any occasion to render the communication privileged either on the ground of duty or of interest, and it was therefore held to be libellous.(11)

But the question whether the *quantum* of interest possessed by the accused is sufficient to protect his imputation on the ground of privilege, is not always an easy one. Take, for instance, the following case: The mate of a ship sent a letter to the defendant who was his personal friend, in which he accused the Captain of drunkenness and gross misconduct in the navigation of the ship, but requesting him not to communicate with the owner. The defendant showed this letter to two others, and in accordance with their advice communicated it to the owner of the ship who immediately dismissed the Captain. The latter then sued the defendant for libel, and the defendant *inter alia* pleaded privilege, but though that question was twice argued, the Court was equally divided, Tindal, C. J., and Earle, J., holding the communication privileged while Coltman and Cresswell, JJ., holding that it was not.(12) Tindal, C. J., held that the defendant's communication was made in full belief of the truth of the information, and that he was performing a duty, however much mistaken he might have been as to the existence of such duty, or in his mode of performing it. He held the rule of law not so narrowed and restricted by any authority that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief and with reasonable grounds for the belief that it is true, will not be excused, though he has no personal interest in the subject-matter.(13) Earle, J., however, supported his view on the ground that the information was given for the purpose of preventing damage from misconduct, and that in furnishing such information it was not essential that the giver of the infor-

(10) *Lynam* v. *Gowing*, 6 Ir. L. R (Ex-D) 259.
(11) *Botterill* v. *Whitehead*, 41 L. T. 588.
(12) *Coxhead* v. *Richards*, 2 C. B. 569.
(13) *Coxhead* v. *Richards*, 2 C. B. 569 (594, 596).

mation should stand in any relation to the other parties, the rule being founded on the importance of the information to the interests of the receiver.(14)

But these views were controverted by Coltman, J., who held that there was no *legal* duty calling on the defendant to communicate with the owners, and as to *moral* duty, it was plainly the other way, for it was the duty of not slandering your fellowmen on insufficient grounds, and "it is clear, that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity." And it was no sufficient justification that the defendant had acted *bona fide* and without malice.(15) This view was concurred in by Cresswell, J., who added that there was no relation of principal and agent between the ship-owner and the defendant; nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no enquiries had been made; they were, until the time in question, strangers; the duty, if it existed at all between them, must therefore have arisen from the mere circumstances of their being fellow subjects of the realm. The mate of the ship might have been, if he believed that which he wrote to be true, under a *moral* duty to communicate with the owner, but the defendant could not take that vicarious duty upon himself; he was not requested by the mate to communicate, but was, on the contrary, enjoined not to make the communication.(16) But though in that case the matter rested there, the view of Tindal. C. J., has been followed in subsequent cases as laying down the correct rule as to the necessity of interest in publishing defamatory matter.(17) At any rate, this clause is in accordance with that view, for though the defendant may not have been under any public or moral duty to make the communication, it was certainly believed to have been made in the interests of the mate and of the public. As such, to quote Blackburn, J.: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication."(18)

Test of Public Good.

5751. But who is to judge whether a communication is or is not in the interest of society? It is held to be a question of law and not one of fact.(19) As Lindley, L. J., put it: "The question of moral or social duty being for the Judge, each Judge must decide it as best he can for himself. I take moral or social duty to mean a duty imposed by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal."(20) The plaintiff was a valet in the service of a person staying at New-

(14) *Coxhead* v. *Richards*, 2 C. B., p. 608.

(15) *Ib.*, pp. 599, 601.

(16) *Ib.*, pp. 603, 604.

(17) *Per* Lindley, L. J., in *Stuart* v. *Bell*, (1891) 2 Q. B. 341 (347) *per* Willes, J., in *Aman* v. *Damm*, 3 C. B. N. S. 597 (602); *per* Lord Blackburn in *Davies* v. *Snead*, L. R. 5 Q. B. 608 (611). The statement, made in Folkard's Libel (5th Ed.)., p. 317, *Note* (*s*), that the judgements of Coltman and Cresswell, JJ., have received universal assent, is certainly incorrect.

(18) *Davies* v. *Snead*, L. R. 5 Q. B. 611; followed per Jessel, M. R., and Brett, L. J., *Waller* v. *Loch*, 7 Q. B. D 621.

(19) *Per Lindley*, L. J. in *Stuart* v. *Bell*, (1891) 2 Q. B. 341 (345); *contra in Umed Singh*, 21 A. L. J. 765.

(20) *Per Lindley*, L. J., in *Stuart* v. *Bell*, (1891) 2 Q. B. 341 (350).

castle as the defendant's guest. The defendant was the Mayor and a Magistrate of the town. The chief constable showed him a letter received from the Edinburgh police informing the Newcastle police that the plaintiff had been suspected of having left after committing a theft at a hotel and suggesting that a cautious inquiry should be made with the view of discovering whether the plaintiff was in possession of the property. The defendant made no enquiry but informed the plaintiff's master of the communication received, whereupon the plaintiff sued the defendant for slander, but the Court held the occasion privileged, Lindley, L. J., observing: "My own conviction is that all or, at all events, the great mass of rightminded men, in the position of the defendant, would have considered it their duty, under the circumstances, to inform Stanley (plaintiff's master) of the suspicion which had fallen on the plaintiff. My own opinion is clear and strong that it was his moral or social, although not his legal, duty to do so, in other words, the occasion was privileged."[21]

5752. Where a person is under a legal duty to inform, he is of course privileged, for it cannot be illegal to publish an imputation when its publication is enjoined by law.[22] The question of good faith is then immaterial, for the question of good faith only arises when the act itself is illegal, and not where it is legal. Now, since ordinarily, and unless otherwise provided by the procedure Code, every member of the public acquainted with the facts of the case is entitled to set the criminal law in motion,[23] it follows that every such communication is privileged as is made for the public good, it being for the public good that society should be rid of its criminals. Assuming then that such person makes a communication in good faith, he could not be prosecuted under this section, though the Court has other means of dealing with him if his communication is found to be false and malicious.[24]

Privilege of the Press.

5753. This view is confirmed by the Privy Council in a case arising upon the following facts. The accused Channing Arnold, was the proprietor and editor of a newspaper published in Rangoon called *"The Burma Critic."* He was convicted of this offence in that he had published a defamatory article concerning a Mr. Andrew, District Magistrate of Mergui. It appeared that Mr. Andrew had discharged one Captain McCornic of abduction and rape, whereupon the accused criticised the discharge, alleging that Mr. Andrew was an intimate friend and "boon companion" of the accused and by reason of such friendship "he entered into a deliberate conspiracy with Lieutenant Finnie, the District Superintendent of Police," to shield McCornic from punishment and to "burke the crimnial charges made against him," These charges had been repeated after the Government had, after enquiry, apprised the accused of the true facts. The accused was thereupon prosecuted and convicted of defamation and on appeal to the Privy Council, his counsel took up his stand on this exception urging that, though the charge was false, it was made in good faith. Some special, though not an absolute

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(21) *Per Lindley*, L. J., in *Stuart* v. *Bell*, (1891) 2 Q. B. 341 (350).
(22) S. 79.
(23) *Ganesh Narayan Sathe*, 13 B. 600; *Keshavlal*, 21 B. 536; *Ramruttun Neogee* 6 W. R. 3; *Furzand Ali* v. *Hanuman Prasad*, 18 A. 465.
(24) Ss. 182, 211, and s. 250, Cr. P. C.

privilege was claimed for the accused, because he was a journalist as to which Lord Shaw observed: "Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever length the subject in general may go, so also may the journalist, but apart from statute-law his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do make him more careful; but the range of his assertions, his criticisms or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position."(25) The question of good faith had been found by the jury against the accused and it was well justified by the evidence. Their Lordships then passed in review their own practice in Criminal Cases and in the end dismissed the appeal adding that the result would have been the same even if they had been a court of regular appeal.

5754. Privilege of Judge, Counsel, Parties and Witnesses.—Though the general rules here enacted make no distinction between the several classes of the public, nor confer upon any class any special privilege, the English Common Law places Judges, Counsel, parties and witnesses in a class apart, clothing them with special immunity in respect of utterances made within the sphere of their special duties. The subject may be treated in the following order:—

(*i*) Their privilege under English Law (§§ 5755);

(*ii*) The nature and extent of their immunity from civil liablity (§ 5756);

(*iii*) The nature and extent of their immunity from criminal liability (§§ 5757-5758);

(*iv*) Common Law rule applicable to civil liability here (§§ 5759-5762); but

(*v*) Not to criminal liability, since it is subject to this section (§§ 5763-5767).

Absolute Privilege under English Law.

5755. As regards English Law, as far back as 1772, Lord Mansfield laid it down to be the rule that "neither party, witness, counsel, jury or Judge, can be put to answer civilly or criminally, for words spoken in office. If the words are opprobrious or irrelevant to the case, the Court will take notice of them as contempt, and examine on information. If anything *mala mens* is found on such enquiry, it will be punished suitably.(1) This statement of the law has since been followed in several cases.(2) In England this immunity is said to be absolute, being

(25) *Arnold*, 41 C. 1023 (1063) P. C.

(1) *King* v. *Skinner*, (1772) Lofft 54, 98 E. R. 529 (530).

(2) *Dawkins* v. *Rokeby*, L. R. 8 Q. B. 264; *Seaman* v. *Netherclift*, 1 C. P. D. 544, 2 C. P. D. 53; *Munster* v. *Lamb*, 11 Q. B. D. 594. The Scotch law is the same; *per* Cockburn, C. J., in *Thomas* v. *Churlan*, 2 B. & S. 475 (479). *See* the case law reviewed *per* Brett, M. R., in *Munster* v. *Lamb*, 11 Q. B. 588 (599-605), and *per* Fry, L. J., *ib.*, 605-608.

based on the principle that "the law will rather suffer a private mischief than any public inconvenience" and it is obvious, on the ground of public policy, that persons engaged in the administration of the law, and those who seek justice in respect of wrongs and injuries suffered, or give evidence as to any such, or make defence thereto may not be deterred from so doing by the fear of being harassed by actions or prosecutions, for defamation in respect thereof. But this is a good ground for conferring a privilege but not an *absolute* privilege erroneously spoken of in the books(3) as attaching to the office of the Judge; for a Judge is not wholly irresponsible for his acts, but may be impeached if he acts maliciously, oppressively, or with partiality in violation of his oath.(4)

And so Cockburn, C. J., said: "For my own part, I should prefer to treat the immunity of Judges as a matter *positivi juris*, as settled by decisions and authority, rather than as resting on sound or satisfactory principle, on which, were the matter *res integra*, it would be desirable to act. I cannot believe that Judges or juries would fail to discharge their duties satisfactorily and fearlessly according to their oaths and consciences, or witnesses give evidence less truthfully, from any fear of exposing themselves to actions at law. I am presuaded that the number of such actions would be infinitely small, and would be easily disposed of; while, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice, so that, on sound principles, the authors of such wrong ought to be responsible to the parties wronged."(5)

The Privy Council emphasized the same view in the following words. "Upon the other side it would appear from certain observations of the learned Judge that this false dangerous doctrine may have been hinted at, that some privilege or protection which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment."(6) But these cases merely establish that a person suffering at the hands of a corrupt or malicious Judge is not wholly without redress. In that sense, his privilege is not absolute, but he is nevertheless absolutely privileged in the sense that he is neither civilly nor criminally liable for words spoken in his office, though they be howmuch soever irrelevant malicious, improper or otherwise indefensible. Lord Mansfield declared any other rule to be "subversive of all ideas of a constitution,"(7) and later Judges support it on the ground of common law, public policy and general convenience.

It will thus be seen that English Law throws round Judges and others a cloak of absolute immunity both from civil and criminal liability.

(3) *E. g.*, Odger Libel (4th Ed.) Ch. X, p. 215; Folkard's Libel (4th Ed.), Ch VIII, p. 192; 1 Halsbury's Laws of England, p. 13, § 14.

(4) *Scroggs*, 8 How. St. Tr. 163, 198; *Arnold*, 41 C. 1023, P. C.

(5) *Dawkins* v. *Paulet*, 9 B. & S. 755.

(6) *Arnold*, 41 C. 1023 (1063, 1064), P. C.

(7) *King* v. *Skinner*, Lofft 54; 98 E. R. 529 (530).

5756. And counsel or advocate,[8] and witnesses[9] though not parties, and their agents are held to stand on the same footing, that is, like the Judges, they are all absolutely privileged and no action will lie for damages for words spoken by them in the conduct of a case, even if they were irrelevant and uttered maliciously. The defendant was a county court Judge, before whom the plaintiff, an accountant and scrivener, had been sued, and who referring to him said "you are a harpy, preying upon the vitals of the poor." The words were stated to have been spoken falsely and maliciously and without any reasonable and probable cause and not *bona fide*, in the discharge of his duty as Judge. But the court of Exchequer unanimously threw out the plaint, on the ground that a Judge could not be sued for words spoken in his office, Kelly. C. B., adding: "It is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law and independently and freely without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a Judge so exercise his office, if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury, whether a matter on which he had commented judicially was or was not relevant to the case before him?

(2) Absolute Civil Immunity.

Again, if a question arose as to the *bona fides* of the Judge, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus if we were to hold that an action is maintainable against a Judge, for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his Court submitted to their determination. It is impossible to overestimate the inconvenience of such a result."[10] This case is then an authority for holding that, in England under English Law, a Judge cannot be sued for defamation for words spoken or written in his office, however unjustifiable and malicious they may be, and the same immunity has been extended to the judicial officers of this country by an Act enacted for their protection[11] (§ 5730). But as observed before, this Act does not advisedly go beyond exempting them from their liability to be sued in any *Civil* Court, for any act done or ordered to be done by them in the discharge of their judicial duty, whether or not within the limits of their jurisdiction: provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of. This

(8) *Munster* v. *Lamb* 11 Q. B. D. 588.
(9) *Mackey* v. *Food*, 5 H. & N. 792; *Pedley & May* v. *Morris*, 61 L. J. Q. R. 21; *Lilley* v. *Roney*, 61 L. J. Q. B. 727.
(10) *Scott* v. *Stansfield*, L. R. 3 Ex. 220 (223); to the same effect, Lord Esher in *Anderson* v. *Gorrie*, (1895) 1 Q. B. 668.
(11) Act XVIII of 1850.

absolute civil immunity, though statutory in the case of judicial officers, is held to extend to counsel, parties and witnesses by force of the common law,[12] for the play of which there is room, since the Indian law of torts is not yet codified and is consequently the law of justice, equity and good conscience, which drags in the rules of English common law as the quintessence of justice.

Indian Rule the Same.

5757. In any case so far as regards the civil liability of Judges, the question has been set at rest by the Statute, and as regards counsel and witnesses, by a decision of the Privy Council decided upon the following facts: An affray took place between a tenant of the plaintiff and the defendants in which one of their party was killed. One of the defendants thereupon falsely complained to the Magistrate and the other two defendants falsely confirmed his statement that the plaintiff and his son had killed the deceased, whereupon they were both arrested, but the plaintiff was discharged and he sued the defendants for damages, alleged to be for the defamation of his character by the defendants, for swearing themselves to the injury of the plaintiff; and the case having gone up to the Privy Council, their Lordships observed: "This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion with the High Court, that if it had been, strictly speaking, such an action, it could not have been maintained; for they agree with that Court that witnesses cannot be sued in a civil Court for damages, in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recognised by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury. But it appears to their Lordships that the suit of the paintiff in the Courts below, although called a suit for defamation of character, may be substantially supported (the question is one of substance rather than of form) as an action for a malicious prosecution."[13]

5758. This *dictum* is, of course, conclusive so far as it goes, and those who hold litigants governed by this section have no difficulty in distinguishing it on the ground that it merely refers to their civil liability, and does not bear upon the question under reference. So in a recent case, it was said that while as regards the civil liability of such person considered as a tortfeasor, there was room for the application of the English rule as quintessence of justice, equity and good

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(12) *Munster* v. *Lamb*, 11 Q. B. D. 588; *Gunesh Dutt* v. *Mugneeram*, 11 B. L. R. 321 P. C.; affiring O. A. *Mugnee Ram* v. *Gonesh Dutt*, 5 W. R. 134; *Bhikumber* v. *Becharam*, 15 C. 264; *Golap* v. *Bholanath*, 38 C. 880; *Crowdy* v. *Reilly*, 17 C. W. N. 554; *Satish Chandra* v. *Ram Doyal*, 48 C. 388 (415, 416) S. B. *Bhaishankar* v. *Wadia*, 2 Bom. L. R. 3 F. B.; *Chunilal* v. *Narsing Das*, 40 A. 341 F. B.; *Govindan* v. *Atchutha*, 39 M. 433; *Jagat Mohan* v. *Kalipada*, 1 Pat. 371; *Karu Singh*, (1926) Pat. 425.

(13) *Ganesh Dutt Singh* (*Baboo*) v. *Mugneeram*, 11 B. L. R. 321 (328, 329), P. C., 17 W. R. 283, O. A. from 5 W. R. 134.

conscience, because the Indian Law of Torts is still uncodified, there was no room for its application to modify the provisions of this section which forms part of a Code the essence of which is to be exhaustive.(14) This view is now concurred in by all Courts.(15) And it was thus justified by Knox, A. C. J., who said: "*Expressum facit cessare tacitum,* is a maxim that cannot be overlooked in construing Statutes whether English or Indian. The Indian Penal code in making defamation a criminal offence was creating an offence which was till then not an offence in India. It is difficult to conceive that a maxim which, as their Lordships say, certainly has been recognised by all the Courts in England to be one based upon principles of public policy, could have been absent from the minds of the framers of the Code, when they were considering this new offence they were creating.(16) Even if it were, the fact remains that the law contains an omission which the Courts cannot supply by having recourse to the doctrine of common law or of public policy. The present position of law is then this—that while litigants, their counsel and their witnesses are absolutely privileged so far as regards their civil liability, their privilege under criminal law is only qualified and limited by good faith as provided in Exceptions(7)-(9) of this section.

5759. Common Law Privilege.—Under English Law "neither party, witness, counsel, jury, nor Judge can be put to answer civilly or criminally for words spoken in office,(17) unless a Judge goes beyond his jurisdiction when a different set of considerations arise,(18) that is to say, the immunity of the Judge extends only to words spoken with reference to a matter within his jurisdiction, which is properly before him. It does not extend to any words spoken however maliciously and without probable and reasonable cause, in a matter not properly before him.(19) So it was the view of Lord Ellenborough that a Judge was only privileged so long as he did not exceed his jurisdiction,(20) and subject to the rule enacted in section 79 and section 19 of the Judicial Officer's Protection Act,(21) it would appear to be the rule in this country. But a Judge

(3) English Law.

(14) *Kari Singh,* 40 C. 433; *Satis Chandra* v. *Ram Dayal,* 48 C. 388 F. B.; *M. Bannerjee* v. *Anukul,* 55 C. 85.

(15) *Abdul Hakim* v. *Richander,* 3 A. 815; *Isri Prasad* v. *Umrad Singh,* 22 A. 234; *Ganga Prasad* 29 A. 685; but in *Kallu* v. *Sital,* 40 A. 271, witness was held to be exempt from a prosecution for this offence by reason of s. 132 of the Indian Evidence Act. But this affords a very limited protection confined to evidence given in the circumstance therein stated; *Tiravengada* v. *Tripurasundari* 49 M. 728 F. B.; *Anwaruddin* v. *Fatheni Bai,* 100 I. C. (M.) 537; *Bai Shantana* v. *Umrao,* 50 B. 162 F. B *McDonnell,* 3 R. 524; *Nirsu Narayan Singh,* 6 Pat. 224; *Maya Das,* (1893) P. R No 14; *Fateh Muhammad,* (1889) P. R. No. 84; *Phundi Ram,* (1911) P. W. R. 7, 10 I. C. 681; *Champa Devi,* 24 A. L. J. 329, (1926) A. 287; *Kari Singh,* 40 C. 433; *Satis Chandra* v. *Ram Dayal,* 48 C. 388 F. B.; *M. Banerjee* v. *Anukul,* 55 C. 85; *Suraj Mal* v. *Ram Nath,* (1928) N. 58.

(16) *Ganga Prasad,* 29 A. 685 (696, 697, 699), *per* Knox, A. C. J. and Aikman, J., Richards, J. *dissentiente.*

(17) *Per* Lord Mansfield in *Skinner,* Loft. 55 (56).

(18) *Per* Lord Esher, M. R., in *Anderson* v. *Gorrie,* (1895) 1 Q. B. 668 (671).

(19) *Kirby* v. *Simpson,* 10 Exch. 358; *Gelen* v. *Hall,* 2 H. & N. 379.

(20) *Thomas Pieton,* 30 St. Tr. 225 (791); cited and explained *per* Lord Esher, M. R., in *Anderson* v. *Gorrie,* (1895) 1 Q. B. 668 (671). The language of Fry, L. J., in *Munster* v. *Lamb,* 11 Q. B. D. 588 (607), is wider, but the question of jurisdiction was not considered there. On the other hand, its existence was assumed; *see Ib.,* p. 608.

(21) Act XVIII of 1850.

(which term includes a Magistrate and all judicial officers whatever their designation) does not cease to have jurisdiction over the subject-matter of a suit or proceeding for this purpose as soon as he has disposed of it or permitted its withdrawal by a party.[22] Indeed, the question of jurisdiction should not be too narrowly scanned.

5760. As regards counsel his privilege is even greater, and not less than that of the Judge, for he speaks in the presence of the Judge who can check him if he says what is improper.[23] Subject to this he is absolutely privileged whether the words spoken by him be false, malicious and irrelevant.[24] So Brett, M. R., said: "Of the three classes—Judge, witness, and counsel—it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false, and what he has to do is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarassed that he could not do the duty which he is called upon to perform. For, more than a Judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of that rule covers a counsel even more than a Judge or witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel who deliberately and maliciously slanders another person. The reason of the rule is that a counsel who is not malicious and who is acting *bona fide* may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct."[25] In this view, the privilege enjoyed by counsel is greater and not less than that possessed by a judicial officer, and if in a case a Judge could not be prosecuted for a defamatory utterance, no more can a counsel though his utterance be false, irrelevant and expressly malicious. But, of course, in such a case it will be the duty of the Judge to see that the privilege is not abused and that it is not made a cloak for the gratification of personal animosity.

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(22) *Law* v. *Llewellyn*, (1906) 1 K. B. 487.

(23) *Per* Brett, M. R. (Lord Esher), in *Munster* v. *Lamb*, 11 Q. B. D. 588 (596).

(24) *Per* Brett, M. R. (Lord Esher), in *Munster* v. *Lamb*, 11 Q. B. D. 588 (593, 603).

(25) *Per* Brett, M. R., Fry, L. J., concurrent; *Munster* v. *Lamb*, 11 Q. B. D. 588 (603 604); following *Skinner*, Loft. 55; *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255 (263, 264, 268): *Kennedy* v. *Hilliard*, 10 Gr. C. L. R. N. S. 195 (209), dissenting from Lord Denman, L. J., in *Kendillon* v. *Maltby*, 2 M. & R. 438.

5761. Apart, however, from this unqualified privilege the Court will accord to counsel the liberty of speech, which, having regard to the time and circumstance, it will consider as justified in forensic argument though the same statement, if uttered elsewhere, would be clearly defamatory. This is so because the measure of good faith must vary with the necessity of the case. Counsel are presumed to address the Court from instructions, and the Court will presume this fact,[1] sufficient to rebut the imputation of malice, till malice is otherwise proved.[2] Such was held to be the case of the accused, a mukhtyar, to whom a litigant approached to secure the transfer of his case from the file of a Magistrate, whereupon the accused drew up a petition for transfer charging the Magistrate with corruption which he delivered to the client to file personally, himself remaining in the background. The man filed it, and when questioned about the defamatory imputation therein contained, he falsely disclaimed all knowledge of it whereupon, the accused was prosecuted for this offence, and his pleader rested his defence upon this exception, but Turner, J., held that he had not acted in good faith because he had himself suggested the plea as likely to insure the transfer while his refusal to accept the *mukhtiarnama* and to appear in Court in support of the application deprived him of the privilege of counsel. In other words, the imputation was published by a mukhtyar, but not as such, and he was consequently held to have been rightly convicted of this offence.[3]

(4) Indian Rule.

5762. The immunity possessed by counsel has been held to extend to all advocates whether counsel or not: *e.g.*, an attorney[4] or a solicitor[5] acting in a county or police court; and it would then extend equally to a vakil, pleader or mulkhtyar and other legal practitioners, including even a party's agent to whom is entrusted the conduct of a case. And, of course, the same immunity extends to a party himself, who is, if anything, because of his ignorance of the proper mode of conducting a case, allowed even a still greater latitude,[6] though this does not enable him to seize the occasion to gratify malice by traducing his adversary or other persons unconnected with the case. The accused was under prosecution in a previous case for defamation by the complainant and was represented by counsel. The complainant, a minister of the Gospel, was being examined as a witness against the accused, who interjected the remark to him: "You cheated people at Hyderabad, and had to leave ministry." The imputation was false and the accused claimed the privilege of party, and reliance was placed on the leading precedent[7] which the Court held to protect parties only for words written or spoken in the *ordinary course* of a judicial proceeding, and

Pleaders and Parties.

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(1) *Butt* v. *Jackson*, 10 Ir. L. R. 120; *Flint* v. *Pike*, 4 B. & C. 473; *Nikunja* v. *Harendra*, 38 C. 375; following *Upendra Nath* v. *Savi*, 36 C. 375; *M. Banerjee*, 104 I. C. (C.) 717; *Anwaruddin*, 52 M. L. J. 269, 100 I. C. 537, (1927) M. 379; *Nagari* (*In re*), 19 B. 340; *Nikunja* v. *Harendra Chandra*, 41 C. 514; *Nirsu Narain Singh*, (1926) Pat. 499; *McDonnell*, 3 R. 524.

(2) *Kripasindhu*, 54 C. 137; *Bhagwan Das*, 98 I. C. 481, (1927) A. 116.

(3) *Christian*, 2 N. W. P. H. C. R. 473.

(4) *Mackay* v. *Ford*, 5 H. & N. 792.

(5) *Munster* v. *Lamb*, 11 Q. B. D. 588.

(6) *Per* Holroyd, J., in *Hogson* v. *Scarlett*, 1 B. & Ald. 244.

(7) *Munster* v. *Lamb*, 11 Q. B. D. 588.

did not confer an unlimited license on parties to libel persons, and in that view the accused was convicted.(8)

The same view was reiterated in another case in which the accused being asked to explain the circumstances appearing in the evidence against him, stated that his grandfather had, at one time, kept the wife of the complainant as his concubine, which was found to be a statement both false and malicious, upon which both Moore and Subramania Aiyar, JJ., agreed in holding the statement defamatory though they differed as to the extent of privilege enjoyed by parties, Moore, J., holding it to be limited by this exception, while his colleague was for extending the wider latitude admissible under English law.(9) But under either view, the accused possesses special liberty of speech which would not be tolerated in any other person. As a rule his statement would be privileged if it has reference to the inquiry and is not expressly malicious (§5764). Where, for instance, the complainant charged the accused with forgery, and the latter being called upon to explain the evidence adduced against him stated that the complainant was his former mistress now in the keeping of another person, and there was some evidence of the truth of the statement, the Court held it to be privileged under this exception.(10)

5763. Of course, the rule of public policy only confers a wider latitude upon persons engaged in a judicial proceeding, but this section has in one respect a still wider application and would apply to proceedings whether judicial or otherwise. But in the latter case, the privilege would be held strictly limited by this clause.(11) The accused called the complainant a "pariah dog" in the course of a quarrel. The latter filed a complaint for defamation before a Magistrate but which he afterwards compromised; but the complainant's relatives did not approve of the compromise and convened a punchayat to call the accused to account for applying the offensive epithet to the complainant. The punchayat asked the accused if he could justify it and the latter admitted his "folly" in using the offensive epithet but justified it by alleging that one Antony had informed him that the complainant had, three years ago, had connection with a pariah woman, and the statement was held to be privileged as made in vindication of his character which the accused considered having been unjustifiably attacked.(12)

(5) Privilege Limited by Good Faith.

This case was decided upon the authority of an English case in which the defendant having been violently attacked by the plaintiff, a barrister, issued his defence in which he commented severely on the speech and conduct of the plaintiff, which he published in a newspaper which the Privy Council held to be privileged on the principle which their Lordships enunciated almost in the very words of this exception: "Their Lordships are clearly of opinion that his charge was a

(8) *Hayes* v. *Christian*, 15 M. 414.
(9) *Nadu Gounden* v. *Nadu Gounden*, (1899) 1 Weir 589.
(10) *Murugesa Pillai* v. *Papathi Ammal*, (1897) 1 Weir 612.
(11) *Kari Gowda*, 19 B. 51.
(12) *Gobindappa Nayak*, 7 M. 36; following *Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495 (504).

privileged communication, in the ordinary sense of the term, on the well-known principle that a communication made *bona fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without that privilege, would be defamatory and actionable."(13)

Witnesses.

5764. Witnesses, whilst under examination, are accorded a similar privilege, though it is necessarily more limited. Under the English rule a witness is absolutely privileged in answering all the questions asked of him by the counsel on either side; and even if his statement is volunteered provided it is made in continuation of the answer elicited by the question put, or was necessary to complete the reply, though counsel had previously warned the witness to say no more. It was so held in a case in which the plaintiff sued the defendant for damages for slandering him from the witness-box in a case in which he was called upon to depose as a handwriting expert. The defendant had, in another case sworn to a will attested by the plaintiff being a forgery, but the Court found it to be a genuine will; and the Judge castigated the defendant as a recklessly imprudent witness. In the subsequent case, the defendant appeared again as an expert witness and in his cross-examination he was questioned whether he had read the Judge's remark upon his testimony. The defendant said that he had. The cross-examination then stopped, but the defendant said that he should like to make a statement about that case, but the Judge said that he could not hear any statement respecting a case not before him. The defendant then ejaculated, in spite of the protests of the Court, the words: "I believe that Will to be a rank forgery, and I shall believe so to the day of my death." The plaintiff, an attorney, who had attested that Will, thereupon sued him for slandering him, and the jury found that the words spoken by the defendant were malicious and volunteered for his own purposes, and then arose the question of law whether a defamatory statement volunteered by a witness was privileged, and it was held by Lord Coleridge, C. J., that such a statement was privileged only if it is intended to be made in a judicial proceeding as a part of evidence necessary to complete his answer, even though the answer be not relevant to the case.(14)

And this view was affirmed by the Court of Appeal, Cockburn, C.J., observing: "if there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant and questions might be, and are, constantly asked which are not strictly relevant to the issue. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness, or are not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say *dehors* the matter in hand, is necessarily

(13) *Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495 (504).

(14) *Seaman* v. *Netherclift*. 1 C. P. D. 540 (54[illegible] 17); O. A. 2 C. P. D. 53.

protected. I quite agree that what he says, before he enters or after he has left the witness-box, is not privileged. Or if a man when in the witness-box were to take advantage of his position, to utter something having no reference to the cause or matter of inquiry, in order to assail the character of another, as if he were asked: Were you at York on a certain day? and he were to answer: Yes, and A B picked my pocket there; it certainly might well be said in such a case that the statement was altogether *dehors* the character of witness, and not within the privilege."(15) Such was the case of the accused from whom, whilst under cross-examination, the complainant, Kasim Sahib, asked the Magistrate to inquire if he had not been previously convicted. The question was objected to, and before the Magistrate could decide upon its admissibility, the accused cried out: "Yes, I was convicted because I had Kasim Sahib's wife in my house," which he repeated in spite of a warning by the Magistrate not to repeat it. His statement was held to be defamatory of Kasim's wife and in no way protected.(16)

Privileges of Party and Witness Compared.

5765. In this and in all such cases the sole question now to consider is whether the act or words of the accused are defended by good faith. Of course, it is not of the essence of good faith that truth shall be proved. For a person acts in good faith, if having regard to facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interest.(17) In a recent case Pigott, J., defended the statement of a witness with reference to s. 132 of the Indian Evidence Act, but it confers upon witnesses a very limited immunity confined only to answers which he is compelled to give.(18) The defendant had in a previous suit described the plaintiff as *sho*, which was a very low caste. The plaintiff sued for damaes and got one anna which the High Court awarded him, holding that the defendant's statement though made in the course of pleadings was not absolutely privileged.(19) This view was reiterated in another case where the plaintiff was described in offensive language.(20) But so far as regards Counsel, while their privilege here is limited by good faith still the Courts would presume good faith unless there be evidence of private malice.(21)

Limits of the Privilege: Exceptions 7-9.

5766. The question how much of abuse is privileged under the exceptions, must, of course, depend upon its relevancy and the intention of the abuser, for if his abuse was incidental, his main object being otherwise, the Court should feel justified in treating abuse as given in good faith. The accused, who was the partner of the defendant in a civil suit, saw the complainant during its hearing, to go and sit amongst the plaintiff's witness, whereupon he complained to the Judge that he had gone

(15) *Seaman* v. *Netherclift*, 2 C. P. D. 53 (56, 57).

(16) *Syed Hussain*, (1881) Weir (3rd Ed.) 357; *Mhd. Sher Ali* v. *Ghasi Roud*, 59 I. C. (A) 863, 22 Cr. L. J. 159.

(17) *Abdul Hakim* v. *Tej Chandar*, 3 A. 815; *Sayed Ally*, (1925) R. 360.

(18) *Kallu* v. *Sital*, 16 A. L. J. 201; *Moss*, 16 A. 88.

(19) *Angoda Ram* v. *Nemai Chand*, 23 C. 867.

(20) *Kali Nath* v. *Gobinda Chandra*, 5 C. W. N. 293.

(21) *Anwaruddin* v. *Fatima* 52 M. L. J. 269, 100 I. C. 537, (1927) M. 379.

to tamper with his witnesses. It was held that the statement was protected by this exception, as the accused was acting in the interest of his partner, and his complaint to the Judge was made in good faith—which presumably consisted in his inferring the motive of the complainant by his act in having to sit amongst the witnesses of the accused's adversary during the examination of his witnesses.(22) The statement of a witness is then privileged whether it is volunteered or made in reply to a question properly addressed to him, if it is "made with reference to the inquiry" though it may not be relevant to it.(23) But the privilege of a witness does not commence till he is actually sworn to give evidence, and it does not continue after he is discharged. Consequently, an observation made by an expectant witness, while waiting about the Court before or after he has given evidence, is not privileged.(24) On this point the following provisions of the Indian Evidence Act are instructive:

"S. 132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate such witness, or that it will expose, or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind:

Witness not excused from answering on ground that answer will criminate.

"Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer." (25)

Proviso.

5767. This provision has sometimes been referred to as laying down the limit of privilege extended to witnesses against their prosecution for this offence,(1) but this view assumes the truth of the converse proposition, which is, of course, fallacious. It has been accordingly held that a witness cannot be prosecuted for defamation, in respect of statements made by him in the course of his evidence given in a judicial proceeding. So where the accused whilst under examination as a witness, falsely stated that the complainant had been convicted of an offence by a Criminal Court, the Court held it afforded no ground for his prosecution for this offence, though he might be proceeded against for giving false evidence.(2)

According to the view now held neither party to a litigation, whether complainant or the accused, is entitled to anything more than the statutory privilege here accorded.(3) And the fact that the person is the accused does not vest him with special immunity if he uses the dock as a pulpit for traducing people. The complainant does not even enjoy the special privilege accorded to witnesses.(4) He is however protected if he made statements resulting from action taken under ss. 154 and 155 of the Criminal Procedure Code.(5)

(22) *Purushotam Kala*, 9 B. 269.

(23) This was the language used by Bramwell, J. A., in *Seaman* v. *Netherclift*, 2 C. P. D. 53 (59), on the authority of *Dawkins* v. *Lord Rokeby*, L. R. 7 H L. 744.

(24) *Trotman* v. *Dunn*, 4 Camp. 211; *Iunam* v. *Gouing*, 6 L. R. Ir. 259.

(25) Act I of 1872.

(1) *Per* Knox, A. C. J., in *Ganga Prasad*, 29 A. 685; *Kallu* v. *Sital*, 40 A 271.

(2) *Babaji*, 17 B. 127; followed in *Balkrishna*, 17 B. 573.

(3) *Satis Chandra* v. *Ram Dayal*, 48 C. 388 F. B.; *Subramania* v. *Thirumudi*, 11 Bur. L. J. 104; 42 I. C. 763; 18 Cr. L. J. 1019, and cases cited *ante*.

(4) *Dinshaw Edulji* v. *Jehangir* 47 B. 15.

(5) *Parwati*, 41 A. 311.

5768. Privilege Arising from Interest or Duty.—Besides Counsel, Judge, parties and their witnesses in a judicial proceeding, there are others to whom this clause affords its qualified protection. Two such cases are given in the illustrations, which are obviously drawn from the two leading precedents in which that view was taken.(6) As to illustration (*a*) it was held in England that the defendant, who was interested in the proceeds of a sale, was entitled to warn the auctioneer not to part with the property sold to the plaintiff, unless he paid for it, on the ground that he had committed an act of bankruptcy.(7) So a creditor of the plaintiff may comment on the plaintiff's mode of conducting his business to the man who is surety to that creditor for the plaintiff's trade-debts.(8) The defendant had dismissed the plaintiff from his services on suspicion of theft, and upon the plaintiff returning to his shop for his wages, the defendant called in two of his servants and told them in the hearing of the plaintiff: "I have dismissed that man for robbing me; do not speak to him any more, in public or in private, or I shall think you as bad as him." The statement was held to be privileged on the ground that both the interest and the duty of the defendant were to prevent his servants from associating with such a person.(9)

Indeed, the "interest" which constitutes the privilege may be acquired in a variety of ways, and it may vary in its extent, so that it may be so small that the Court would then hold it to be no interest at all for the purpose of this clause. It would have been useful, if it were possible, to define a limit of such justifiable interest, but it is obviously impossible, for in the chequered commerce of life it can never be predicated as to what degree of interest should justify a libel. Consequently, as observed by Kay, L. J., "the true mode of judging upon the question is to put oneself as much as possible in the position of the defendant.(10) It is not enough for the accused honestly to believe that a duty or interest exists. There must be facts upon which the Court could hold that the accused had reason to possess the interest under which he shields his libel.(11) If there were no facts or circumstances to create such an interest, the fact that he honestly believed in its existence may protect him under section 76, and it may otherwise be a mitigating circumstance, but it is not a complete answer to the charge.(12) The duty of the question of interest is then a legal inference from facts upon which it is the duty of the Judge to find whether it constitutes a privileged occasion.(13)

(6) *Ill.* (*a*) *is Blackham* v. *Pugh,* (1846) 2 C. B. 611; to the same effect now, *Baker* v. *Carrick,* (1894) 1 Q. B. 838; ill. (*b*) follows a bead-roll of cases commencing with *Barwis* v. *Keppel,* (1766) 2 Wils. 314; *Sutton* v. *Jhonston,* (1785) 1 T. R. 493; *Grant* v. *Gould* (1792) 2 Hen. Bl. 69; *Mansergh,* 1 B. & S. 400; *Warden* v. *Bailey,* 4 Taunt 67; *Dawkins* v. *Lord Paulet,* L. R. 5 Q. B, 94; *Dawkins* v. *Lord Rokeby,* L. R. 8 Q. B. 271; *Grant* v. *Secretary of State for India,* 2 C. P. D. 445; *Doss* v. *Secretary of State for India,* L. R. 19 Eq. 509; *Chatterton* v. *Secretary of State for India,* (1895) 2 Q. B. 189.

(7) *Blackham* v. *Pugh,* 2 C. B. 611.

(8) *Dunman* v. *Bigg,* 1 Camp. 269-*n.*

(9) *Somerville* v. *Hawkins,* 10 C. B. 583.

(10) *Per Key,* L. J., in *Stuart* v. *Bell,* (1891) 2 Q. B. 341 (359).

(11) *Hebditch* v. *MacIlwaine and others.* (1894) 2 Q. B. 54.

(12) *Stuart* v. *Bell,* (1891) 2 Q. B. 341 (349).

(13) *Per* Lord Esher, M. R., in *Hebditch* v. *MacIlwaine and others,* (1894) 2 Q. B. 54 (58).

5769. Of course neither the interest nor the duty need necessarily be an interest or duty enforceable by law, for it may be a moral or social duty of imperfect obligation,(14) which must also be decided by the Judge.(15) A familiar instance of such a duty is the character given to a servant in answer to an inquiry addressed by a person to whom the servant had applied for employment, in which case the occasion is privileged for the common convenience of society even though it should appear that the former employer was mistaken in some of his statements.(16)

Advice Gratis When Protected.

5770. In such case, it is not even necessary that the information should be given in answer to an inquiry,(17) though, if it is so given, it will be of itself sufficient evidence of good faith, provided, of course, that the occasion is not availed of for the purpose of defamation. So if an intending customer comes to me and inquires as to the respectability of a tradesman, it is my duty to tell him all I know. But I am not justified in taking my stand at the tradesman's door and voluntarily decry him to his intending customers.(18) So, again, if I see A's servant robbing A, it is my duty to inform A, but I take greater risk if I inform A about a floating rumour as to his servant's dishonesty without taking any trouble to ascertain the truth.(19) So where the plaintiff, by name King, a master, purchased a quantity of barley of Butler, to whom the defendant offered the following advice gratis: "Don't trust that damned rogue, he will never pay you a farthing. Have you sold King some barley? You mind and have the money for it before it goes out of the waggon, or you will never have it." Butler, in consequence, refused to deliver the barley till he was paid for it. Lord Abinger, C. B., told the jury that the defendant's words were unprivileged because they were volunteered.(20) They, moreover, bore the imprint of malice. And the defendant was in no way interested in Butler. But if he had been his friend, partner or creditor or otherwise concerned in his business, his advice, though voluntary, would have been privileged. Such was the case of the defendant who wrote to the lady to whom the plaintiff was about to be married, disclosing to her all his antecedents. The defendant had been a friend of the plaintiff and the letter was written in consultation with the clergyman of his parish which the Court consequently held to be *prima facie* privileged.(21) Dawes told the defendant that he intended to engage the plaintiff as accoucheur at his wife's approaching confinement; the defendant thereupon advised him not to do so on account of the plaintiff's alleged immorality. The communication was held to be privileged though it had been volunteered.(22)

5771. The landlord may complain to the tenant of the conduct of her lodgers(23) and the occupier of a house may complain to the landlord

(14) *Per* Lord Campbell, C. J., in *Harrison* v. *Bush*, 5 E. & B. 344 (349).

(15) *Per* Lindley, L. J., in *Stuart* v. *Bell*, (1891) 2 Q. B. 341 (350).

(16) *Edmondson* v. *Stephenson*, (1766) Buller's N. P. 8; *per* Brett, L. J., in *Waller* v. *Loch*, 7 Q. B. D. 622; *Jenoure* v. *Delmege*, (1891) A. C. 73 (78); *Robshaw* v. *Smith*, 38 L. T. 424.

(17) *Per* Jessel, M. R., in *Waller* v. *Loch*, 7 Q. B. D. 621.

(18) *Southam* v. *Allen*, L. Raym. 231.

(19) *Cleaver* v. *Sarrande*, 1 Camp. 268; *Kine* v. *Sewell*, 3 M. & W. 297; *Amann* v. *Damm*, 8 C. B. N. S. 597; *Masters* v. *Burgess*, (1886) 3. T. L. R. 96.

(20) *King* v. *Watts*, 8 C. & P. 614 (Damage one farthing).

(21) *Re Coleridge*, Q. C. 15 C. B. N. S. 410, 411.

(22) *Dixon* v. *Smith*, 29 L. J. Ex. 125 (129).

(23) *Knight* v. *Gibbs*, 1 A. & E. 43.

of the workmen he has sent to repair the house.[24] So information given to a vicar absent on the continent, as to rumours affecting the moral character of the curate he has left in charge, is privileged; so is similar information given verbally to the absent vicar's solicitor with a view to his informing the vicar, should he think it right to do so; so again, is the information given to a neighbouring vicar who has asked the curate in charge to preach for him.[25] So where the plaintiff, a good churchman, informed the bishop of the diocese, of a report current as to the disgraceful conduct of the incumbent of a parish in which the defendant did not reside and in which he was not personally interested, his communication was held to be privileged, because he was interested in a matter which brought scandal on the church.[1] So a letter written by a clerk to a Board of Guardians complaining that one of the under-clerks in the office neglected his duty and behaved in an offensive and insubordinate manner was held to be privileged.[2]

The plaintiff was the daughter of a deceased officer in the army. Two ladies, A and B, interested themselves in securing subscriptions. A collected some subscriptions for her and B wrote to a society for information concerning the plaintiff which being unfavourable to her, B with the permission of the society communicated it to A whereupon A stopped all payments and the question was whether the communication made by the society was privileged and it was so held on the ground that the society was formed to prevent the abuse of charity and any communication made by it was privileged. Even the fact that B solicited the information was immaterial, for, as Blackburn, J., put it, "where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he, *bona fide* and without malice, does tell them, it is a privileged communication.[3] A, a creditor of B, a member of the firm of B. C. & Co., found his claim against B resisted till he had to sue him for the money. A knew that C had filed a petition in insolvency and A also knew that C had at the time of his petition claims against the firm of B. C. & Co. A thereupon circulated a letter to persons dealing with the firm warning them against paying anything due to B. C. & Co., adding that a member of the firm had filed his petition in insolvency, "the object being to collect the outstandings and defeat the creditors," that the other members were not entitled to recover the outstandings or to give an effectual discharge for such payments and that A was taking steps to have all the other members declared insolvents. It was a fact that the firm was without capital, and A subsequently did file a petition of insolvency against the other members of the firm, though unsuccessfully, and upon these facts it was held that taking the letter as a whole it was protected under illustration (*a*) to this exception.[4] This case is further justifiable on the principle that where the statement is not divisible, the whole of it is privileged if only a part of it is privileged. So where A and B were joint trustees and the defendant said she had heard rumours about its maladministration by A and B and her publication

(24) *Toogood* v. *Spyring*, 1 C. M. & R. 81.

(25) *Clark* v. *Molyneux*, 3 Q. B. D. 237.

(1) *James* v. *Boston*, 2 C. & K. 4.

(2) *Keight* v. *Hill*, (1873) J. P. 176.

(3) *Per* Blackburn, J., in *Davies* v. *Snead*, L. R. 5 Q. B. 608 (611); cited *per* Jessel, M. R., in *Waller* v. *Loch*, 7 Q. B. D. 619 (621).

(4) *Cassem Karrim* v. *Jamshedjee*, 9 C. W. N. 195.

as regards A was justifiable, it was held that the privilege extended to the alleged slander of B as the communication could not be made without mentioning him.(5)

5772. The defendants who were the committee of a Marine Insurance Company, posted the plaintiff's ship as suspended from the highest class which implied that it was not quite safe. The plaintiff wrote to the defendants complaining of the publication and the defendants promised to reinstate the ship to its former class upon executing certain repairs which they specified. The plaintiff pleaded his inability to execute the repairs and requested the defendants to mark the vessel as withdrawn but which the defendants refused to do. The Court held that the action of the defendants was actuated by a desire to perform the duty they had undertaken towards ship-owners and the public in general, and that their refusal to scratch the plaintiff's ship formed no ground for complaint.(6)

It will be thus seen that "interest" is an ever widening circle and its extent depends upon what is regarded as a duty of imperfect obligation.

Caste Disputes.

5773. In this country several cases have arisen on the question of caste dispute, the preservation of caste being regarded as the protection of one's interest in matters social and religious. In case of caste offence and penalties the Court recognizes the autonomy of caste and refuse to sit in judgment over caste decisions, unless they are shewn to have been obtained by express malice. (§§ 5682-5684). The accused, who were the headmen of the caste to which the parties belonged, prohibited other members from holding intercourse with the complainant on pain of incurring caste penalties. The complainant's niece, in ignorance of this prohibition, invited the complainant to a family ceremony, but the accused insisted that she should retire as she had been outcasted. It was held that the imputation, being made for the protection of the accused and of others of their castemen, was protected, though the accused gave undue publicity to the fact, but which was overlooked because the accused were ignorant rustics and so was also their statement that the complainant had been outcasted which was not strictly true.(7)

5774. In matters relating to caste and within the exclusive cognizance c caste assemblies, the Court does not apply the same rigid test which it does i: judging of the legality of its own procedure. As was observed by Brandt, J.: "It is clear that the Court will not interfere on the ground that the procedure of such assemblies is not strictly or even approximately 'judicial' as to the manner of recording either evidence or resolutions, when there is no evidence that according to custom or otherwise it is necessary to keep such a record.....And for the same reason it is not open for the Courts to determine whether or not the evidence on which the caste assembly acted is such as a Court of Justice would act upon."(8) Hence where a caste punchayat declared the complainant to be a Rangari and he was not of the caste of the Punches, the latter could not be convicted of this offence, merely because their decision was erroneous and made without sufficient inquiry if it

(5) *Per* Lush, J., in *Davies* v. *Snead*, L. R. 5 Q. B. 608 (609).

(6) *Clover* v. *Royden*, L. R. 17 Eq. 190 (204).

(7) *Chalil Kothali*, (1882) 1 Weir, 609; *Padman Babul*, 14 Bom. L. R. 585; 16 I. C. 335, 13 Cr. L. J. 687. *Ayyaswami*, 47 M. L. J. 8.

(8) *Salar Mannaji* v. *Herojee Row* (1887), 1 Weir, 614.

was a decision given in good faith, that is after such inquiry as was reasonably necessary and sufficient, or in other words, if the inquiry was *bona fide* and not a blind for securing immunity against a prosecution such would be the case if the accused hastily convened a punchayat of picked men to outcaste the complainant behind his back and without notice to him.

5775. In another case the accused, a member of a Khoja Religious Association, was called upon by that body to shew cause why he should not be excommunicated therefrom. The accused replied by publishing a letter in the press denouncing the association as a " dangerous society giving every encouragement to murder and assassination" and characterized the notice as an incitement to murder him. One member of the association prosecuted him for this offence. It appeared that a body of men had seceded from the association, that religious feeling ran high and that the accused connected the commission of some fanatical murders with the secret workings of the association, that he was consequently really alarmed though he had no sufficient ground for doing so. He defended himself with reference to this exception, but the Court held the allegation was unjustified and its publication to persons other than members of the community unnecessary.(9) The complainant was put out of caste at a meeting of his castemen for taking water from an untouchable man. The accused told some of the members of the caste not to take water from the complainant's hand, and if they did they too would be put out of caste. He was held to be protected by exception 10 of this section.(10) But an allegation made at a caste panchayat that a child was born to a woman of adulterous intercourse is not protected unless the accused can shew that it was made in good faith.(11)

Explanation (5).

5776. The defendant invited the plaintiff, a Brahmin, to attend a *sradh* ceremony at his house, but when he arrived he turned him out saying that as he had taken meals at widow remarriages, other Brahmins objected to his presence. The plaintiff sued the defendant for slander but the Court threw out the case holding that it was no defamation to say that a man had become an outcaste or was outcasted because it did not imply defect of moral character;(12) but the soundness of this view is questionable in view of explanation 4 which directly provides for the case in point.(13) But if in this case the accused had merely asked the complainant to leave without assigning any reason he would have rightly escaped the charge of defamation.(14) The accused, a tailor, was convicted because he had sent a post-card to the complainant demanding a sum of money for work done. The Court held that there was no injury to the complainant's character intended or implied and that therefore no offence was committed.(15) Caste disputes ordinarily arise because a person complains of improper

(9) *Jaffar Fadu*, 4 S. L. R. 67, 8 I. C. 209.

(10) *Umed Singh*, 22 A. L. J. 79,77 I. C. 824, 25 Cr. L. J. 472.

(11) *Baga Mahar*, 76 I. C. (N) 393, 25 Cr. L. J. 68; *Nanhey* v. *Pyari*, 96 I. C. (N) 394.

(12) *Vengala* v. *Thallam*, 28 M. L. J. 58; 26 I. C. 460.

(13) *Bishambhar* v. *Gobind Das*, 12 A. L. J. 552; *Khamani*, 24 A. L. J. 171, 92 I. C. 584, (1926) A. 306.

(14) *Faqir Tulaha*, (1926) A. 711.

(15) *Abdulla* v. *Clarke*, (1909) P. W R. 3, 1 I. C. 99.

expulsion, or of the withholding of certain rights due to him as a member thereof.

5777. The cases, before considered, are, moreover, sufficient to show that though the body of men possessing the interest may be numerous, the *quantum* of interest possessed by each may vary and in some cases it may be infinitesimal. In this case, if the imputation be for the public good, the person making it need not possess any interest at all. For the existence of interest is only required where the imputation is made for the protection of the interest of the maker or of another person and not when it is for the public good (§§ 5697-5707).

5778. Matters of Public Interest.—But since an imputation made for the public good is made in the interest of the public, it follows that there is even here the necessity of the presence of some interest though that interest is very different to that required in the two earlier cases. Such interest may be presumed to be possessed by every member of the public in a public department such as the Post Office, so that a defamatory letter written by a private individual to the Postmaster-General, complaining of the misconduct of an official under him, is privileged even though some of the charges therein made may be untrue, and though the defendant stood in no relation, past or present, either to the official maligned or to the postal authorities[16] (§§ 5698, 5699). In this case all that is required is good faith, though the imputation may not be true, and in this respect this clause differs from exception I which similarly protects an imputation made for the public good, if it is true, good faith being then immaterial. The combined effect of these two clauses then is that an imputation is privileged if it is made for the public good, and is either true or made in good faith. In either case, the question whether an imputation is for the public good is a question of fact. Where, however, the matter is of public interest, the Court does not weigh any comment on it in a fine scale. It makes some allowance for even intemperate language, so long as the writer keeps himself within the bounds of substantial truth and does not misrepresent or suppress any facts.[17]

5779. Caution in Good Faith.—Indeed, a person may not only make an imputation, but convey a caution under the same circumstances as are specified in exception 9. In ordinary cases the two go together; as in illustration (a) to the last exception. But a person may of course convey a caution without making any imputation in which case this exception should be directly applicable. So a relation or intimate friend may confidentially advise a lady not to marry a particular suitor, and may or may not assign reasons, in which case the statements will be privileged.[18] In England, words by way of caution were formerly held to be "good counsel" for which no action would lie,[19] though some doubt has been thrown on this rule by later cases in which it was said that no one was justi-

Exception 10.

(16) *Blake* v. *Pilford*, 1 Moo. & Rob. 198: *Woodward* v. *Lauder*, 6 C. & P. 548.

(17) *Edmonds on Birch & Co.*, (1907) 1 K. B. 371 (380), *Fernandas*, 13 Bom. L. R. 1187, 12 I. C. 971.

(18) *Todd* v. *Hawkins*, 8 C. & P. 88· *Adams* v. *Coleridge*, 1 T. L. R. 84.

(19) *Vanspike* v. *Cleyson*, Cro. Eliz. 541.

fied in cautioning another uninvited, and that the exemption only extended to a communication invited and not to one merely volunteered;[20] but this view is clearly indefensible and has not been followed in still later case.[21] It would be, indeed, the height of technicality to say that if A should see his friend's servant B systematically pilfering his friend's things, he should only be justified in cautioning him against B if he was asked his opinion about B, but not otherwise. The contrary has been accordingly held in several cases,[22] and is the rule here enacted.

Undue Publicity.

5780. The question here is not whether the caution was conveyed uninvited, but whether it was conveyed in good faith, and if it is conveyed to any one in particular, then the further question arises whether it was to his good. The question of good faith in this exception must, of course, be answered in the light of observations already made (§§ 382-386). Such good faith implies fairness and honesty, belief in the truth though not the truth. It postulates, moreover, the exercise of reasonable circumspection in giving publicity to the imputation, which should be confined only to persons within the privilege. For instance, if a person is subjected to a social penance, there is no reason why that fact should be published broadcast. A Hindu couple went to England, and upon their return were put of caste, but re-admitted after performing expiatory ceremonies. This re-admission was resented by the accused and the other members of his faction, who six months after the admission circulated leaflets indiscriminately in the bazar describing the complainant as a "*doshi*," or sinner, meaning that he was not fit to be associated with. The accused relied on this exception, but the Court thought "that the manner in which the publication was made was unnecessary and in excess of the purpose for which the privilege was allowed, and, therefore, not protected."[23] This view has been reiterated in several cases decided both in England and in this country, in all of which a caution conveyed with undue publicity was held to destroy the privilege. So in a case similar to the last, the complainant having attended a Hindu widow marriage legalized by law,[24] his *guru* or spiritual preceptor, disapproving of his action, published a notice declaring him to be an outcaste and interdicting his disciples and the public of the town from all social intercourse with him until he performed the expiatory penance, a copy of this decree was made on a post-card posted to the complainant, whereupon the Court held the mode of publication in excess of the necessity; which rendered this exception inapplicable.[25]

So in Bombay, one Uma left her husband and married B, which marriage was declared void by the headman of the caste. Some years afterwards another headman of the caste declared the marriage valid.

(20) *Per* Lord Abinger, C. B., in *King* v. *Watts*, 8 C. P. (615); *Bennett* v. *Deacon* 2 C. B. 628; *Coxhead* v. *Richards*, 2 C. B. 569.

(21) *Amann* v. *Damm*, 8 C. B. N. S. 602; *Stuart* v. *Bell*, (1891) 2 Q. B. 347; *Clark* v. *Molyneux*, 3 Q. B. D. 237; *Rumsey* v. *Webb*, Car. & M. 105.

(22) *Clearer* v. *Sarrande*, 1 Camp. 268; *Kine* v. *Sewell*, 3 M. & W. 297; *Amann* v. *Damm*, 8 C. B. N. S. 597; *Masters* v. *Burgess*, 3 T. L. R. 96

(23) *Thiagaraya* v. *Krishasami*, 15 M. 214; following *Sankara*, 6 M. 381; *Williamson* v. *Freer*, L. R. 9 C. P. 393; *Somerville* v. *Hawkins*, 10 C. B. 583

(24) Act XV of 1856.

(25) *Sankara*, 6 M. 381.

This decision was, however, challenged by certain members of the community who addressed their protests to him asking him to rescind his decision, but he took no notice of their protests, whereupon twelve of the dissentients published a notice in a local paper to the effect that B having kept a concubine by name Uma has had offspring by her. They were convicted of this offence, but they pleaded that such notices were customary and that the publicity as to Uma's status was for the public good, and that at any rate two of the accused were directly interested in contesting the legitimacy of B's sons born to him by Uma. But the Court held that the publication was not for the public good, though it was for the good of the caste, but in that case the publication in a public print reached a circle who could in no way be interested in the question, and that therefore the accused had been rightly convicted of this offence.(1) So where the accused openly declared that he had seen the complainant having connection with a pariah woman whereupon he was outcasted, and the facts were such that he *bona fide* believed that he had seen what he asserted, but the Court held his communication unprivileged because he "violently and publicly" talked about the complainant and in a manner quite unnecessary and improper.(2) But a person may honestly believe though his belief may be wholly erroneus.(3) Such was the case of the accused. who had given undue publicity to the sentence of excommunication passed by a caste panchayat on the complainant. The Court took into consideration the ignorance and illiteracy of the accused and acquitted them for what they had done through a mistaken sense of duty.(4)

Communication in Confidence.

5781. A person cannot claim privilege, if he marks his communication "*private and confidential*" any more than if he goes about circulating defamation, but warning each hearer that his gossip is given in confidence. But two persons may make a communication confidential in the legal sense of the term, if there is in fact such relationship between them.(5) Such relationship exists between counsel and client, husband and wife, guardian and ward, master and servant, and even between intimate friends. So a father, guardian or an intimate friend may warn a young man against associating with a particular individual, or a lady against marrying an objectionable suitor.(6) And so it is the duty of a steward, bailiff, foreman or house-keeper, to inform his master if anything is going wrong, without waiting to be questioned about it. In all such cases, confidential communication averts undue publicity, and the question of privilege then depends, not so much upon the confidential relationship, though it establishes the interest, as on the measure of publicity. In England, tradesmen issue in confidence a trade-protection circular, which contains names of all bad, dishonest and dilatory customers which serves as a warning to other fellow tradesmen, but such circulars are clearly illegal because it reaches those some of whom will be interested in one item, others in another item, but none in all

(1) *Shiv* v. *Gowda*, 3 Bom. L. R. 188.
(2) *Palani Asari*, (1882) 1 Weir. 613 (614).
(3) *Parvataneni* v. *Kasinaduni*, 23 I. C. (M.) 489, 15 Cr. L. J. 281 following *Abdul Hakim* v. *Tej Chander*, 3 A. 815.
(4) *Virji Bhagwan* v. *Bai Amba*, 11 Bom. L. R. 638, 3 I. C. 744.
(5) *Picton* v. *Jackman*, 4 C. & P. 257
(6) *Todd* v. *Hawkins*, 8 C. & P. 88.

the items of information contained in it.(7) But the Police Confidential Gazettes issued in this country, stand on a different footing, for they publish the names of habitual criminals, in the extermination of which all are equally interested, and more so the Police amongst whom it is circulated.

Unnecessary Aspersion.

5782. There can be no good faith where there is unnecessary aspersion or abuse of another which takes the case out of the exceptions. The accused complained against the complainant—a Forest Range Officer—alleging that he connived at the Village Munsiff and others illicitly browsing goats in a reserve and illicitly trading in timber and demanding an inquiry. The complainant was removed from service for various causes, the complaint being one of them. The court held the allegations false and recklessly made. He was convicted of this offence.(8) The same fate befell the memorialist to a Lieutenant-Governor, who had accused a Deputy Collector of dishonesty and corruption.(9) So it would be *prima facie* defamatory to say of a man that he made gifts not out of charity but for some self-advantage.(10)

5783. Statement to Pleader.—The accused had been accused in a former case under s. 506, I. P. C. Immediately after the termination of proceedings in that case, the pleader questioned the accused what was the real cause of the trouble whereupon the accused replied in his ordinary voice that the trouble arose of a particular alleged elopement. The complainant's *mukhtiar* having overheard it the accused was convicted of this offence but the Court held the statement protected being made in answer to a natural question put to him by his legal adviser at a time when the relations of legal adviser and client could not be said to have ceased.(11) But it would have been clearly publication of defamation if the statement had been made after that relationship had ceased.(12)

5784. The defendant, a clergyman, after having promised to perform the marriage of the plaintiff with a lady attached to his mission, wrote to her that he was not prepared to perform the marriage owing to the plaintiff not being worthy of her. The lady then broke off the engagement. The plaintiff sued for damages, but the Court threw out the suit holding the communication privileged.(13)

5785. Legislators' Absolute Privilege.—Members of the Legislature—Central(14) and Provincial(15)—have been accorded an absolute privilege in respect of their speeches delivered at the meetings of the Legislature. In this respect they have been accorded the same privilege as is enjoyed by members of the British and Colonial Parliaments. The privilege is confined to utterances in the House, but their repeti-

(7) *King* v. *Patterson*, (1887) 83 L. T. J. 408.
(8) *Madappa Goundan*, 43 I. C. (M.) 403, 19 Cr. L. J. 115.
(9) *Jai Debi*, 13 A. L. J. 681, 29 I. C. 322, 16 Cr. L. J. 482.
(10) *Appa* v. *Maricar*, 43 I. C. (R.) 417, 19 Cr. L. J. 129.
(11) *Debendra* v. *Bhagirath*, 13 C. W. N. 1087.
(12) *Sher Singh*, (1910) P. R. No. 10, 5 I. C. 892.
(13) *B.* v. *C.*, (1908) P. R. No. 83, 4 I. C. 918.
(14) Government of India Act, s. 67 (7).
(15) *Ib.*, s. 72-D (7).

tion outside is not privileged, and would be subject to the provisions of this section. The special immunity accorded to them is founded on public policy, it being the policy of Law to give them the right of free expression in the interest of the public, unfettered by a fear of their exposure to prosecution or a suit for damages.

Session. Pres. Mag. or Mag. of 1st class. Non-cog. Warrant. Bailable. Comp.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Punishment for defamation.

[*Defames*—s 499.]

Synopsis.

(1) *Analogous Law* (5786).
(2) *Procedure and Practice* (5787-5795).
(3) *Only a "Person aggrieved" may complain* (5787-5790).
(4) *Sanction When Necessary* (5791).
(5) *Alteration of Charge and Conviction to s. 182 or 211* (5792-5794).
(6) *Venue* (5795).
(7) *Proof* (5796-5797).
(8) *Charge* (5798-5799).
(9) *Proof of Defamation* (5800-5810).
(10) *Proof of Criminal Intention* (5801).
(11) *Publication* (5806-5807).
(12) *Falsity of Imputation Unnecessary* (5808-5809).
(13) *Cross-examination on Complainant's Character* (5810).
(14) *Possible Defences* (5811-5812).
(15) *Defamation and Abuse* (5813).

5786. Analogous Law.—This section constitutes defamation as an offence for the first time in this country,[16] prior to which it was treated only as a civil wrong redressable merely in compensation obtained in a civil action. The last section which defines the offence embraces all such cases, so that the offence as now enacted is one in which the party aggrieved is entitled to the double remedy by way of a civil suit for damages and a criminal prosecution under this section. But though there is nothing in the section to indicate when the Criminal Court should feel justified in refusing to proceed by way of prosecution, still it is obvious that no Court will lend itself to the abuse of its process by entertaining trivial and frivolous complaints—complaints upon such facts, for instance, for which the English Courts award the customary one farthing damage. There are besides other cases of defamation which the Court regards as essentially a civil wrong, for which redress by a civil suit is considered as more appropriate. Such is a defamation committed by a newspaper or a juridical person, such as an incorporated company. And there is s. 95 (§§ 891-897). Certain persons enjoy absolute statutory protec-

(16) *Ganga Prasad*, 29 A. 685.

tion against their accountability to the court for their speeches and on account of the publication of those speeches in the official reports:—

The following provisions relate to these exemptions:—

"Subject to the rules and standing orders affecting the chamber there shall be freedom of speech in both chambers of the Indian Legislature. No person shall be liable to any proceedings in any Court by reason of his speech or vote in either chamber, or by reason of anything contained in any official report of the proceedings of either chamber."(17)

Another clause similarly worded exempts members of the Provincial Legislature.(18)

5787. Procedure and Practice.—No Court shall take cognizance of this offence, except upon a complaint made by some person aggrieved by such offence or where he is a minor, lunatic, sick or infirm by some other person with the leave of the Court.(19) The offence is therefore non-cognizable, but warrant should, ordinarily, issue in the first instance. It is both bailable and compoundable and is triable by the Court of Session, Presidency Magistrate or a Magistrate of first class.

Only a "Person aggrieved" may Complain.

5788. As regards the right to complain, the prohibition applicable to this section also extends to a complaint for an offence falling under Chapter XIX (ss. 490-492) and under sections 493 to 496. The meaning of the term "person aggrieved by such offence" is important, and has been already set out. But evidently that phrase does not bear an uniform sense applicable to every section mentioned in section 198 of the Procedure Code, since persons "aggrieved" by this offence may not be necessarily aggrieved by the other offences such as the criminal breach of contracts of service (ss. 490-492) or bigamy (ss. 493, 494). Indeed, in order to ascertain whether a person is aggrieved, the first thing necessary to inquire is how the defamation complained of affects the complainant. This must, of course, mainly depend upon the social habits of the people, and the effect the defamation has upon the complainant's reputation in their estimation.

For instance, there can be no doubt that the husband is as much aggrieved by the defamation of his wife, as the wife herself, and it is therefore settled that the husband is entitled to complain of a defamation affecting his wife,(20) and this because any imputation regarding her unchastity necessarily affects her husband, who is thereby lowered in the estimation of his fellowmen. Indeed, the same thing may be said of the other near relatives of a female member of a Hindu joint family. As remarked by Ameer Ali and Handley, JJ.: "A Hindu lady residing with her father, her brother or her son is a member of his family; and her reputation is bound up with the reputation of the person in whose house and under whose charge she is living. If any imputation

(17) S. 67 (7), Government of India Act.
(18) *Ib.*, s. 72-D (8).
(19) S. 198, Cr. P. C.
(20) *Chotalal Lallubhai* v. *Nathabhai*, 25 B. 151, F. B. overruling *contra* in *Kustandin*, (1887) B. U. C. 327; *Chellam Naidu* v. *Ramasami*, 14 M. 379; *Anantha Gaundan*, 15 M. L. J. R. 224.

is made against her character, that would affect as much the relative with whom she is living as herself."[21] In this view, the Court held that where the imputation alleged unchastity to a Hindu widow residing at the time with her brother, the latter was a "person aggrieved" by such imputation, and that, as such he was competent to set the criminal law in motion.[22]

A somewhat discordant note was struck in two unreported cases of the Bombay Court in which the person defamed was said to be the person aggrieved,[23] but these cases were overruled by the Full Bench[24] in which Jenkins, C. J., said: "Now it does not appear to me that a husband complaining of an imputation of unchastity on his wife's part would *prima facie* come within the mischief, and I think one is entitled to approach the question in the light of this consideration, and to ask whether there is anything in the expression 'some person aggrieved by such offence' that excludes him from being a competent complainant. I am unable to find in the Code any limitation of the sense in which the word 'aggrieved' is used. Nor is there any indication of the kind of grievance which may qualify a man to complain. Still I think it must be conceded that any fanciful or sentimental grievance would not suffice; it must be such a grievance as the law can appreciate; it must be what has been termed a legal grievance and not a *sta pro ratione voluntas* reason."[25]

5789. This case has been followed in Calcutta where the Court held the father-in-law of a woman living with him, whose husband was a lunatic, sufficiently aggrieved to institute the complaint.[1] But the Punjab Court takes a somewhat narrow view of the section, holding that the father could not complain against a person imputing unchastity to his daughter, because it was not intended to harm the reputation of the complainant as well as his daughter,[2] and on this ground that Court has refused to hear even the husband of the woman accused of immorality.[3] But this view postulates the existence of the rule that the right to complain depends upon the intention of the accused, so that if he intended to injure the wife, the husband could not complain though he may have been outcasted and suffered all the social degradation possible. But it is submitted that this view is unwarranted by the language of s. 198 of the Procedure Code, the language of which is sufficiently wide to permit of the prosecution being instituted not only by the direct victim of the calumny but by all those injured thereby.

5790. But the case is different where the President of a Municipality complained for the defamation of his subordinate officials on the ground that under the Municipal Act he was responsible for the efficient discharge of their duties.[4] In this connection it may be well to add that a person does not become an aggrieved person within the meaning of s. 198 of the Criminal Procedure Code merely because he *feels*

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(21) *Thakur Das* v. *Adhar Chandra*, 32 C. 425.
(22) *Ib.*
(23) *Kustandin*, (1887) B. U. C. 327; *Lakshman*, (1888) B. U. C. 302.
(24) *Chotalal* v. *Nathabhai*, 25 B. 151, F. B.
(25) *Ib.*

(1) *Daem Sardhar* v. *Batu Dhali*, 3 C. L. J. 38; following *Chotatal* v. *Natha Bai*, 25 B. 151, F. B.
(2) *Imam Baksh*, (1887) P. R. No. 39; following *Daud*, (1884) P. R. No. 22.
(3) *Daud*, (1884) P. R. No. 22.
(4) *Beauchamp* v. *Moore*, 26 M. 43.

aggrieved by the defamation; his grievance must be rational and such as other persons in the same circumstance would consider a real cause for complaint. The fact that one person feels aggrieved out of sympathy to another does not entitle him to complain. If it were otherwise a neighbour or a friend might complain for the offence. The word "aggrieved" in this connection must be understood to refer to a grievance caused by a legal injury suffered, though it is not necessary that the person aggrieved should be entitled to maintain a civil action for damages.

Sanction When Necessary.

5791. Another limitation on the right of complaint is enacted by s. 197 of the Procedure Code which requires that a public servant accused cannot be prosecuted for any offence committed by him as such without the previous sanction of Government. This prohibition is, of course, confined to an offence committed by a public servant *as such*, that is to say, under the colour of his office.(5) Moreover where the person to be prosecuted is a judicial officer, other considerations arise (§§ 5734, 5752, 5759). And since counsel, parties and witnesses to a judicial proceeding similarly possess exceptional immunity, it follows that before issuing process the Court must be satisfied that their offence is not exceptional. This is necessary, not because the Court looks ahead to the possible defences the accused might set up, but because it cannot issue process till a *prima facie* case is made out, and that it takes judicial notice of a fact which is obvious. But otherwise the Court has not to speculate what special privilege the accused might set up. Its duty is to issue process if the accused is shown to have made a statement which is *prima facie* defamatory.(6) It is bound to assume the absence of privilege till privilege is pleaded and proved.(7)

Alteration of Charge and Conviction to Section 182 or 211.

5792. Again, a statement may be not only defamatory but also disclose the commission of an offence under s. 182 or 211, in which case the Court would not be justified in refusing process merely because an inquiry into those offences cannot be made without sanction.(8) For instance, where the accused stated to his officer that another subordinate—the complainant—borrowed money from his official superior, the fact that the statement amounted to an offence under s. 182 does not make it any the less defamatory, and it being so, the complainant is not precluded from prosecuting the accused for this offence, though he could not have proceeded against him under s. 182 without sanction.(9) But such a case is distinguishable from cases in which the statement being made in the course of a judicial proceeding,

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(5) *Nandolal Basak* v. *Mitter*, 26 C. 852; *Parashram*, 7 B. H. C. R. 6; *Lakshman*, 2 B. 481; *Ghulam Muhammad*, 9 M. 439; *Amir Singh*, (1904) P. R. No. 29; *Fink* v. *Corporation*, 30 C. 721 (724); *Dunne* v. *Kumar Chandra*, 30 C. 593; *Anath Nath* v. *Mohendra*, 15 I. C (C.) 489 (sanction required to prosecution of Receiver); *contra in Nagendra Nath* v. *Jagendra Nath*, 15 I. C. (C.) 491, 13 Cr. L. J. 491.

(6) S. 105, Indian Evidence Act; *Periyaswami*, (1886) 1 Weir 580 (583).

(7) S. 105, Indian Evidence Act (1 of 1872).

(8) *Krishna Rao* v. *Appaswami*, (1891) 1 Weir 585.

(9) *Ib; Ram Sewak Lal* v. *Maneshwar*, 37 C. 604; distinguishing *Sharbe, Khan* 10 C. W. N. 518; followed in *Satis Chandra* v. *Ram Deyal*, 48 C. 383, F. B.,

the offence committed is perjury, or the preferment of a false charge, in which case the necessity for sanction cannot be circumvented by having resort to this section. Such was the case of the complainant who having applied for sanction to prosecute the accused under s. 211, the Magistrate refused him sanction but granted process for this offence, but the Court held such procedure unjustifiable, inasmuch as if there were no grounds to proceed against the accused under s. 211, it was no ground to proceed against him for a different offence on the same facts.(10)

5793. But apart from such circumstances, there is nothing in law to prevent the Court from convicting the accused of this offence, though the complaint was laid under s. 211(11) and even the Appellate Court may alter a conviction from s. 182 into one under this section,(12) if the proceedings were instituted on a complaint properly laid, but not *vice versa*. In other words, while a complaint made under ss. 182 and 211 after due sanction might culminate in a conviction for this offence, a complaint made for this offence would not justify a conviction under s. 182 or 211, for proceedings under those sections cannot be instituted without sanction or complaint as required by section 195 of the Procedure Code. And so a conviction had under s. 501 cannot be altered into one under this section, for the two offences are distinct and do not involve proof of the same elements.(13) So again where process was issued against the accused under s. 506 but the Magistrate finally discharged him under s. 500, the Magistrate treating the issue of process under a wrong section as a *lapsus calami*, the Court ordered a retrial holding that the mistake had prejudiced the trial.(14) An acquittal of an offence punishable under s. 182 is no bar to another trial for this offence.(15)

5794. It may be added that the Courts commend it as most desirable that the examination and cross-examination of the complainant should be held in the presence of the Magistrate who has to finally decide the case.(16)

Venue.

5795. Another point worth noting, which affects the question of jurisdiction is that the imputation charged as defamatory must have been either made or published within the territorial jurisdiction of the Court taking cognizance of the same.(17) The Courts in British India have no jurisdiction to try for the publication of defamation outside British India.(18)

5796. Proof.—It is perhaps needless to add that all the points constituting defamation together with its publication must be affirmatively proved by the prosecution. An admission made by the accused in his examination under s. 342 of the Criminal Procedure Code cannot be used by the prosecution to fill up the gap in their own evidence.(19) Publication

(10) *Profulla Kumar* v. *Harendra Nath*, 44 C. 970.

(11) *Ujjala Bewa*, 1 C. L. R. 523; *Alli*, 25 A. 209; *Naurati*, 6 L. 375.

(12) *Gur Narain Prasad*, 25 A. 534.

(13) *Uma Shankar*, (1889) P. R. No. 18; *Ashutosh* v. *Purnachandra*, 36 C. L. J. 287.

(14) *Anath Nath* v. *Mohendra*, 16 C. W. N. 983 15 I. C. 488; *Ram Sewak Lal* v. *Maneshwar*, 37 C. 604; followed in *Satis Chandra* v. *Ram Dayal*, 48 C. 383 F. B.

(15) *Ram Sewak Lal* v. *Maneshwar*, 37 C. 604.

(16) *Brindaban* v. *Ishaquddin*, 13 C. W. N. 550.

(17) *Barke* v. *Skipp*, 45 M. L. J. 754.

(18) *Varna Kote Illath*, (1900) 1 Weir 579.

(19) *Jeramiah* v. *Vas*, 36 M. 457; *Anand Rao*, 17 Bom. L. R. 82.

means communication to at least one other person than the defamer and the defamed.(20) Where the accused defamed the complainant—a medical practitioner—for having killed a patient by his treatment and the Magistrate after consulting medical books found that the complainant's treatment was wrong, the court condemned the procedure as erroneous.(21) In such a case the court should have examined expert evidence.

5797. The points requiring proof are:—

(1) That the accused made or published an imputation.

(2) That it concerned the complainant or some other person thereby aggrieving the complainant.

(3) That the said imputation amounts to defamation (s. 499).

5798. Charge.—It is said that a charge under this section should specify the particular occasion on which the offence complained of is proved to have been committed.(22) These observations occur in a case in which the accused had passed a receipt to the complainant on the 12th April describing his caste as "*Brithial* Bania" whereas the complainant was a "*Gondha* Bania," and upon which the charge framed was that the offence alleged was committed "on or about the 12th April" which Stevens and Henderson, JJ., held to be insufficient on the ground that it did not "set forth the particular occasions on which the defamation is said to have been committed so as to give the accused person an opportunity of defending himself with reference to each act alleged to have been committed by him."(23) This is, of course, necessary where the statement complained of is repeated on several occasions on the same day or on different days, in which case the accused could not be held accountable for acts not specified in the charge. The charge should, moreover, specify the name of the person defamed, for it is the very gist of the offence.(24) But it is not necessary to negative the exceptions to section 499, merely because they are appended to the definition of the offence.(25) The charge must, of course, set out the words alleged to be defamatory.(1)

5799. The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you made or published the following imputation concerning A B, to wit—(*here set out the defamatory matter*) intending to harm or knowing or having reason to believe that it would harm the reputation of the said A B, and that you thereby committed an offence punishable under section 500 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

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(20) *Barke* v. *Skipp*, 45 M. L. J. 754.
(21) *Purnachandra*, 28 C. W. N. 579.
(22) *Bishwanath* v. *Keshab*, 30 C. 402.
(23) *Ib.*
(24) *Anon*, Weir (3rd Ed.), 357.
(25) It was so contended by Mr. Anstey but the contention was overruled; *Kikabhai*, 9 B. H. C. R. 451.
(1) *Barke* v. *Skipp*, 45 M. L. J. 754.

5800. Proof of Defamation.—The essential ingredients of this offence have been already set out under the last section which defines it (§§ 5630-5784). It is only intended to set out here the points upon which the constitution of the offence depends, and the evidence by which it may be proved.

In the first place there must be proof of an imputation (§ 5645) which may be made in words spoken or written or by signs (§ 5645) or visible representation (§§ 5632-5646). The imputation must be made (§ 5633) or published (§§ 5633-5646) by the accused. Indeed, for the purpose of the Code, no words are defamatory unless they are made or published, for a person may write the most atrocious libel and put it into his box, and he could not be charged, unless he publishes it and his publication is accompanied by the intention which makes his publication criminal, that is to say, unless he publishes it "intending to harm or knowing or having reason to believe that such imputation will harm the reputation of another person." Two things must then be certain—the person defaming and the person defamed, the former must be ascertained, because without ascertaining him no person could be charged for this offence, and there can be no defamation unless some ascertained person is defamed. An imputation which affects the whole human race cannot be punished, because the complainant feels aggrieved by a calumny affecting his race. At the same time it is not necessary that the defamation should hit any one in particular, for the term "person" does not merely mean an individual and is large enough to include an aggregate of individuals, such as a corporation or a company (§§ 5673, 5674). These two persons being ascertained, the next thing to see is whether the imputation amounts to the offence as it is defined in the last section. Its principal ingredient on this head is his "intending to harm, or knowing or having reason to believe that such imputation" will harm the reputation of the person defamed.

Proof of Criminal "Intention."

5801. As already stated an intention to harm is by no means an essential prerequisite of this offence (§§ 5649-5651) for, if the imputation was made "knowing or having reason to believe"[2] that it will harm the reputation of another, it is defamation. As Lord Kenyon said: "In order to constitute a libel the mind must be in fault and shew malicious intention to defame."[3] But there may be neither intention nor knowledge and yet the accused cannot escape if he had reason to believe that it will harm the complainant's reputation and it does have that effect, then the offence is complete and the latter is entitled to complain.[4] This intention, knowledge or belief constitutes the *scienter* which converts his act into a crime, and the Code has constantly to refer to it in connection with the proof of other offences (§ 5651). But the facts and circumstances necessary to prove criminality in one case are not necessarily relevant to establish it in every case. For as the offences differ, so does the evidence, though the underlying principle is in each case the same.

(2) S. 26.
(3) *Rex* v. *Lord Abingdon*, 1 Esp. 226.
(4) *Anand Rao*, 17 Bom. L. R 82 2 I. C. 657.

Such, for instance, are the principles enacted in sections 6 and 9 of the Indian Evidence Act[5], the former of which enacts that the facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.[6] Consequently, if A sues B for a libel contained in a letter forming part of a correspondence, letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.[7] This will be necessary only when the words complained of are not *per se* defamatory and when there is any doubt as to the intention of the accused, in which case the Indian Evidence Act allows also the proof of further facts necessary to explain or introduce a fact in issue or a relevant fact.[8] So it is provided: "A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true. The position and relations at the time when the libel was published may be relevant fact as introductory to the facts in issue. But the particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B. But the fact that A had previously published an imputation respecting B showing ill-will on the part of A towards B is relevant as proving A's intention to harm B's reputation by the particular publication in question.[9]

5802. Where the libel contained in a document consists of several statements one of which alone the complainant complains of as libellous, the accused is entitled to show that the other statements therein contained are true for the purpose of showing that though it may contain an inaccurate statement, it was not as a whole libellous. The complainant, Laidman, a Subordinate Judge at Dehra Dun, charged the accused Captain Hearsay of this offence in that the latter wrote a letter to the Government of India complaining of the complainant's conduct as Judge for having abused three litigants in his presence adding that that was not an isolated case of Mr. Laidman abusing respectable natives in his Court, and that when the time came the accused could produce several others whom he had treated in a similar manner. The accused wanted to establish the former by establishing the latter, and put the following question to the complainant: "Do you swear that you have never in Court used any offensive expression to any native of this country?" The question was objected to on behalf of the complainant, but Petheram, C.J., allowed it, adding: "We are not trying the defendant for telling a falsehood, but for defaming the complainant in his character as a Judge. Upon this issue I am of opinion that the whole of the complainant's character as a Judge is relevant."[10]

5803. For the purpose of proving that a statement is libellous the opinion of other persons is relevant, since reputation implies the

(5) Act I of 1872.
(6) *Ib.*, s. 6.
(7) Act I of 1872, s. 6. ill. (*c*).
(8) *Ib.*, s. 9.
(9) Act I of 1872, s. 14, ill (*e*).
(10) *Laidman* v. *Hearsay*, 7 A. 906.

good opinion of others, so that an opinion which affects one's reputation is relevant not because it is opinion, but because it is necessary to establish the criminality of the act complained of.[11] So where A sues B for a libel expressed in a painted caricature exposed in a shop window, the remarks of a crowd of spectators may be given in evidence on the question of the similarity of the caricature and its libellous character.[12]

5804. Judgment of a Court of competent jurisdiction are admissible in evidence subject to the provisions of section 43 of the Indian Evidence Act[13] which contains the following as its illustration: "(*a*) A and B separately sue C for a libel which reflects upon each of them. C, in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither. A obtains a decree aganist C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C."[14]

5805. For the rest, the question of the physical and moral, as distinguished from the legal character of the act of a person accused of an offence under this section is, like those which arise under other sections of the Code, one to be determined by considerations and inferences drawn from common experiences rather than from the rules of legal construction. What the imputation was which a man intended to convey who did not directly express it and whether he believed or had reason to believe that the imputation would produce a particular sentiment or opinion on the part of those to whom the communication was made are matters of fact, or inference from fact, belonging, where the judicial functions are divided, to the province of the jury. Whether the imputation thus found to have been made, and whether the harm thus found to have been the probable or expected result were such as to satisfy the definition of the offence of defamation would be questions for the Judge.[15] Where the imputation is conveyed in the mother-tongue of the parties, others speaking or understanding the same language are competent witness to depose to the sense it was intended to convey.

So West, J., said: "The natural sense of language is best determind by the impression it makes on ordinary persons speaking the tongue in which it is uttered. But in the case of a foreign language, still more than in that of a provincial dialect, the aid of persons who, as compared with the Court, are specially conversant with the language is indispensable to the attainment of a right understanding of what any particular expressions in that language and the character peculiar to it were fitted to convey; the popular and colloquial sense of the whole passage as it stands in the vernacular character is what is important for the purpose on hand, and this is best learned from the testimony of a number of persons as to the impression the words were calculated according to their

(11) Indian Evidence Act (I of 1872), s. 32 (8).
(12) *Ib.*, ill. (*n*).
(13) Act I of 1872.
(14) *Ib.*, s. 43. ill. (*a*).
(15) *Per* West and Pinhey, JJ., in *Pitambar*, (1879) B. U. C. 140.

judgment and knowledge of the language to make. It is so far from wrong for a Judge to inform himself as to the sense conveyed, which is of course the impression naturally communicated to readers in the vernacular, that he could hardly in any other way place his view of the meaning and purpose of any particular passage beyond the reach of very plausible objection."[16]

Publication.

5806. Besides intention the prosecution have to give formal evidence of publication. This must depend upon the nature of the libel. If it is oral, then the only evidence possible is the statement of witnesses before whom the defamatory words were uttered, in which case it is the duty of the prosecution to prove as far as possible the *ipsissima verba* of the accused and not merely their substance, or the witnesses' impressions of them. Sometimes the words used may convey a sense exactly the opposite. In that case the witnesses must be asked to depose as to the tone and temper of the accused, and their own impression of the sense in which they understood him (§§ 5662-5666, 5676, 5677). For this purpose the evidence of intention would lend a very material assistance. For it will show what sense the accused intended to attach to his expressions, and why.

5807. Where, however, the defamation complained of is committed in writing, all that the prosecution has to prove is its authorship, which may be done by calling persons who are acquainted with his handwriting, by filing his admitted handwriting for the purpose of comparison, and by the testimony of a handwriting expert (§§ 5198-5202). Where the incriminating matter is in print, its publication is sufficiently proved by the production of the printed copy[17] (§ 5637). And if the matter was printed from the copy proved to be in the handwriting of the accused, there is evidence from which it may be presumed that the printing and publication were by the direction of the accused.[18] But as against the printer and publisher publication may be proved by production of an attested copy of a declaration made under the Registration of Press Act,[19] the scope of which has been already discussed under s. 124-A. A letter is deemed to be published both where it is posted and where it is received and opened[20] (§ 1267).

Falsity of Imputation Unnecessary.

5808. It will be observed that it is no part of the offence that the imputation concerning one should be false. On the contrary, it may be true, but truth alone is never a justification for this offence (§§ 5686, 5687). Consequently, the prosecution need not take upon themselves the duty of proving falsity of the defamatory imputation, which would encourage the defence to cross-examine witnesses for the purpose of establishing its truth, and the result in such cases then is that both parties enter the lists upon an issue which is by no means material to the case and which often leads to damaging the complainant's character far more than the defamation complained

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(16) *Per* West and Pinhey, JJ., in *Pitambar*, (1879) B. U. C. 140 (141); this view is not inconsistent with s. 98 of the Indian Evidence Act (I of 1872); and the English rules which exclude such evidence, *see* s. 499 §§ 5662-5665.

(17) *Soosai Naidu*, (1891) 1 Weir 579.

(18) *Lovett*, 9 C. & P. 462.

(19) Act XXV of 1867.

(20) *Barke* v. *Skipp* 45 M. L. J. 754.

of. In civil cases the procedure is necessarily different, for there truth alone being a good defence the plaintiff suing for damages has necessarily to show that the imputation complained of is not true. Even in such a case it is not necessary to call a crowd of witnesses, for it is ordinarily sufficient if the plaintiff swears on oath that the defamatory imputation is false, which is sufficient to shift the burden of proof even in a criminal case.(21)

5809. Where, however, the prosecution rest content with proving publication and intention, it is not open to the accused to cross-examine the complainant as to the truth of the imputation, unless he intends to plead truth as a justification, in which case it is not only allowable but necessary for him to cross-examine the complainant; and if he fails to do so it is a subject of serious consideration whether he should be subsequently allowed to tender proof, as to the material incidents of which he had not cross-examined the complainant.(22) There is, however, no law which entitles the accused to have the complainant medically examined for the purpose of proving the truth of his imputation that she was pregnant by adultery.(23) And even as regards the cross-examination of the complainant and his witnesses law does not permit the accused to direct an aimless cross-examination with the possible hope of ensconcing himself behind one or other of the ten exceptions. This license is generally permitted to the accused by untrained Judges, but it exposes the complainant who had come for justice to the insensate fury of the accused.

Cross Examination on Complainant's Character.

5810. Of course, such cross-examination is widely different from that which law permits to the accused. For instance, since the gist of the crime is an intention to harm the reputation of the person defamed, the accused is entitled to show that the complainant has no reputation to lose. And so Petheram, C.J., said: "Mr. Gordon now seeks to show that Mr. Laidman (the complainant) as a Judge, has no character to be defamed. This is a fact in issue. A statement which is defamatory of one person is not necessarily defamatory of another. The defendant is not being tried for telling a falsehood, but for filching a man's character. Upon this question it is necessary to consider what the complainant's character is."(24) But this does not let in evidence of the complainant's general character but only of particular instances of the same kind of misconduct as that alleged in the libel. For example, if a libel charged a man with having been drunk on a particular occasion, it could not be justified by evidence showing that on other occasions he had committed theft.(25)

And even when the examination relates to other acts of similar misconduct it must be confined to the elucidation of facts, so that a question whether a certain report were not current about the com-

(21) *Shibo Prasad, Pandah*, 4 C. 124.
(22) *Dum Singh*, 6 A. 220.
(23) *Agnew* v. *Jobson*, 13 Cox 625; followed in *Pudmon*, (1889) B. U. C. 474.
(24) *Laidman* v. *Hearsay*, 7 A. 906: *Devi Dyal* 4 L. 55.
(25) *Scott* v. *Sampson*, 8 Q. B. D 491; followed in *Laidman* v. *Hearsay*, 7 A. 906.

plainant is wholly irrelevant, for if the rule was otherwise the consequence would be that a man might circulate a slander, and then call as witnesses persons who had heard the slander from him, and thus avail himself of his own wrongful acts.(1) So Wood, B., observed: "I have ever understood that general good character is always presumed in law, unless by evidence of particular acts, fairly and specifically put in issue, that presumption is negatived. Some cases have been mentioned wherein it would seem that such evidence has been received at *Nisi Prius*. I will not attempt to distinguish the present from those; I strongly protest against any such mischievous doctrine altogether, and deny that it has any legal foundation. It cannot be supported by any principle of law. I say distinctly that it is not warranted by the law of the land."(2)

5811. Possible Defences.—If the prosecution establish a *prima facie* case against the accused, the latter has besides the general exceptions the choice of ten exceptions under which he may defend himself. The applicability of these exceptions depends upon proof of either truth or good faith. It has been stated before that the prosecution are not bound to prove the falsity of the imputation complained of as defamatory, nor are they invariably bound to prove the absence of good faith. But this may be sometimes necessary. So the authors observed: "Whether an imputation be or be not made in good faith is a question for the courts of law. The burden of the proof will lie sometimes on the person who has made the imputation, and sometimes on the person on whom the imputation has been thrown. No general rule can be laid down. Yet scarcely any case could arise respecting which a sensible and impartial Judge would feel any doubt. If, for example, a public functionary were to prosecute for defamation a writer who had described him in general terms as incapable, the Court would probably require the prosecutor to give some proof of bad faith. If the prosecutor had no such proof to offer the defendant would be acquitted. If the prosecutor were to prove that the defendant had applied to him for money, had promised to write in his praise if the money were advanced, and had threatened to abuse him if the money were withheld, the Court would, probably, be of opinion that the defendant had not written in good faith, and would convict him. On the other hand, if the imputation were an imputation of some particular fact, or an imputation which, though general in form, yet implied the truth of some particular fact which, if true, might be proved, the Court would probably hold that the burden of proving good faith lay on the defendant. Thus if a person were to publish that a Collector was in the habit of receiving bribes from the zemindars of his district, and were unable to specify a single case, or to give any authority for his assertion, the Court would probably be of opinion that the imputation had not been made in good faith. And if there is no good faith it is immaterial that the publication was for the public good.(3)

(1) *Per* Patteson, J., in *Thompson* v. *Nye*, 16 Q. B. 175 (179); *Bell* v. *Parke*, 11 Ir. C. L. R. 413 (420); *Scott* v. *Sampson*, 8 Q. B. D. 491; *Wood* v. *Durham*, 21 Q. B. D. 501.

(2) *Jones* v. *Stevens*, 11 Price 235.

(3) *Purna Chandra*, 28 C. W. N. 579.

5812. "Again if a critic described a writer as a plagiarist the Court would not consider this as defamation without very strong proof of bad faith. But if it were proved that the critic had, like Lauder, interpolated passage in old books in order to bear out the charge of plagiarism, the Court would doubtless be of opinion that he had not criticised in good faith, and would convict him of defamation."(4)

5813. Defamation and Abuse.—Some common terms of vulgar abuse, must be distinguished from defamation as such. Of these terms of abuse, this may be said that they do not constitute defamation for the simple reason that no one takes them literally. Such expressions as "*baiman*," "*badmash*" are current coin in the bazar, and though they may at times constitute insult they cannot be the subject of punishment under this section.(5) So calling a European or an Anglo-Indian a "native" is not defamation.(6) So where the accused had called the complainant a rogue, the Court took into consideration the circumstances in which the statement was made and acquitted him for this offence.(7)

Session. Pres. Mag. or Mag. of 1st class. Non-cog. (s. 198, Cr. P. C). Warrant. Bailable. Comp.

Printing or engraving matter known to be defamatory.

501. Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

[*Good reason to believe—cf.* s. 26. *Defamatory*—s. 499.]

Synopsis.

(1) *Analogous Law* (5814).
(2) *Procedure and Practice* (5815-5817).
(3) *Proof* (5818).
(4) *Form of Charge* (5819).
(5) *Meaning of Words* (5820).
(6) *Printing Defamatory Matter* (5821).

5814. Analogous Law.—This section furnishes another instance of the Code making abetment a distinct offence. A person who prints or engraves any matter with the knowledge or belief that it is defamatory abets the defamer by giving him facility for the dissemination of his libel. And since his act is calculated to give it wide publicity the section does not discriminate between his offence and that of the defamer.

5815. Procedure and Practice.—No Court shall take cognizance of this offence except upon a complaint made by some person aggrieved by such offence (§ 5814). The offence is consequently non-cognizable, but warrant should ordinarily issue in the first instance. It is both bailable and compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first class.

(4) Note R. Reprint, p. 184.
(5) *Bakhtawar Lal*, (1922) P. L. R. 51, (1922) A. I. R. (L.) 459; *Thakaria* v. *Puran Singh*, 67 I. C. (L) 589, 23 Cr. L. J. 429.
(6) *Nga On Thi* 1 Bur. L. J. 39, 66 I. C. 80, 23 Cr. L. J. 240.
(7) *Esufali*, 20 Bom. L. R. 601, 46 I. C. 411, 19 Cr. L. J. 731.

5816. As this offence is distinct from that punishable under the last section, and involves proof of other elements, the Court is not competent to alter or amend a complaint under this section into one under the last section, since s. 198 of the Procedure Code precludes the Court from taking cognizance of this offence except upon a complaint by some person aggrieved by such offence.(8) On a conviction under this section the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, which are in the custody of the Court or in possession or power of the person convicted.(9)

5817. For other points of practice reference should be made to commentary under the last section (§§ 5787-5795).

5818. Proof.—The points requiring proof are:—

(1) That the accused printed or engraved any matter.
(2) That the matter was defamatory.
(3) That he did so knowing or having good reason to believe that it was defamatory.

5819. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at—— you printed or engraved some matter, to wit——knowing or having good reason to believe that the same was defamatory, and that you thereby committed an offence punishable under s. 501 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5820. Meaning of Words.—"*Prints or engraves*": The word "prints" does not include composition, but the multiplication of copies by the process known as printing: Engraving being, however, used to denote the process of cutting figures, letters or devices on stone, metal, wood or any other substance. A person who prepares a wood cutting of a defamatory caricature would thus be punishable under this section. "*Having good reason to believe*": This is a new phrase and a variation of that defined in section 26. The interposition of the word "good" is obviously intended to imply that the "reason to believe" defined in s. 26 must be not only sufficient but strong, and such as would most probably lead any man to believe that the matter was defamatory. "*That such matter is defamatory*": It is not necessary that the accused should know the person defamed, if the matter he prints or engraves is unmistakably defamatory. So a person may get printed defamatory matter leaving blank space for filling in the name, in which case the accused would be liable to the same extent as if he knew the name subsequently filled in. But in such a case there must be evidence that what was printed was intended to be published, and that it was a libel upon some person.

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(8) *Uma Shankar*, (1889) P. R. No. 18.

(9) S. 521 (1), Cr. P. C.

5821. Printing Defamatory Matter.—This offence is wholly distinct from the offence of defamation in that the person who prints or engraves defamatory matter may not intend to publish it with the intention which makes it defamation within the meaning of section 499. Indeed, the gist of the offence consists in printing or engraving such matter with the knowledge of its nature. If the person printing also publishes the matter he prints he may then be guilty of the principal offence punishable under the last section: otherwise he would be punishable under this section if he knew or had good reason to believe that the matter was defamatory. This may be evident from the nature of the matter printed. For if it is plainly defamatory it is a good reason for the printer to know that it is so.(10) But if the defamation is couched in *innuendo* or otherwise requires explanation then the prosecution must adduce evidence of facts and circumstances from which such knowledge or belief can be inferred.

Session. Pres. Mag. or Mag. of 1st class. Non-cog. (s. 198, Cr. P. C.). Warrant. Bailable. Comp.

Sale of printed or engraved substance containing defamatory matter.

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

[*Defamatory matter*—s. 499.]

Synopsis.

(1) *Analogous Law* (5822).
(2) *Procedure and Practice* (5823).
(3) *Proof* (5824).
(4) *Form of Charge* (5825).
(5) *Sale of Defamatory Printed Matters* (5826-5827).

5822. Analogous Law.—This section is supplementary to the last and it is another instance of abetment being specially provided for. The essence of criminality is dissemination of defamatory matter with knowledge of its nature.

5823. Procedure and Practice.—No Court shall take cognizance of this offence except upon a complaint made by some person aggrieved by such offence.(11) The offence is consequently non-cognizable, but warrant should ordinarily issue in the first instance. It is both bailable and compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. For other points of practice, reference should be made to the commentary under s. 500 (§§ 5787-5795). It is evident that since the jurisdiction of Court depends upon a complaint laid for *such* offence, the Court is not empowered to amend or alter a complaint instituted under s. 500 into one under the last or this section,(12) though if the process is issued under s. 500 there

(10) *Sardar Dayal Singh*, (1891) P. R. No. 8.
(11) S. 198, Cr. P. C.
(12) *Uma Shankar*, (1889) P. R. No. 18.

is nothing to prevent the Court from charging the accused under this section, if the complainant so desires,[13] but not otherwise.

5824 Proof.—The points requiring proof are:—

(1) That the accused sold or offered for sale any printed or engraved substance.

(2) That the substance contained defamatory matter.

(3) That he then knew that it contained such defamatory matter.

5825. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you sold or offered for sale any printed (*or* engraved) substance, to wit——containing defamatory matter knowing that it contained such matter, and that you thereby committed an offence punishable under s. 502 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, or High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5826. Sale of Defamatory Printed Matters.—This section does not apply to all disseminators of calumny. Those who circulate it by word of mouth are dealt with as actual defamers. Those who disseminate it in print are punishable under this section. But between the two there is a noticeable distinction. For one who verbally publishes defamation is liable even if he does so having reason to believe that it will harm the reputation of some person, whereas the seller of printed calumny is immune unless knowledge of its nature is brought home to him. It may then be said that the circulator of printed libel possesses an advantage denied to the lip-libellor, though the mischief done by the one is incalculaby more than that done by the other. But this section was not intended to emphasize any such contrast. Its sole object is to reach those who in the ordinary course of their trade or business sell books, pamphlets, prints or paper which they know contains defamatory matter. It has been held in the Punjab that such knowledge may be presumed on their part if the matter is *per se* defamatory,[14] but the section does not appear to warrant the imputation of such constructive knowledge, which may at times be wholly at variance with facts. For instance, a large bookseller may, in the course of his trade, receive a book for sale, which he may sell without being aware of its contents though they may be flagrantly defamatory. Surely he could not then be prosecuted on the strength of that fact and apart from any evidence, or knowledge on his part that the matter sold is defamatory.

(13) S. 230, Cr. P. C.

(14) *Per* Plowden, J., in *Sardar Dayal Singh*, (1891) P. R. No. 8.

Liability of Printer and Publisher.

5827. The case of the printer and publisher of a registered press is different. For his liability is created by Statute[15] and even then it only creates a presumption which is rebuttable (s. 124-A.) And on this point the English rule would appear to be wider, making the publisher criminally liable even though he was shown in fact to possess no knowledge of the libel. So where the defendant, the proprietor of *The Times,* was shown to have left the management of the paper entirely to his son, himself residing in the country, he was still held criminally liable for publishing a libel on a nobleman, though he was in fact wholly ignorant of its publication.[16] But in the case of a bookseller indicted for selling a book written in Latin and containing a libel on the Court of King's Bench, the Court discharged him on his filing an affidavit that he did not know Latin and on his giving up the name of the author and printer from whom he had received the book for sale.[17] Even in the case of the publisher of a newspaper, the rule is now modified by Statute[18] and the tendency of modern decisions is to make criminal responsibility depend upon knowledge. A libel appeared in the *Man of the World* of May 11th, 1878. On the 25th May the defendant was appointed its publisher, and back numbers sent to his office. The complainant's agent purchased a copy of the number for May 11th on December 13th by applying to the defendant who told his assistant to look it up and deliver it to the purchaser. The defendant swore that he had not examined the back numbers at all and knew nothing of the libel whereupon Cockburn, C.J., intimated that in those circumstances no jury could find the defendant criminally liable for publishing the libel.[19]

(15) Act XXV of 1867, s. 7.

(16) *Walter,* (1799) 3 Esp. 21; *Gutch Fisher and Alexander,* Moo. & Mal. 433.

(17) *Wiatt,* (1722) 8 Mod. 123; *Cuthel,* 27 How, St. Tr. 642.

(18) Lord Campbell's Act, 1843, s. 7 (6 & 7 Vict., c. 96).

(19) *Barnard,* 43 J. P. 127. To the same effect, *per* Lord Coleridge, C. J. in *Bradlough and others,* 15 Cox C. C. 217; *Ramsey and Foote,* 15 Cox 231: *Allison,* 16 Cox 559.

CHAPTER XXII

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

Criminal intimidation.

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration.

A, for the purpose of inducing *B* to desist from prosecuting a civil suit, threatens to burn *B*'s house. *A* is guilty of criminal intimidation.

[*Person*—s. 11. *Act*—s. 33. *Injury*—s. 44.]

Synopsis.

(1) *Analogous Law* (5828).
(2) *Principle* (5829).
(3) *Meaning of Words* (5830).
(4) *What is Criminal Intimidation* (5831-5836).
(5) *What is a Threat* (5831-5832).
(6) *Threat must be of an "Injury"* (5833-5834).
(7) *Injury to Third Person* (5835).
(8) *In whom one is "interested"* (5836).
(9) *Criminal Intent* (5837-5838).
(10) *"To cause alarm"* (5837).
(11) *Act must be Illegal* (5838).

5828. Analogous Law.—This section has undergone a complete transformation since its first draft which after enumerating certain offences such as murder, hurt, mischief, house-breaking, unnatural offence and rape made the offence, *inter alia* depend upon the causing of distress or terror to the person intimidated.[20] The word "distress" was naturally objected to though the Law Commissioners defended its retention.[21] The original clause was apparently taken from Russel's work on Crimes [22] and it was both disjointed and incomplete. The present section is practically new, and the substitution of the word "alarm" for distress and terror is intended to confine the offence only to cases when the effect of the threat is to cause more pain than is covered by those words.

(20) Cl. 482.
(21) 2nd Rep., s. 417.
(22) *Ib.*, s. 419.

5829. Principle.—The anxiety and mental anguish caused by an injury threatened, may often be as great or even greater than the actual injury. And since it may lead to reprisals and the consequent breach of the peace, law esteems such threats an offence, even though they fall short of a preparation to commit the offence threatened. But such threats which preface a probable execution, must be distinguished from those which are used as mere terms of vulgar abuse and in which there is neither the intention nor the possibility of execution. Such are the usual expression "I will see you" which is as vague as it is meaningless, but which have furnished ground for many a frivolous action. The gist of the offence is causing of alarm to another person or the doing of a thing which he was not bound to do. If the threat falls flat upon him, the offender could not be punished for his evil intention which he was powerless to achieve. So Lord Ellenborough, C.J., said: "To make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man.....The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against and other sorts of threats."[23] So Petheram C. J., said: "The gist of the offence is the effect which the threat is intended to have upon the mind of the person threatened, and it is equally clear that, before it can have any effect upon his mind, it must be either made to him by the person threatening, or communicated to him in some way."[24]

5830. Meaning of Words.—"*Threatens another with any injury*": "Threat"[25] is the declaration of an intention to inflict punishment, loss or pain on another. "Injury" is defined in s. 44. It involves the doing of an illegal act. "*Person, reputation or property*" that is to say, by committing offences against the person, such as murder, hurt or wrongful restraint, of the offence of defamation as defined in s. 499, or offences against property dealt with in Chapters XVII and XVIII (ss. 378-489D.) But it is not necessary that only these offences should be committed, for the term "injury" implies the doing of an illegal act and not an act punishable under the Code. "*In whom that person is interested*": The word "interested" is here used in its largest sense as implying any interest, whether created by relationship, contract or otherwise. "*With intent to cause alarm to that person*": The term "alarm"[1] is here used in a sense signifying consternation caused by the threat, producing a state of terror in the mind which may provoke retaliation or produce mental anxiety by the prospect of evil. "*To do any act which he is not legally bound to do*": This means an involuntary act.

"*A threat to injure the reputation*": *See* s. 499, Expl. 1 (§§ 5644-5646).

5831. What is Criminal Intimidation?—Criminal intimidaton is in one word a "threat," but every threat is not criminal intimidation, which is a threat of the kind and given with the intent specified in the section. But all the same, it is a threat, that is to say, a declaration of an intention to inflict

(1) What is a Threat ?

(23) *Southerton*, 6 East R. 126.
(24) *Ganga Chunder Sen* v. *Gour Chunder Banikya*, 15 C. 671.
(25) From A.-Sax. *Threotan*, to tire, harass.
(1) From It, *All'arme*, to arms; hence, a sudden fear or painful suspense excited by an apprehension of danger.

punishment, loss or pain on another. It must then be necessarily communicated to the other party,[2] though not necessarily by the accused, if he intended that it should reach the person threatened and influence him to the consequence comtemplated in the section.[3]

5832. The threat must, moreover, relate to an injury to the person, reputation or property of another. An injury to one's person may be threatened by means of personal violence, as where one threatens to murder another,[4] or the threat may be directed against one's reputation, as where one threatens to accuse another of an unnatural offence,[5] or it may again be of an injury to property, as a threat to burn one's house. But it is not necessary that the threat should expressly refer to an injury of one kind or another, for the threatener often veils his offence in a language from which it is not possible to describe the nature of the evil threatened. Such would be the case where one is threatened with vengeance, as in the case of the complainant who having been sent for by a Police Inspector, the constable ordered to fetch him was escorting him, when the accused appeared upon the scene and threatened both the constable and the complainant with the Head Constable's vengeance. It was found that the Inspector had no authority to call the complainant in the manner he did, and the Court then held the threat to mean injustice and oppression by the Head Constable under whom the two were living, and convicted the accused under s. 506.[6] So a threat to ruin another may amount to this offence if it acquires a more definite sense, having regard to the position and relationship of the parties, and the authority or power one wields over another. So an official superior may threaten to dismiss his subordinate in which case there is a threat and it may be a threat of an injury according to the circumstances of the case. In other words, no threat is punishable unless it threatens an "injury" as that term is defined in section 44 (§ 362).

(2) Threat must be of an "Injury."

5833. Now the word "injury" implies "any harm illegally caused to any person in body, mind, reputation or property," from which it follows that in order to be criminally punishable a threat must be a declaration of one's intention that one would illegally cause harm to the person, reputation or property of another. The illegality of the act by which the harm is threatened must then be clearly established by the prosecution. In some cases, as where one threatens to murder another or burn his property, the illegality of the act is too evident to require demonstration. But there are threats in which their illegality would have to be proved. Such would be the case, for instance, where one threatens to get another dismissed from the police-service, in which case the threat does not explain itself.[7] The accused told the complainant, a member of their caste, that he should give up his field or else they would put him out of caste and injure him in person and reputation. As the complainant refused to give up his field, the accused put their threat into execution by convening

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(2) *Gunga Chunder Sen* v. *Gour Chunder Banikya*, 15 C. 671.

(3) *Syed Mahomed*, (1900) 1 Weir 622: *Anon*, (1865) 1 Weir 622; *Palani* 622; *Goundan*, (1892) 1 Weir 623.

(4) Such a threat is specially provided against in England by 24 & 25 Vict., c. 100, s. 16.

(5) Specially provided against in England by the Larceny Act (24 & 25 Vict. c. 96), s. 44.

(6) *Purshotam*, (1896) B. U. C. 850; *Nand Kishore*, 102 I. C. 557.

(7) *Dada Hanmant Dain*, 20 B. 794.

a *panchayat* of the caste at which the complainant did not attend and who pronounced his excommunication. He thereupon prosecuted the accused for this offence, but the Court held that since the complainant could not have brought a civil action to decide whether he was rightly or wrongly expelled from the caste, his expulsion did not constitute an injury within the meaning of section 44 of the Code: for as the Court remarked: "The Civil Courts have always refused to enquire whether an expulsion from caste was legal or illegal, although they have awarded damages to persons who were entitled to be invited to caste dinners and were omitted."(8)

This question was more fully adverted to in a case in which the complainant having attended a Hindu widow-marriage, the accused, who was his *guru*, or spiritual preceptor, declared him out of caste and forbade his other disciples and the public generally to associate with him until he performed an expiatory penance. The accused was prosecuted, and on a question as to the applicability of this section arising, Muttusami Ayyar, J., said: "There can be no criminal intimidation where the injury of which complaint is made, is the hardship arising, from a conventional punishment, which a spiritual superior, acting in the exercise of his authority as regulated by the custom of the caste, is competent to inflict. The custom implies a common submission to his authority, and assuming that there was an error of judgement on his part, the error cannot be accepted as sufficient for turning a case of conventional discipline into a criminal offence. It may be a matter for regret that there should be this spiritual tyranny and oppression, but if it is consistent with the usage of the caste of which the complainant claims to be a member, and if it is not expressly forbidden by law, we are not at liberty to treat it as a criminal offence."(9) But a threat to proclaim that a person is put out of caste is threat of the publication of an imputation which amounts to defamation: in other words it is a threat to charge another with a conduct which is injurious to his reputation (§§ 5682-5684) and as such it amounts to this offence. But such a threat is widely different to one in which the offender threatens merely with caste penalties in which case the harm threatened is not illegal because the Civil Courts have no jurisdiction to try the question whether a person had been rightly or wrongly made the subject of caste discipline.(10)

5834. But where a person threatens another with a penalty in consequence of which he causes injury to himself, the former could not be acquitted of this offence merely because he had resorted to a time-honoured usage in which he believed. The accused, who was the *mukaddam* of a village, had certain of his property stolen, and he, thereupon, had recourse to the ordeal of heated oil in order to discover the thief. As such, he ordered the complainant to submit to the ordeal threatening to beat him and turn him out of the village if he did not, and the complainant thereby burnt his hand. It was held that the accused could not be convicted under s. 330, because the accused could not be held to have voluntarily

(8) *Alya Dhurma*, (1870) B. U. C. 37.

(9) *Sankara*, 6 M. 381. It may be added that, under Regulation I, s. 21, "no interference on the part of the Court in caste question is warranted, beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste or character of the plaintiff." This provision is unaffected by Regulation V, s. 2, cl. 3 which prescribed only a limitation for "suits for recovering the right of participation in caste, communications and privileges."—See *Alya Dhurma*, (1870) B. U. C. 37 (38).

(10) *Cf. Fakirappa*, (1882) B. U. C. 1[illegible]

caused hurt but that his offence fell under this section, inasmuch as the complainant had dipped his hand in heated oil in consequence of the threat, which he was not bound to do.(11) So there was held to be no injury where the accused went to the complainant, the brother of an adult woman, and told him that he had come from the Sarkar, and would get him six months' imprisonment if the complainant did not let his sister go. The accused was evidently anxious to release the woman from detention in the complainant's house, and Kemball, J., held that his threat did not amount to an injury within the meaning of section 44.(12) There was nothing in this case to show that the accused intended to prosecute the complainant falsely; for if that were his intention he could not have resisted his conviction for this offence.(13) A more familiar example of such innocent threat is the demand made by the creditor coupled with a warning that unless he be paid up, he should take legal steps to recover his money.

So where the accused wanted the complainant to sell him a cow and on his refusing to do so, he threatened to ruin him with cases. The complainant was at one time found to be a person of bad livelihood, and the accused charged him again before a Magistrate with bad livelihood. It was held that a mere threat to injure by "cases" followed up by a prosecution, did not satisfy the definition of injury, for there was nothing to show that the cases threatened were meant to be false cases and that those instituted afterwards were false. In short, a harm so caused would not be illegal though it was caused from an improper motive.(14) But the fact that the cases threatened to be instituted were false may as well be inferred from the tenour of the threat and the surrounding circumstances. The accused Ata Husain, was a leading Shiah and took a prominent part in the Muharram festival. A local disturbance being apprehended between the Hindus and Mahomedans in consequence of the Dasehara and Muharram festivals falling on the same day, the Tehsildar took agreements from leading members of both communities to keep the peace during the festivals. As soon as the Tehsildar left the town, the accused commenced to threaten both the communities that if they did not break their bonds and join him in committing a breach of the peace he would implicate them and get them imprisoned, and which Sir Comer Petheram, C. J., held to be "the very kind of threat against which s. 506 of the Penal Code is directed."(15) The learned Judge did not go into the question of illegality because its illegality was obvious and a threat directed against the public at large must of necessity be of a false prosecution.

(3) Injury to Third Person.

5835. The injury may be threatened to another or to a third person in whom that other is interested. So a threat to A that the accused would waylay and kill his son B if he did not submit to his demand, would be clearly this offence committed against A, though the person threatened to be injured was B in whom A was interested by the ties of parental relationship. And since that threat is punishable because of the alarm it causes in another, it is conceivable that the accused may commit this offence though the person threatened be himself. So a threat to commit suicide if

(11) *Hirde Ram*, 9 C. P. L. R. 18.
(12) *Moroba Bhaskarji*, 8 B. H. C. R. 101.
(13) *Per* Collins, C. J., and Benson, J., in *Chitoraputra*, (1896) 1 Weir 623; *per* Stevens and Henderson, JJ., in *Jowahir Pattak* v. *Parbhoo Ahir*, 30 C. 418.
(14) *Jowahir Pattak* v. *Parbhoo Ahir*, 30 C. 418.
(15) *Ata Husain*, (1886) A. W. N. 41.

another person refuses to do a particular act may amount to this offence, if the latter is interested in the former.[16] Such, for instance, would be the case if the fond son were to threaten to cut his own throat unless the father gave him a sum of money or yielded to his other wishes. But such a case must be discriminated from that of the beggar who threatens to mutilate his body unless his demand is met. Here the injury threatened has exactly the same purpose in view though since one is not interested in the other, the offence, committed by the threatener would be extortion, but not criminal intimidation. The two offences are thus closely akin though they differ only in this that while the purpose of the extortioner is delivery of property, the object of the offender here may be to coerce another to do or not to do an act unconnected with the delivery of property.

In whom One is "Interested."

5836. Of course, the term "interested" is large and includes interest of any kind, pecuniary or personal, social, moral, or religious, but there must be such an interest as furnishes a spring for human action. And the extent of the interest may then be gauged by the alarm produced in the mind of the complainant in consequence of the threat communicated to him. It may then happen that the accused threatens A with intent to influence B in whom the accused believes A is interested, but if A was not, in fact, interested in B, the accused cannot be punished in spite of the intention of the accused to overawe A. The accused, a clerk in the Forest Department, dismissed by the complainant Mr. McGregor, the Divisional Forest Officer, sent a petition purporting to be written by the inhabitants of certain villages to the Commissioner, threatening that unless Mr. Mc.Gregor were transferred to another district, he would be killed. All the ingredients of this offence were proved against the accused, but the question depended upon whether the threat made to the Commissioner was made to one who was "interested" in McGregor. It was found that the Commissioner exercised a general supervision over the work of the complainant, but it was held to be no interest of the kind here contemplated, for that interest would not alarm the Commissioner because Mr. McGregor's life had been threatened. The interest here contemplated must be of such a personal character as may suffice to explain human conduct. It is not an interest which one human being feels in another.[17] In this view the accused was acquitted, even though the Court found that the accused intended to frighten the Commissioner into ordering the transfer he desired.

(i) To Cause Alarm.

5837. Criminal Intent.—One criterion for gauging the interest one person feels in another, is the alarm produced upon his mind. It is not of the essence of the crime, but it is both a fair measure of the accused's intention as well as of the interest of one person in another where that fact is material. But the test is not an infallible one—nor, indeed, it is invariable. For the susceptibilities of all men are not equal, and a threat which may suffice to frighten one out of his wits will produce scarcely any effect upon another. But the accused is presumably aware of the temperament of his victim and he attunes his threats accordingly. It is therefore always pertinent

(16) *Nubi Bukhsh* v. *Oomra*, (1866) P. R. No. 109; *Chikbati Guruadu*, (1881) Weir (3rd Ed.) 390.

(17) *Mungesh Jivaji*, 11 B. 376.

to inquire what effect the threat has had upon the accused. How did they affect his daily movements; what precautions did he then take to protect himself against their execution? These are, moreover, questions which will explain the accused's words in another sense. For it is a notorious fact that the people of this country use words and utter threats at the slightest provocation, but which are well understood to be mere epithets of vulgar abuse. Such are threats affecting one's female relations, to set fire to one's house, bury one alive, twist one's neck like a chicken, and words too numerous to mention, but all of which are mere terms of opprobrium and convey no well-formed determination to carry the threat into execution. Allied to them are words of braggadocio in which there is much stage-thunder, but in which the very extravagance of the language used is a sure sign of its hollowness. There is a tendency in certain quarters to take such threats for their face value, but nothing could be more fallacious than to pay regard to the sound, disregarding the sense in which they are used. But this requires some knowledge of the genius and temperament of the people and familiarity with their thoughts and mode of expression for which due allowance must be made.

5838. Again, the object of a criminal threat must be to achieve some future purpose by causing the person threatened to do or not to do some act which he is not legally bound to do. A threat to take revenge for an act already done is then scarcely within the rule unless the threatener expects to shape its course in future by coercing the other to do some further act as the means of avoiding the execution of such threat. Two things are then necessary: *First*, that the threat must be directly connected with a demand to do an illegal act; and *secondly*, it must clearly indicate that the doing of the act was the only means of avoiding its execution. It is not, of course, necessary that the threat should be adequate to compass the doing of the act, but it must be at any rate sufficient to overcome a man of ordinary nerves and temperament, for otherwise it will be difficult to hold that the threat was intended to cause alarm.

Act must be Illegal.

504. Whoever intentionally insults, and thereby gives provocation, to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Any Mag. Non-cog. Warrant. Bailable. Comp. Summary.

Intentional insult with intent to provoke breach of the peace.

[*Person*—s. 11 *Offence*—s. 40.]

Synopsis.

(1) *Analogous Law* (5839).
(2) *Procedure and Practice* (5840).
(3) *Proof* (5841).
(4) *Form of Charge* (5842).
(5) *Principle* (5843).
(6) *Intentional Insult* (5844).
(7) *What is an Insult* (5845-5848).
(8) *Intention All in All* (5846).
(9) *Insult must give Provocation* (5847).
(10) *Though Breach of Peace be Unlikely* (5848).
(11) *Venial Offence* (5849-5850).
(12) *Privileged Occasion* (5851).

5839. Analogous Law.—This offence arises out of the offence of defamation as it is punishable under English Law, that is to say, when the defamatory words published to the person defamed are such as are calculated to provoke a breach of the peace (§§ 5628, 5629). But since the offence of defamation in the Code follows a very different principle, this section is enacted to meet a case which s. 499 had left unprovided for. Insult as such was punishable under Hindu law.(18) It was actionable under civil law.(19) But as slander it is not actionable under English Law without proof of special damage, unless it imputes an indictable offence, a contagious disease, or the words are spoken in the way of his office, profession or trade, or impute unchastity or adultery to any woman. And this view has been affirmed as regards this country by the Full Bench of the Calcutta High Court.(20) In this view this section constitutes an offence for which there is no corresponding remedy in a civil suit for damages. In other words, an act punishable under this section does not necessarily constitute an actionable wrong. This may appear anomalous but as Maclean, C.J., pointed out in the case last cited,(21) the anomaly arises from the two totally different stand points from which the civil and criminal law view the offence. The latter punishes it to prevent a breach of the peace, but the former only regards the offence as actionable when it is attended with some damage.

5840. Procedure and Practice.—This offence is non-cognizable and warrant should ordinarily issue in the first instance. It is both bailable and compoundable and is triable by any Magistrate, and may be tried summarily. As defamation is a more serious offence, it can be treated and tried summarily as an insult, the gist of which is the use of an expression tending to the breach of peace. Even the English notion of defamation is based upon that principle, but the gist of this offence lies rather in its immediate tendency to occasion a breach of the peace or commit any other "offence," which here means an offence punishable by the Code.(22) This is a petty offence and should be atoned for by an apology or a small fine.(23) The tender of an apology, however, should not be treated as evidence of the accused's guilt.(24)

5841. Proof.—The points requiring proof are:—

(1) That the accused insulted some person.

(2) That he did so intentionally.

(3) That he thereby gave provocation to some person.

(4) That he then intended, or knew it to be likely that the provocation given will cause him to break the public peace or commit any other offence.(25)

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(18) Narada (Sacred Books of the East), pp. 207-212; Vrihaspati, p. 355; Vishnu, pp. 27, 28, 36; Yajnavalkya (Mandlik's Ed.), p. 232, s. 205.

(19) Saunder's Justinan, 4, 4, 1 p. 418.

(20) *Girish Chandra Mitter* v. *Jatadhari*, 26 C. 653, F. B.

(21) *Girish Chunder Mitter* v. *Jatadhari*, 26 C. 653 (662), F. B.

(22) S. 40.

(23) *Chet Singh* (1911) P. W. R. 21, 11 I. C. 619, 12 Cr. L. J. 435.

(24) *Abdul Rahiman*, 4 M L. W. 556, 36 I. C. 142, 17 Cr. L. J. 462.

(25) *Jay Krishna*, 21 C. W. N. 95; *Gul Mahamed* v. *Akbar Ali*, 99. I. C. 604, (1927) L. 129.

5842. Charge.—The charge should run thus:—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you intentionally insulted A B by using the following words, to wit——(*set them out*) and thereby gave him provocation to the said A B (*or* to C D) intending (*or* knowing it to be likely) that such provocation will cause him to break the public peace (*or* to commit any other offence) and that you thereby committed an offence punishable under s. 504 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5843. Principle.—The object of this section is clearly to prevent the use of language which is resented by the person with reference to whom it is used, and which, if allowed to go unpunished, is provocative of reprisals, thereby disturbing the public tranquillity. Consequently, the ten exceptions to which section 499 is subject are no justification for using an insulting expression which would be punishable because of its offensive tendency and apart from the considerations of justification or truth. The absence of such provision in other countries has, it is stated, led to the practice of duelling.(1)

Insult must be Intended.

5844. Intentional Insult.—The offence of criminal insult punishable by this section, derives its criminality from the fact that it is intentional and gives provocation which is likely to lead to retaliation. It does not punish the use of all insulting expressions, nor indeed, it could, were even such an offence possible, for no criminal law can provide against the sensitiveness of human nature, nor could it justly punish one for the morbid sensibility of another. All it can do and does is to punish the offering of an *intentional* insult to another. Now, such an insult may be offered by word or deed, and as the section is worded, the offence is sufficiently wide to comprise even cases elsewhere especially provided for, *e.g.*, in ss. 297, 298. But the immediate object of this section is to provide for cases not otherwise provided for, and as such, it would include even cases of personal abuse where it is calculated to provoke a breach of peace. A police constable ordered the complainant to desist from carrying on a loud altercation on the public road, over the price of a chicken. The complainant protested, whereupon the accused feeling his authority set at nought ordered him to accompany him to the police outpost. The complainant declined, whereupon the accused pushed and dragged him to the outpost calling him a pig, *soor*. The Court held the use of this word to constitute an insult, though there was no finding that the word had given any provocation to the complainant, which is, of course, the gist of the crime.(2) But this may be assumed from the nature of the word used and the circumstances in which it was uttered (§§ 5848-5850).

(1) Bentham's Theory of Legislation, p. 299.

(2) *Goolab*, 5 Bom L. R. 507.

5845. What is an Insult?—But the words used must be insulting, that is to say, they must be words expressive of contempt, indignity or insolence. They may be used as terms of abuse, as where one calls another *sala* or *haramzada* or *soor* or the like,(3) or they may be words of greater significance in which case they may approximate the offence of defamation, as where a high caste Hindu is accused of drunkenness or partaking of the forbidden food, in which case the words are as defamatory as they are insulting—defamatory, because they lower him in the estimation of his society, and insulting, because they are provocative of the breach of peace. But whether they are more appropriately one or the other must depend upon the intention of the accused and the place and circumstances of their publication. If they were spoken to a man's face, they were clearly insulting, but if they were published behind his back, they would be treated as defamatory. An insult unlike defamation need not be conveyed in words—for it may be equally conveyed by acts, signs and visible representations. So it is insulting to pull a Mahomedan by his beard,(4) to make faces at another, or to make lewd and indecent gestures in the presence of a female(5) or ridicule one in coarse caricature, and in fact in any one of the ways in which human feelings are moved and hurt.(6)

5846. But there can be no insult where no insult was intended.(7)

Intention All in All.

There are many things said and done which are not taken in good part, but which the law does not punish, because the necessary *mens rea* is wanting. This is furnished in the present case by the intention as distinguished from knowledge and belief. So a person may lecture to another for his good, well knowing that he will feel insulted, but the one does not commit this offence, because the other considers himself insulted. The conduct of missionary or evangelistic preachers is a case in point. These persons use expressions distasteful to those to whom they preach; they even know it, but their discourse, however unpalatable, is not punishable under this section merely because it is insulting, unless it offends against the provisions of s. 298 (§§ 2989-2995). The complainant gave a caste-dinner, to which two accused were bidden. They arrived late and asked some of the other guests to whom food had been already served, to move to another place, which they refused to do, and whereupon the two accused threw down a shoe amongst them and which rendered the food impure and in consequence of which all the guests had to leave without partaking of it. The accused were prosecuted both for mischief as well as this offence, but they were acquitted of both by Blair, J., who with reference to this offence, held the evidence of intention wanting.(8) The same view was taken in the Punjab, where the accused had excluded the complainant from the use of their wells on the ground of their being of a low caste, which was held to be neither punishable as a nuisance under s. 290, nor as an insult under this section.(9)

(3) *Girish Chander Mitter* v. *Jatadhari*, 26 C. 653 (654, 661), F. B.

(4) *Bhagwan Das*, 23 A. L. J. 73, 86 I. C. 79, (1925) A. 318.

(5) S. 509, *Holmes Dears*, C. C. 207: *Syed Mahomed*, (1900) 1 Weir 622.

(6) *Habib Khan* v. *Mazharul Haque*, 1 Pat L. W. 536; *Jay Krishna*, 21 C. W. N. 95.

(7) *Kuppusami*, 28 M. L. J. 505, 20 I. C. 109.

(8) *Moti Lal*, 24 A. 155.

(9) *Ram Dita* v. *Kirpa Singh*, (1883) P. R. No. 3.

Insult must Give Provocation.

5847. The question whether an insult was intentional is, of course, a question of fact, and not of law. But the mere fact that the insult was intentional does not make it criminally punishable, for which the section requires the additional circumstance that it should give provocation to cause a breach of the public peace. This does not mean that the provocation given should actually result in the breach of the public peace. For, all that the section requires is that the person insulting should give provocation, and not that the person insulted should accept it in the manner intended. As was said in Madras that "The law makes punishable the insulting provocation which, under ordinary circumstances, would cause a breach of the peace to be committed, and that the offender is not protected from the consequence of his acts, because the person insulted became too terrified to accept the provocation in the manner intended.(10)

Though Breach of Peace be Unlikely.

5848. These words were used in a case in which the complainant had been reduced to a state of abject terror by the abusive language of the accused, and whose insults were accordingly unlikely to cause him to break the public peace or commit any other offence, but which the Court held to be insufficient to exculpate the accused.(11) This case was followed by Best, J., who held the mere forbearance of the person insulted from being provoked to commit a breach of the peace insufficient to protect the offender.(12) The accused in a quarrel with the complainant's wife, indecently exposed his body to her, who thereupon entered her house. The accused then abused the complainant who kept quiet without attempting to assault the accused. The Magistrate acquitted the accused on the ground that the insult had provoked neither the complainant nor his wife to commit a breach of the peace, but White, C.J., and Moore, J., held that the offence of the accused depended upon the provocation given and not upon the provocation felt, and in that view the acquittal of the accused was set aside.(13) The soundness of this view is manifest, for, the offence is intended to prevent the doing of an act likely to occasion a breach of the peace and not upon one which actually causes it, nor, indeed, is it necessary that the person insulted should be in fact provoked, because if it were so, the measure of criminality would vary with the temperament and power of the complainant, so that the strong could oppress the weak, for the latter would suffer when they were unable to retaliate. The section therefore punishes insults which are provocative of the breach of peace, and in judging of their character, law judges them by the standard of an ordinary resonable man, holding them criminal if they are ordinarily sufficient to arouse passions and provoke retaliation.

5849. Venial Offence.—This is a trivial offence and suitable apology is not infrequently taken as a sufficient atonement. A, who was

(10) *Per Collins*, C. J., and Parker, J., in *Jogayya*, 10 M. 353, *Jay Krishna*, 21 C. W. N. 95; *Stiffles* v. *Dixit*, 7 N. L. J. 124.

(11) *Jagayya*, 10 M. 353; followed in *Chunibhai*, 4 B. L. R. 78.

(12) *Sooraparaza*, (1894) 1 Weir 621.

(13) *Syed Mahomed*, (1900) 1 Weir 622.

not a pleader entered a pleader's room in order to see a pleader. B, a pleader objected to A's presence in the room as against the rules. As A refused to leave the room B ejected him. A having re-entered B abused him apologising afterwards. B was convicted of this offence but the Court held his apology a sufficient amends for the offence.(14) Mere rudeness is not insult. So where the complainant a lady customer entered the shop of a furniture dealer and asked him to deliver the furniture which her husband had on the previous day asked him to supply on hire, the dealer did not get up from his seat and refused to give her the furniture. It was held that the dealer might have been rude but he had not insulted the lady.(15) So where the accused called the complainant a *Kirar* which has a somewhat contemptuous significance, the Court held the occasion too trivial to call for a conviction.(16)

5850. And it is not even necessary that the insult should be sufficient to provoke the person insulted, for if it gives provocation to *any* person it is sufficient; such a case may be imagined of the husband provoked by an insult directed against the wife, or by the father insulted through his son. But the analogy should not be carried too far. For if A insults B, it is none of C's business to complain, if C was in no way interested in B. To hold otherwise would expose a slanderer to a greater penalty than a defamer.

5851. Privileged Occasion.—In dealing with the offence of defamation reference has already been made to occasions which the Courts treat as privileged (§§ 5754-5767). It is clear that where such a person cannot be convicted of libel he cannot be convicted of this offence, which is a minor offence of the same *genus*, though the ingredients of the two offences are not essentially the same, but the immunity which is dictated by public policy or the absence of express malice would appear to be equally applicable to both(17) (§ 5759).

Pres. Mag. or Mag. of 1st class. Non-cog. Warrant. Not bail. Not comp. Sanction. (s. 169. Cr. P. C.)

505. Whoever makes, publishes or circulates any statement, rumour or report—

Statements conducing to public mischief.

(*a*) with intent to cause, or which is likely to cause any officer, soldier, sailor or airman in the army, navy or air force of Her Majesty or in the Royal Indian Marine or in the Imperial Service Troops to mutiny, or otherwise disregard or fail in his duty as such, or

(*b*) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public, whereby any person may be induced to commit an offence against the State or against the public tranquillity; or

(14) *Moro Balwant Marathee*, 15 Bom. L. R. 1039, 22 I. C. 158.

(15) *Rahim Baksh*, 18 A. L. J. 515, 56 I. C. 435, 21 Cr. L. J. 451.

(16) *Mhd. Baksh*, 65 I. C. (L) 635, 23 Cr. L. J. 171.

(17) But see *Tikekar* v. *Piarelal*, 45 I. C. (N) 1002, 19 Cr. L. J. 666.

(*c*) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community;

shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception.—It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.

[*Offence*—s. 40. *Offences against the State*—Ch. VI, ss. 121-130. *Offences against the public tranquillity*—Ch. VIII, ss. 141-160.]

Synopsis.

(1) *Analogous Law* (5852-5857).
(2) *Procedure and Practice* (5858-5859).
(3) *Proof* (5860).
(4) *Principle* (5861).
(5) *Public Mischief* (5862).
(6) *Truth No Defence* (5863).

5852. Analogous Law.—Both this section as well as s. 153-A, to which it bears a close affinity, were amended by the Indian Penal Code Amendment Act 1898,[18] prior to which the present section ran as follows:—

Circulating false report with intent to cause mutiny, or an offence against the State, etc.

"505. Whoever circulates or publishes any statement, rumour or report, which he knows to be false, with intent to cause any officer, soldier, or sailor in the Army or Navy of the Queen, to mutiny, or with intent to cause fear or alarm to the public, and thereby to induce any person to commit an offence against the State or against the public tranquillity, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

5853. Its amendment to the present form was thus justified by the Select Committee[19]:—

"We have inserted the clause proposed by the Government, but we have altered and enlarged the scope of the exception to the clause. No doubt, the statements, rumours and reports referred to are of a highly mischievous character, but having regard to the conditions under which modern journalism and the discussion of public questions are necessarily carried on, we think that, when the statement, rumour or report is published without any criminal intent, it is going too far to require the person who published it to prove its actual truth, to require such proof might be throwing an impossible burden upon him, and it should be sufficient for him to show that he had reasonable grounds for believing it, as, for instance, by showing that he made due inquiry before he published it."

(18) Act IV of 1898, s. 6.

(19) Gazette of India, 1898, Pt. V, p. 14.

5854. And in explaining the scope of this section, the Law Member in charge of the Bill[20] said:—

"In s. 505 the Select Committee have made a considerable modification. As the clause now stands, I think, it need cause no apprehension to any speaker or journalist who speaks in good faith. It must be borne in mind that the clause does not strike at mischievous and mendacious reports generally. It is aimed only at reports calculated to produce mutiny or to induce one section of the population to commit offence against another. If a man takes upon himself to circulate such a report, he surely cannot complain if he is asked to show that his intentions were innocent, and that he had reasonable grounds for believing the report."[21]

5855. The proposal to make no exception in favour of truth was the subject of trenchant criticism in a memorial submitted by the Calcutta Bar. Referring to it Sir Griffith Evans said:—

"It is said, 'the time has not come to prohibit the telling of the truth in India.' There is no denying the humour of this comment. But if the learned authors of it had met a man who had found out that by an accident there was something wrong with the grease of the sepoys' cartridges, and who was going to take that information into the sepoy lines with the probable result of an immediate mutiny, in which my learned friends, their wives and their children would be slaughtered, I much fear they would have laid violent hands on that man in preference to dying in defence of the principle so neatly enunciated. In such cases, *Salus republicae, suprema lex*."[22]

5856. The section was then enacted as amended by the Select Committee, and its effect is to punish the circulation of any report or rumour, even if true, if it is likely to cause mutiny or disturbance of the public tranquillity, or if it was circulated with that intent; but if it was circulated in the reasonable belief that it was true and without intent to incite mutiny, sedition or the disturbance of public tranquillity, then the accused is exempt irrespective of the consequences. In this state of the law the sepoy in Sir Griffith Evans's illustration might escape scot-free if his statement was true, and circulated with the object of cautioning his co-religionist against incurring religious impurity.

5857. The section provides for a case since made the subject of another section (s. 153-A) (§§ 1486-1494). But this section is somewhat more general and deals with the dissemination of false and mischievous news with intent to create a public disturbance. As such, the offence may be divided into two parts: (*i*) where the publication is likely to cause mutiny amongst soldiers or sailors; and (*ii*) where it is likely to cause commotion amongst the public, inducing some one to commit an offence against the State or against the public tranquillity. In both cases the offence may equally be sedition, though sedition differs from this offence, in that it may be committed against the Government without affecting the persons here enumerated. But it is difficult to conceive of a case in which the offence falling in clause (*a*) would not be also punishable under some one or more of the provisions of Chapter VII (ss. 131-140), which specially deals with offences relating to the Army, Navy and Air Force, and as regards clauses (*b*) and (*c*), most of the cases here dealt with would be equally punishable under either section 153-A or 124-A. The offence, in short, is a short statement of the offences elsewhere

(20) Mr. M. D. Chalmers.
(21) Gazette of India, 1898, Pt. VI, p. 26.
(22) Gazette of India, 1898, Pt. VI, p. 38.

more specifically provided for. Its position here therefore seems anomalous.

5858. Procedure and practice.—No Court shall take cognizance of this offence unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf. This offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first class.

5859. Where the accused was summoned under this section, but the trial proceeded as if the offence tried was that defined in s. 499, the Court ordered a retrial on the motion of the complainant holding that there had been no judicial disposal of the complainant under either section and that if s. 506 was a *lapsus calami* for s. 500, which was the real offence intended, then the procedure appropriate to the trial of that offence should have been followed.(22) A person charged under s. 500 or s. 501 cannot be convicted of this offence, and *vice versa*, since the two offences are distinct and involve proof of different ingredients.(23)

5860. Proof.—The points requiring proof are:—

(1) That the accused made, published or circulated a statement, rumour or report.

(2) That he did so with intent—

(*a*) to cause or which was likely to cause any officer, soldier or sailor to fail in his duty, or to cause fear or alarm to the public, whereby any person may be induced to commit an offence against the State or against the public tranquillity; or

(*b*) to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community.

5861. Principle.—This section presumably deals with an offence not hereinbefore provided for. Its primary purpose is to check the circulation of false and mischievous news calculated to excite commotion and create disturbance amongst the public. More serious offences would be probably dealt with under the more specific provisions of the earlier section (§ 5857).

5862. Public Mischief.—The section is not intended to punish the circulator of every idle gossip or mischievous news which one hears every day in the bazar. It is rather intended to punish those who give currency to such news with a definite purpose in view, that purpose being to cause fear or alarm to the public, so that they or some one of them are thereby induced to commit an offence against the State or the public tranquillity. The fact that there is a vague possibility of the

(22) *Anath Nath Dey* v. *Mohendra Nath*, 10 C. W. N. 983.

(23) *Ashutosh* v. *Purna chandra*, 36 C. L. J. 287.

commission of this offence is scarcely sufficient. For, what the section punishes is the dissemination of matter which is likely to cause such fear or alarm as is sufficient to induce some one to commit an offence against the State or the public tranquillity, or which is likely to incite one class to commit an offence against another class.

The accused, a *daffadar* of a tea estate in Darjeeling, who had recently returned from Nepal, where he had been on leave, circulated a report among the garden coolies that a war was impending between the British Government and Nepal, that Nepalese soldiers were stationed on the frontier and that coolies would be killed by the British. The effect of this report was that about 150 coolies of the tea garden immediately ran away, whereupon the accused was convicted of this offence, but the Court held that though the report had certainly caused fear and alarm amongst the coolies, there was nothing to show that it was likely to induce them to commit an offence against the State or against public tranquillity. The fact that such panic-stricken people might easily commit such offences is hypothetical and far-fetched. No doubt the act of the accused was very mischievous and malicious, but he could not be taken to have intended more than what was the probable result of the report which he circulated, namely, the flight of the coolies. The accused was consequently acquitted.(24)

The section here is intended to protect one class against the attacks of another class and preserve the public peace by preventing the commission of an offence against the State or against the public tranquillity. It is not intended to punish the dissemination of mischievous news merely because it is mischievous and has a remote tendency to induce the commission of such offences. So if a person were to circulate false news to the effect that the Sarkar had poisoned wells to cause the spread of plague, or that it had ordered the slaughter of a hundred men to mark the opening of a bridge, the news is undoubtedly mischievous, but its disseminator could not be punished upon a possibility of certain consequences assumed, but of which there was no probability.

Explanation.

5863. Truth No Defence.—But if the news was followed up by any overt act, evidencing the commission of any of the offences mentioned in the section, then the offender could be dealt with under this section irrespective of the result. And in such a case truth alone is no justification, for truth is no defence to the commission of offences against the State (§ 1261), and against the public tranquillity (§§ 1492-1494), or against any class or community. And if the law were otherwise, the question in each case would be, what is Truth?

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Comp.

Punishment for criminal intimidation.

506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

(24) *Manbir*, 3 C. W. N. 1 (2).

and if the threat be to cause death or grievous hurt or to cause the destruction of any property by fire, or to cause an offence punishable with death or transportation, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Session. Pres. Mag. or Mag. of 1st class. Non-cog. Warrant. Bailable. Not comp.

[*Cause death*—s. 299. *Grievous hurt*—s. 320.
Criminal intimation—s. 503.]

Synopsis.

(1) *Analogous law* (5864-5865).
(2) *Procedure and Practice* (5866-5867).
(3) *Proof* (5868).
(4) *Form of Charge* (5869).
(5) *Proof of Criminal Intimidation* (5870-5874).
(6) *Threats* (5871-5872).
(7) *Cause Alarm* (5873).
(8) *Involuntary Act* (5874).

5864. Analogous Law.—This section prescribes punishment for the offence defined in section 503 and committed under the two circumstances of varying gravity. As such, it follows the lead of English Law under which the offence as presented in clause 2 is the subject of special legislation. Thus the sending of a letter threatening to murder is punishable with penal servitude for ten years,(25) and so is also the sender of a letter threatening to burn or destroy houses, cattle or agricultural property,(1) while the rest of the clause summarizes, s. 46, of the same Statute.(2)

5865. The offence here described may amount to extortion, where the object of the offender is to obtain delivery of property in which case it would be punishable as such.

5866. Procedure and Practice.—This offence is non-cognizable, but warrant should, ordinarily, issue in the first instance. It is bailable, and compoundable if the offence falls under clause 1, otherwise it is non-compoundable, and in either case it is triable by the Presidency Magistrate or a Magistrate of the first class, and clause 2, also by the Court of Sessions, and in both cases it may be tried summarily. The sentence of fine without imprisonment prescribed as an admissible punishment for this offence shows how widely the offence may differ in the measure of its criminality. It has been accordingly held that though clause 2 of the section is non-compoundable, still there may be a case in which it will be right to allow the withdrawal of the complainant from prosecution.(3) Each threat given under the circumstances mentioned in s. 503 constitutes a distinct offence, so that if a person so threatens at

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(25) Offences against the Criminal Act (1861) 24 & 25 Vict., c. 100, s. 16, re-enacting 4 Geo. IV, c. 54, s. 3; 10 & 11 Vict., c. 66, s. 1.

(1) Malicious Damage Act (1861), 24 & 25 Vict., c. 97, s. 50, re-enacting 4 Geo IV, c. 54, s. 3; 10 & 11 Vict., c. 66, s. 1.

(2) *Ib.*, s. 46.

(3) *Vithoba*, (1887) B. U. C. 330, following *Devama*, 1 B. 64.

the same time three different persons, and each of them institutes a separate prosecution against him, he may be convicted of the offence against each of them.(4) And in such a case he may be tried together for all the three offences.(5)

5867. The accused may be tried either by the Court within whose jurisdiction the threat was given, or where the person threatened resided, or did or abstained from doing the act in consequence of the threat.(6)

5868. Proof.—The points requiring proof are:—

(1) That the accused threatened the complainant or some other person.

(2) That the threat was of some injury to him.

(3) That it was given to cause alarm to him or to cause him not to do or to omit to do any act which he is legally entitled to, or was or was not bound to do.

5869. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you threatened AB (*or* CD), with injury to his person (*or* reputation *or* property), with intent to cause alarm to the said AB (*or* CD), [(*or* to cause the said AB *or* CD to do an act, to wit——(*specify it*), *or* not to do an act, to wit——(*specify it*), which he wat not legally bound to do, *or* which he was legally entitled to do]. And that you thereby committed an offence punishable under s. 506 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

5870. Proof of Criminal Intimidation.— The necessary ingredients of this offence have been already set out under the defining section (§§ 5831-5838). As there stated, the gist of the offence consists in causing another to do an act by means of threats. As such, there is very little to choose between such an offender and an extortioner under s. 383, for both achieve their purpose by the force of threat, but an extortioner uses them to obtain money or money's worth, while an offender here may have some other purpose in view. All the same there is a close affinity between the two offences, and it must be kept in mind in dealing with them.

Threats.

5871. In the first place, then, there must be evidence of threats (§§ 5831-5832), and these must be connected with the alarm caused to another person or the doing of an involuntary act as the direct result of the threats. It is not, however, necessary that they should cause either, for the criminality of the act lies in the intention and not in the result attained. For

(4) *Goolzar Khan*, 9 W. R. 30.
(5) S. 234, ill. (*h*), Cr. P. C.
(6) S. 179, ill. (*c*), Cr. P. C.

instance, if a person points a cocked pistol at another and bids him sign a petition withdrawing from a suit, on pain of being, immediately shot dead in case of his refusal to sign it, could the accused be heard to say that the pistol was not loaded and could have done the complainant no harm, or that the complainant preferred death to such an ignominious surrender of his claim? At the same time if the complainant knew that the pistol was empty and he therefore refused to sign there would then be no question of alarm, though there would still remain the question whether the threat was sufficiently serious to be criminally punishable. The threat may assume a variety of forms according to the susceptibilities of the person threatened. For instance, a Pariah may threaten to defile a person's home by making an intrusion therein, unless his demand is satisfied, in which case the threat of trespass is a sufficient injury within the meaning of law justifying the accused's conviction for this offence. A threat to publish a defamatory imputation about one, or about one's deceased relative is equally within the rule, while a threat to burn one's house or to cut off one's water supply are palpable examples of threats to property.

In one case the accused, who had set up an arbitration court, issued notice to the complainant that if he did not appear and answer a claim made against him, the same would be decreed *ex parte*, the Court held it to amount to this offence even though the accused had no means of enforcing his decree.(7) But in another case the accused, who had extorted Rs. 300 from the complainant showing him a letter from a god Nagore in which it was alleged that his failure to pay would be visited with calamity, was convicted of cheating but acquitted of this offence on the ground that s. 503 assumes that the injury threatened must proceed from the accused, while s. 508 equally required some further act on his part.(8)

5872. A threat may be couched in an ambiguous language; evidence may then be given to shew the meaning it bore to the complainant and the effect it had upon his mind. Evidence may also be given of other threats uttered by the accused either against the same complainant or against others, the latter being admitted as showing intention and the act in question being a part of a scheme and as negativing accident.(9)

Cause Alarm.

5873. The threat must be intended to cause alarm from which it follows that ordinarily it would be sufficient for that purpose. The degree of such alarm may vary in different cases, but the essential matter is that it is of a nature and extent to unsettle the mind of the person on whom it operates and takes away from his acts that element of free voluntary action which alone constitutes consent.(10) The case where the threat produces an alarm is comparatively a simple one, for all that has then to be proved is that the threat was given and that that the alarm was due to the threat, but where the threat has not that effect, it may be a question whether

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(7) *Priya Nath* v. *Lalji*, 27 C. W. N. 479, 72 I. C. 508, 24 Cr. L. J. 306.
(8) *Dorai Swami*, 48 M. 774.
(9) *Tucker*, R & M. C. C. R. 134; *Kain*, 8 C. & P. 187; *Ward*, 10 Cox, 42.
(10) *Parfit*, 1 East, P. C., p. 416; *Simmon's case*, 2 East, P. C., p. 731; *Taplin's case*, 2 East, P. C., p. 712.

it was sufficient to overcome a man of ordinary nerves, otherwise the Court may hold it to be an empty boast, too insignificant to call for the penal visitation of this section.

Involuntary Act.

5874. The object of the threat may be merely to cause alarm to the person threatened, though ordinarily its object is something more. When it is to obtain delivery of property, the offence is extortion; when it is to coerce the person to do or not to do any other act, the offence would be criminal intimidation. It is not necessary that the act done should be illegal, so long as it is involuntary, for the section punishes the coercion of will irrespective of its legality. As such, it will apply to a large number of cases in which a certain effect is directly traceable to the exercise of this species of undue influence.

Session. Pres. Mag. or Mag. of 1st class. Non-cog. Warrant. Bailable. Not comp.

Criminal intimidation by an anonymous communication.

507. Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

[*Criminal intimidation*—s. 503.]

Synopsis.

(1) *Analogous Law* (5875).
(2) *Procedure and Practice* (5876).
(3) *Proof* (5877).
(4) *Principle* (5878).
(5) *Anonymous Intimidation* (5879-5881).

5875. Analogous Law.—This is a proviso to the last section prescribing a higher punishment in consequence of the offence being committed by means of an anonymous communication. The alarm caused by such a communication is necessarily greater, for it does not localize the point of attack and creates in the mind a proportionately greater suspense and apprehension.

5876. Procedure and Practice.—This offence is non-cognizable and warrant should, ordinarily, issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class. For other points of practice *see* s. 506 (§ 5855).

5877. Proof.—The points requiring proof are the same as those required to prove a case under s. 506, in addition to which, prove—

(4) That the threat was by a communication in which the true name and residence of the accused was concealed.

5878. Principle.—The aggravating feature of this offence is the anonymity which accompanies the threat which produces in the receiver a greater uneasiness than when the author of the threat is known. Such

a threat, moreover, shows greater malignity of mind, while the care taken to escape detection presents difficulties in proof, all of which make such an offender a fit subject of exemplary punishment.

5879. Anonymous Intimidation.—The ordinary offence of criminal intimidation may be committed either by verbal or written communication of threats. In England, a distinction is made between the two modes of communication, but no such distinction, exists in the Code. Even in an offence falling under this section an anonymous communication may be either verbal or written, though ordinarily it will be written. The term "anonymous communication" simply means a communication in which the name of the author is not disclosed. This is also implied by the phrase "or having taken precaution to conceal the name or abode of the person from whom the threat comes." A pseudonymous communication is thus equally within the rule; and so is a communication in which the identity of the author is concealed by giving a wrong and misleading address. There is otherwise no concealment of the abode if mention of it is omitted.

5880. A communication may be made by affixing it to a gate in a public highway, near which the complainant would be likely to pass from his house, in which case it will be a question of fact whether the accused intended to use that means of communicating with the complainant.(11)

5881. The additional term of two years is the maximum which may be added to the sentence passed under the last section. If, therefore, the Court considers the normal sentence prescribed by the last section sufficient, it is not bound to record a conviction under this section.

508. Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of Divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is object of the offender to cause him to omit,

Pres. Mag. or Mag. of 1st or 2nd class. Non-cog. Warrant. Bailable. Comp.

Act caused by inducing person to believe that he will be rendered an object of the Divine displeasure.

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both.

Illustrations.

(a) A sits dhurna at Z's door with the intention of causing it to be believed that by so sitting, he renders Z an object of Divine displeasure A has committed the offence defined in this section.

(11) *Williams*, 1 Cox, 16.

(*b*) A threatens Z that, unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of Divine displeasure. A has committed the offence defined in this section.

[*Person*—s. 11 *Voluntarily*—s. 39. *Legally bound to do*—s. 43.]

Synopsis.

(1) *Analogous Law* (5882).
(2) *Procedure and Practice* (5883).
(3) *Proof* (5884).
(4) *Form of Charge* (5885).
(5) *Principle* (5886).
(6) *Intimidation by Religious Imposture* (5887-5889).
(7) *Accused must induce* (5888).
(8) *Accused must Cause Voluntarily* (5889).

5882. Analogous Law.—In the ordinary case of criminal intimidation the threat relates to an injury to the person, reputation or property of another; but in this case the same result is achieved by arousing one's fears of Divine vengeance by preying upon his superstition or his religious belief. This section was originally proposed to be placed under a separate chapter devoted to "offences relating to religion and caste," and the authors justified it in the following words: "It is intended to prevent such practices as those known among the natives by the names of *Dhurna* and *Praga*: such acts are now punishable by law,[12] and it is unnecessary to adduce any argument for the purpose of showing that they ought to be so."[13] But this view did not pass unchallenged, it being objected to on the ground that its enactment would rather encourage and perpetuate than repress what is pernicious.[14] Even the Law Commissioners felt it advisable to delete the clause as separate offence, but they recommended its inclusion in the general offence of criminal intimidation,[15] but the Legislature acceded to their recommendation so far as to transpose the section to its present place where it remains as a species of criminal intimidation, the offender being punished for the imposture, not because of his pretended power to imprecate the vengeance of the Deity, but because of its being used for an illegal purpose.

5883. Procedure and Practice.—This offence is non-cognizable, but warrant should, ordinarily, issue in the first instance. It is both bailable and compoundable, and is triable by the Presidency Magistrate or Magistrate of the first or second class. For other points of practice reference should be made to s. 506 (§§ 5866-5867).

5884. Proof.—The points requiring proof are:—

(1) That the accused induced or attempted to induce another person to believe that he or some other person in whom he is interested will become an object of Divine displeasure.

(2) That he will so become by some act of the accused.

(12) They were punishable by Beng. Reg. XXI of 1795, and VII of 1820; Bom. Reg. XIV of 1827.
(13) Note J, Reprint, p. 137.
(14) 2nd Rep., s. 262.
(15) *Ib.*, s. 265.

(3) That the accused thereby caused or attempted to cause any person to do something which he was not legally bound to do, or to omit to do something which he was legally entitled to do.

(4) That the accused caused or attempted to cause as in (3) voluntarily.

5885. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you voluntarily caused (*or* attempted to cause), A B to do something, to wit—(*here describe the act or omission*) which he was not legally bound to do (or that you caused, etc., A B to omit to do something, to wit——which he was legally entitled to do—) by inducing (*or* attempting to induce) the said A B to believe that he (*or* C D in whom A B was interested) will become (*or* will be rendered) by some act of yours an object of Divine displeasure, if the said A B did not do the thing which was your object to cause the said A B to do (or not to do), and that you thereby committed an offence punishable under section 508 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5886. Principle.—Though the authors intended this section to apply to the practice of *Dhurna*, it is obvious that it has other uses as well. It will, for instance, equally apply to the threat of practising sorcery on the complainant unless he submitted to the demand of the accused. The act of the imposter may, in short, take any form of threat so long as it is intended to impress on the victim fear of an impending evil due to some supernatural agency which the accused has the power to invoke. The alarm so produced in a superstitious mind causes the same if not greater mental torment as a threat of direct physical injury, and its intensity varies in inverse ratio with the education and enlightenment of the accused, the result being that the ignorant and the weak fall an easy prey to this species of imposture, clothed as it often is in the garb of sanctity, and appealing as it does to the deeprooted instincts of religion.

5887. Meaning of Words.—"*By some act of the offender*": Consequently, where the displeasure requires no such act, there can be no conviction for this offence.(16)

5888. Intimidation by Religious Imposture.—The mischief which an act causes must not be judged in the light of reason or by the standard of a civilized man. Its effect must in a great measure depend upon the nature and education of the receptive mind. The practice of *Dhurna*, at one time the familiar mode of realizing a debt or demand, has long since fallen into desuetude, and this section may so far be regarded as a landmark, which marks one epoch in human history. But it cannot be even yet predicated that the superstitious faith of the people has so completely

(16) *Darai Swami*, 48 M. 774.

died out as to render the section nugatory. For, there still remain tracts where there lingers a faith that the torture of one recoils upon another, which is the underlying principle of the cases supposed in the two illustrations, and which are otherwise not quite accurately drawn. For instance, they suppose that the means are adopted to coerce another to do an act which he is not legally bound to do, but it is not stated, though without that qualification the illustrations are too wide. For if A was in either case making a just demand adopting that means for enforcing it, could he be punished for using pressure to enforce a legal right? The use of such pressure is not illegal unless the act to be performed is one which the person pressed was not legally bound to do. This is clear from the first two clauses.

Under clause 2 a mere persuasion that unless a person complied with the wishes of the offender he had power to call down upon him the vengeance of Heaven is not criminal, unless the accused voluntarily causes that person to do anything which he is not legally bound to do. In this view the two illustrations are clearly misleading, since illustration (*a*) states nothing as to why A sits *Dhurna* at Z's door, and the "certain act" which A wants Z to perform in illustration (*b*) may or may not involve the doing of anything which Z is not legally bound to do, though it is only in the former case that A would be guilty under this section. This was evidently the view of Birdwood and Parsons, JJ., in a case decided upon the following facts: The complainant was the Police Patel of A, and as such he was bound to send a certain monthly return to B; which the accused was bound to carry from A to B, and for which he was paid a certain remuneration. The complainant ordered the accused to carry one such return from A to B, but the accused declined, whereupon the complainant insisted upon compliance with his order. Thereupon the accused lifted up a stone and struck one blow on his own hand with it, exclaiming that the wrath of certain deities named shall rest on the complainant. The complainant, a Mahomedan, prosecuted the accused, and his conviction for this offence was upheld, it being held that the intention of the accused was to induce the complainant to believe that he would be rendered by that act of his, an object of Divine displeasure if he insisted upon the accused carrying the return which the complainant was legally entitled to order him to carry.(17)

Accused must Induce.

5889. The use of coercion must be to cause another to do an act which he is not legally bound to do, or omit to do anything which he is legally entitled to do. This may be either done or the accused may attempt to cause it to be done. In either case it must be his objective. And the means employed by him must be the evoking of fears of Divine displeasure as a consequence of his act, which he must induce the other to believe in. If, therefore, A says to B: "Pay me my debt, otherwise you will have to answer for it in the next world." A may appeal to B's fear of the hereafter, but it is a fear neither evoked nor caused by any act of the accused. The case would, however, be different if in the same case A were to say: "Pay me Rs. 100, else I will recite *mantras*, whereby you will die," in which case the accused attempts to induce B to submit to

(17) *Mhadnack*, (1888) B. U. C. 376.

his exaction by making him believe in the efficacy of his power. The transition between such a case and the following is imperceptible, though there is probably a limit beyond which it would not be possible to push the provisions of the section. Suppose a blackmailing priest were to give out that the planet Saturn has haunted some one, and unless it is propitiated by suitable offerings it forebodes calamity; the object is the same, though it is a matter of every day occurrence. But in such a case it may be said that the accused does not profess to intimidate by calling up Divine vengeance by some act of his own, but professes rather to propitiate it by his paid intervention. So Turner, C. J., said: "To constitute the offence punishable under this section it must be shown that the respondent threatened to believe that by that act or illegal omission the person threatened, or some one in whom the person threatened is interested, would become an object of Divine displeasure."(18) The section has, consequently, no application to a case of social excommunication due to the act of the accused, as where the headman of a caste puts one out of caste for some social delinquency interdicting all social intercourse till the person outcasted performs some prescribed purificatory penance. Here the headman does no act to expose the person outcasted to Divine displeasure. Such displeasure is, if at all, *ex hypothesi* incurred by his very act, and all that the headman does is to declare that it is so.(19)

Accused must Cause Voluntarily.

5890. Again, there must not only be some act done or professed to be done, but the complainant must be persuaded that, that act would bring down the vengeance of Heaven upon him. If he goes no further, he may yet escape, since the section requires that such inducement should be followed up by his voluntarily causing or attempting to cause the complainant to do or omit to do as stated in clause 1. This may be illustrated by an example. A induces B to believe that he possesses supernatural powers by which he could invoke divine agency to harm B, if B did not repay A's debt. A commits no offence, though B believes A. And he incurs no penalty even if B voluntarily offers A a present with the loan so long as A does not demand it. But if he does, he cannot then escape the charge that he had voluntarily caused B to make him a present, which B was not legally bound to do (§ 5888).

Word, gesture or act intended to insult the modesty of a woman.

Pres. Mag. or Mag. of 1st class. Non-cog. Warrant. Bailable. Comp. with Court's sanction.

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

[*Woman*—s. 10.]

(18) *Sankara*, 6 M. 381 (394). (19) *DeCruz*, 8 M. 140

Synopsis.

(1) *Analogous Law* (5890).
(2) *Procedure and Practice* (5891).
(3) *Proof* (5892).
(4) *Form of Charge* (5893).
(5) *Principle* (5894).
(6) *Meaning of Words* (5895).
(7) *Insult to Female modesty* (5896).
(8) *Intrusion upon Privacy* (5897).

5891. Analogous Law.—A person who insults the modesty of a woman in a public place is guilty of a public nuisance,[20] one whose act goes beyond the words and gesture may be guilty of assault or use of criminal force punishable under s. 354. This section applies only to an act which is not punishable either as one or the other, but which is nevertheless an outrage on female modesty. Such would be the singing of an obscene song, the making of an indecent proposal, or the exposure of one's nude person—acts which become punishable by reason of their depraved suggestiveness.

5892. Procedure and Practice.—This offence is non-cognizable, but warrant should, ordinarily, issue in the first instance. It is bailable and compoundable with the permission of the Court, and is triable by the Presidency Magistrate or a Magistrate of the first class.

5893. Proof.—The points requiring proof are:—

(1) That the accused—

(*a*) uttered some word; or

(*b*) made some sound; or

(*c*) made some gesture; or

(*d*) exposed some object; or

(*e*) intruded upon the privacy of a woman.[21]

(2) That in cases *(a)* to *(d)* above, he intended that the same shall be heard or seen by a woman.

(3) That he thereby intended to insult the modesty of any woman.

5894. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you *(name of the accused)* intending to insult the modesty of one A B, uttered the words, to wit—— (*or* made some sound *or* gesture. to wit——, *or* exhibited some object, to wit——), intending that the same shall be heard (*or* seen) by the said A B, and that you thereby committed an offence punishable under section 509 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge"

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(20) S. 294 (§§ 2888-2896).

(21) *I.e.*, of some one specified, and not of a class; *Khair Mahemed*, 86 I. C. 968, (1925) S. 271.

5895. Principle.—This section enacts an offence because it causes annoyance to the woman, and it therefore finds place in this chapter which deals with the offences of "criminal intimidation, insult and annoyance." Where such an act is committed in a public place it is punishable as a public nuisance.[22] Where it amounts to an assault or the use of criminal force, it is punishable under the special section enacted for the purpose,[23] and, where the instrusion involves entry into the woman's property it is punishable as criminal trespass or the other offences allied thereto.[24] This section is intended to punish an act which, but for it, would go unpunished.

5896. Meaning of Words.—"*Exhibits any object*": A letter sent by post containing indecent overtures is such an object exhibited to the complainant by whom it was received.[25]

5897. Insult to Female Modesty.—The question what constitutes an insult to female modesty requires no description, for it is well known. Any word spoken or sung, picture or figure exhibited which suggests lewd thoughts is immoral and insulting to female modesty, unless the woman was a consenting party to it. The fact that the indecent act was done unobserved by all except the woman is, of course, no excuse for the offence, because it is intended to punish such very acts (§ 5714). Nor does the fact that there were several women present, some of whom did not mind, matter, for if the accused intended that his obscenity should be witnessed by all, it is sufficient if it caused annoyance to some. The question whether a song or sight was intended to insult female modesty may be answered with reference to the song or sight. A lewd song is *prima facie* insulting to female modesty, and so is the exhibition of a nude picture or figure. At a certain time of the year, *e.g.*, *Holi* the singing of such songs and the exhibition of such figures has degenerated into a usage, but there is no religious sanction for such bacchanalian revels, though usage, the parent of all laws, has made them tolerable. At such times, obscenity may be defended with reference to the festival, and it will be then for the prosecution to shew that it was intended to insult the modesty of a woman.

There can be, of course, no offence, unless the accused's intention that his word or sound shall be heard by the woman is accompanied or followed by its being actually so heard, of which there must be evidence.

5898. Intrusion upon Privacy.—Again, where the offence charged consists of the accused's intrusion upon the privacy of a woman, it must be shown that the intrusion was made with intent to insult the modesty of any woman,[1] which, of course, implies that the intrusion was unwelcome to her. Where, therefore, the accused was found at night inside the complainant's house, whither he had gone for the purpose of visiting the former's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room, it was held that the accused could neither be convicted under s.

(22) S. 294.
(23) S. 354.
(24) *Balmakand Ram* v. *Ghansam Ram*, 22 C. 398; *Premananda* v. *Brindabun*, 22 C. 994.
(25) *Tarak Das Gupta*, 50 B. 246.
(1) *Phias Mahammad*, 5 Bom. L. R. 502; *Hopper*, (1892) P. R. 6.

451 or this section.[2] So the mere fact that the accused entered the sleeping apartment of a woman in the middle of the night and called her by name and asked her to get up, would not constitute this offence, in view of the fact that the accused and the woman had had previous acquaintance with each other, and that she was in the habit of speaking to strangers at that hour and entertain them to *Pan Supari*.[3]

In any case the mere fact that the accused was found on the prosecutor's premises with intent to peep or endeavour to peep into the apartment occupied by the ladies of the household would not constitute this offence, unless there were facts and circumstances justifying a finding that the intrusion was insulting to their modesty.[4] But this may be presumed where the parties are shown to be strangers, or the prosecutor is a woman of respectability, though poor.[5] In short, an intention to insult the modesty of a woman may be presumed from the mere fact of entry into the private apartment of a woman, unless the accused accounts for his presence otherwise.[6] So where the accused was found to have effected an entry into a room occupied by four women, which fact the accused simply denied, the Court felt justified in holding that his entry had been made at least with the object of committing this offence, and in this view his conviction under s. 456 was upheld.[7]

Any Mag. Non-cog. Warrant. Bailable. Not comp. Summary.

Misconduct in public by a drunken person.

510. Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which extend to twenty-four hours or with fine, which may extend to ten rupees, or with both.

[*Person*—s. 11. *Public place*—s. 159, § 1522. *Trespass*—s. 441.]

Synopsis.

(1) *Analogous Law* (5898).
(2) *Procedure and Practice* (5899).
(3) *Proof* (5900).
(4) *Being Drunk and Disorderly* (5901).

5899. Analogous Law.—This is another section in which an act is punishable because of the annoyance it causes to others—in this case, to any person. Such an act is also punishable under the various municipal bye-laws, and under s. 34 of the Police Act,[8] under which such cases are usually dealt with. The offence consists not in being drunk, but in causing annoyance to others through drunkenness. The fact that he was made drunk does not seem to affect the question, for, the offence is in the nature of a nuisance in which the liability of the accused is unaffected by

(2) *Lajje Ram*, (1898) P. R. No. 12. C. 994.
(3) *Phias Mahammad*, 5 Bom. L. R. 502.
(4) *Hopper*, (1892) P. R. No. 6.
(5) *Balmakand Ram* v. *Ghansam Ram*, 22 C. 391; *Premanundo* v. *Brindaban*, 22 C. 994.
(6) *Premanundo* v. *Brindaban*, 22 C.
(7) *Ib.*
(8) Act V of 1861.

the exceptional provisions of s. 85 (§§ 804-807). It is, indeed, a case in which he who errs when drunk must pay for it when sober.(9)

5900. Procedure and Practice.—This offence is non-cognizable, but warrant should, ordinarily, issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate and may be tried summarily. The general provisions of the section have been to a great extent supplemented by the provisions of s. 34 of the Police Act,(10) which empowers a police-officer to take into custody without a warrant any person, who within his view is found drunk or riotous, or who is incapable of taking care of himself. Moreover, several Municipal Acts contain similar provisions for the apprehension of persons found drunk in any public place, so that in practice the more cumbrous machinery necessary to establish a case under this section is now seldom resorted to. It will, however, be useful to meet a case where a person commits trespass to the annoyance of another, which cannot be otherwise punished.

5901. Proof.—The points requiring proof are:—

(1) That the accused was drunk.

(2) That as such he appeared in a public place or committed trespass.

(3) That he then conducted himself in such a manner as to cause annoyance to any person.

5902. Being Drunk and Disorderly.—This section does not punish drunkenness as such, but drunkenness followed by disorderly conduct in a public place or "in a place where it is a trespass in him to enter." The term "public place" has been the subject of adequate notice (§ 1522), and it is in that sense that it has been used here. A person guilty of disorderly behaviour in a public place commits a public nuisance and may be dealt with as such. If he was drunk he may be punished under this section. But a drunken person may cause annoyance in a place not public. In that case it is only punishable here if it was accompanied by trespass, not necessarily criminal trespass as understood in section 441, but trespass within the meaning of civil law (§§ 4937-4939). Annoyance may be caused by the mere fact of the drunken person remaining on the premises after he is told to go, or he may be guilty of brawling and other acts causing annoyance "to any person," and not necessarily to one in possession of the property.

(9) *Qui peccat ebrius, lua sobrius,* 'Let him who sins when drunk be punished when sober."

(10) S. 34, *Sixth,* Act V of 1861.

CHAPTER XXIII

OF ATTEMPTS TO COMMIT OFFENCES.

Punishment for attempting to commit offences.

Triable by Court by which the offence attempted is triable. Cognizable if offence attempted is cognizable. Warrant or summons shall issue according as the offence is one in respect of which a warrant or summons shall ordinarily issue. Bailable if offence contemplated is bailable. Comp. if offence attempted is comp.

511. Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence shall, where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence or with both.

Illustrations.

(*a*) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(*b*) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

Synopsis.

(1) *Analogous Law* (5903-5905).
(2) *English Law* (5904-5905).
(3) *Procedure and Practice* (5906).
(4) *Proof* (5907).
(5) *Form of Charge* (5908).
(6) *Principle* (5909).
(7) *Meaning of Words* (5910).
(8) *What is an Attempt* (5911-5912).
(9) *Intention* (5911).
(10) *Preparation* (5912).
(11) *Preparation Distinguished from Attempt* (5913-5918).
(12) *Question one of Degree: Illustrations* (5914-5915).
(13) *Allahabad View Criticised* (5916).
(14) *Preparation may be a Distinct Offence* (5919-5923).
(15) *Cases on the Border Line* (5920-5921).
(16) *Degree of Proximity Necessary* (5924-5931).
(17) *"Towards" the Commission of the Offence* (5925).
(18) *Attempt where Offence Impossible* (5926).
(19) *When Innocent Act Becomes Criminal Attempt: Locus paenitentiae* (5929).
(20) *Where Accused is Entrapped* (5930-5931).
(21) *Attempt Implies Doing of an Act* (5932).
(22) *Case where Express Provision Made Elsewhere* (5933-5935).
(23) *Other Attempts* (5936-5937).
(24) *No Attempt* (5938-5940).

5903. Analogous Law.—This section prescribes punishment for an attempt not otherwise expressly provided for. Such provision has been made by several sections of the Code, for instance, in the following sections:—

121. Attempts to wage war against the Queen.
124. Attempt wrongfully to restrain or overawe the Governor-General, Governor, Lieutenant-Governor, or Member of Council.
124-A. Sedition, by attempting to bring into hatred or contempt the Government.
125. Attempt to wage war against a friendly Asiatic Power.
130. Attempt to rescue any prisoner.
131. Attempt to seduce soldier or sailor from his allegiance.
152. Attempt to obstruct a public servant in the discharge of his duty.
153-A. Attempt to promote class-hatred.
161-163, 165, 239-241, 251. Attempt to take bribe.
196. Attempt to use false evidence.
198. Attempt to use a false certificate.
200. Attempt to use a false declaration.
213. Attempt to obtain gratification for screening an offender.
239-241, 251. Attempt to deliver false coin.
307. Attempt to murder.
308. Attempt to commit culpable homicide.
309. Attempt to commit suicide.
385. Attempt to intimidate with a view to commit extortion.
387. Ditto when intimidation causes fear of death or of grievous hurt.
388. Ditto with extortion.
389. Ditto when intimidation causes fear of an accusation.
391. Attempt to commit dacoity.
393. Attempt to commit robbery.
394. Ditto with hurt caused.
397. Robbery with attempt to cause death or grievous hurt.
398. Attempt to commit robbery or dacoity when armed with a deadly weapon.
460. Attempt by a lurking house-trespasser to cause death or grievous hurt.

In all these cases the provisions of this section are inapplicable, because the offence is otherwise expressly provided for. In other cases this section should apply if what is done amounts to an attempt.

5904. English Law. Under English Law every attempt to commit a felony, or a misdemeanour is a misdemeanour at common law, whether the crime attempted is by Statute or at

common law.[11] To constitute an attempt the act must be immediately connected with the commission of the offence.[12] The view taken one time was that there could be no attempt unless there was the possibility of committing the offence. As Cockburn, C. J., put it: "The word 'attempt' clearly conveys, with it the idea that if the attempt had succeeded the offence charged would have been committed,"[13] or again:[14] "An attempt to commit felony can only in point of law be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit." This was also the view of Blackburn, J., who said: "If the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."[15] But this view led to the result that a pick-pocket could not be convicted of an attempt to commit theft, if the pocket happened to be empty, a view which could not long prevail. The earlier cases were consequently overruled[16] it being held that in such a case the accused could be rightly convicted of an attempt. The earlier precedents were followed by the Calcutta High Court[17] whose view has ceased to be in harmony with that now prevailing in English as well as the other Courts (§§ 3301-3311).

5905. The present English view was, indeed, anticipated by the English Law Commissioners (Lords Blackburn and Barry, Lush and Stephen, JJ.), responsible for drafting the English Criminal Code, who proposed to define an attempt as follows:—

"Art. 74. An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause.

"Every one who believing that a certain state of facts exists, does or omits an act, the doing or omitting of which would, if that state of fact existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was reason of the non-existence of the state of facts at the time of the act or omission impossible.

"The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence and too remote to constitute an attempt to commit it, is a question of law."

5906. Procedure and Practice.—The procedure applicable to this offence is exactly the same as is applicable to the offence of which it is an attempt. That is to say, this offence is cognizable or non-cognizable according as the offence is cognizable or non-cognizable, and so it is one in which warrant or summons may ordinarily issue, or whether bail should be taken or refused, or the offence could be compounded

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(11) *Hensler*, 11 Cox. 570; *Roderick*, 7 C. & P. 795; *Martin*, 2 Mood, C. C. 123; *Butler*, 6 C. & P. 368.

(12) *Eagleton*, 24 L. J. M. C. 158; *Roberts*. 25 L. J. M. C. 17.

(13) *M'Pherson*, Dears & B. 197 (202).

(14) *Collins*, 33 L. J. M. C. 177.

(15) *Cheeseman*, L. & C. 140 (145).

(16) *Brown*, 24 Q. B. D. 357; *Ring*, 61 L. J.M. C. 116; *Williams*, [1893] 1 Q B. 320; overruling *Collins*, 33 L. J. M. C 177: *M'Pherson*, Dears & B. 197.

(17) *Riasat Ali*, 7 C. 352; followed in *Chandi Pershad* v. *Abdur Rahman*, 22 C. 131 (138).

or not, and it is similarly triable by the same Court by which the offence attempted is triable. It would seem that if the Court was precluded from taking cognizance of an offence without sanction, it is not necessarily precluded from taking cognizance of an attempt under this section without such sanction, because ss. 195-199 of the Procedure Code which qualify the general powers of the Court, only refer to an offence and not to its attempt or abetment.[18] And since as compared to the completed offence this is a minor offence of the same kind, a person, though charged for the one may be convicted of the other if the facts warrant it.[19] So a person may be charged for committing rape and convicted of an attempt, but in that case though a sentence of 10 years' transportation or of 5 years' rigorous imprisonment may be passed, it is illegal to pass a sentence of 7 years' rigorous imprisonment commutable under section 59 to 7 years' transportation.[20] A conviction under this section is not subject to s. 75, since that section merely mentions Chapters XII and XVII and not Chapter XXVII of which this section is a part[21]. A sentence of whipping cannot be passed on a conviction for attempting to commit house-breaking by night with intent to commit theft.[22] But such a sentence is legal where the offence committed is attempted robbery as defined in s. 393.[23]

5907. Proof.—The points requiring proof are:—

(1) That the act amounted to an attempt.

(2) That it was an attempt to commit an offence under the Code.

(3) That that offence was punishable with imprisonment.

5908. Charge.—The charge should mention both this section as well as the principal section.[24] A person charged for a principal offence may be convicted of an attempt.[25] It should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

That on or about the—day of——at——you attempted to commit (*specify the offence attempted*), and in such attempt did a certain act towards the commission of the said offence, to wit——(*mention it*), and that you thereby committed an offence punishable under s.—(principal offence), and s. 511 of the Indian Penal Code, and within my cognizance (or within the cognizance of the Court of Session or the High Court).

And I hereby direct that you be tried (by the said Court) on the said charge.

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(18) *Anant* v. *Puranik*, 25 B. 90.
(19) S. 238, Cr. P. C.: *Joseph Marian*, 10 W. R. 10.
(20) *Joseph Marian*, 10 W. R. 10; s. 57.
(21) *Ajudhia*, 17 A. 120; *Bharosa*, *ib.* 123; *Motawel*, 1 Weir 37; *Jhamman Lal* (1906) P. R. 14; *Ghasita*, (1918) P. R. 13; *Banne*, 24 O. C. 250; 64 I. C. 142; 22 Cr. L. J. 750.
(22) *Yella*, 3 B. H. C. R. 37; s. 2 (10) Whipping Act (VI of 1864).
(23) S. 4 (9), Whipping Act (VI of 1864).
(24) 1 W. R. Cr. L. 11.
(25) *Billinghurst*, 27 C. W. N. 821; (1924) A. I. R. Cal. 18; 1.

5909. Principle.—All offences may be viewed from four distinct stages; (*i*) intention; (*ii*) preparation; (*iii*) attempt; and (*iv*) completed act. Of these the Criminal Codes of all countries exempt the first from punishment. The Code punishes the second stage of certain offences, while the third marks a distinct advance in the development of criminality, so that it is punishable everywhere. Ordinarily then, law allows *locus pœnitentiæ* only up to the second stage, after which it regards the development of the scheme as too far advanced to remain unpunished. This has led to an important question as to when the preparation ends and an attempt begins. The section does not, however, punish all attempts, for it leaves unpunished attempts of those minor offences which are themselves only punishable with fine. And as it leaves out attempts of other offences otherwise expressly provided for (§ 5902), this section is not exhaustive of the attempts which are punishable here, but only provides for some cases of attempts which would have otherwise gone unpunished. What such attempts are will be seen presently.

5910. Meaning of Words.—*"Or causes such an offence to be committed"*:—This means a person who instigates or engages another to commit an offence. It would thus include one who attempts to abet an offence. "Does any act towards the commission of the offence:" These words are equivalent to the English phrase "does an overt act." They exclude a mere intention not followed up by an overt act; they also exclude acts not proximate and necessarily connected with the commission of the offence. "Where no provision is made for the punishment of such attempt:" In one sense these words are clear enough, but in another sense they are not. For instance, suppose A runs after B with a hatchet intending to murder B. He is rescued before A can give a stroke. Is he guilty under s. 307 or under this section? (§§ 3301-3311).

5911. What is an Attempt?—As has been before remarked (§ 5909), the Code recognizes four stages in the commission of a crime, and of these it makes reference to three stages, namely, preparation, attempt and completed offence. The first stage is intention—and so long as the offence rests only in intention it is not punishable. So Lord Mansfield, C. J., : "So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable."[1] Intention is the determination of the will to act in a particular manner. As such, it amounts to resolution or a settled determination that a certain thing shall be done. So long as such intention does not pass beyond the stage of mental resolve or determination law cannot punish it, because law will not take notice of an intent without an act.[2] But the moment it emerges from that stage, it ceases to be an intention and develops into a preparation.

(1) Intention.

(1) *Scofield*, (1784) Cal. 397 (403); *Baku*, 24 B. 287.

(2) *Per* Coleridge, J. in *Dugdale*, 1 E. & B. 435.

Even the expression of an intention may be an act sufficiently criminal as in the case of criminal intimidation, insult or annoyance. And it may even be a completed offence as in the case of sedition. But otherwise even the expression of an intention is not criminal. For instance, if A were to say to B that he intended stealing his purse, A could not be punished for the mere expression of his intention. And if A were to follow B under such circumstances as irresistibly point to his determination to pick B's pocket—even then he could not be punished, for he is at the preparatory stage of an offence which falls short of an attempt, and is as such not punishable. But this is not the invariable rule. For, indeed, there are offences, the heinousness of which has led law to punish even their preparation. Such are offences to overthrow the sovereignty of the King[3] and preparation to commit dacoity,[4] in which case even that stage is punishable.

(2) Preparation.

5912. But in such cases that stage is defined. There are, however, cases in which the transition between what is a preparation and an attempt is so gradual as to be almost imperceptible. And since those are cases in which a preparation is not punishable, it becomes necessary to see if a working rule cannot be devised to test when an act ceases to be a preparation, and becomes an attempt. Now the preparation to commit an offence consists in devising or arranging the means or measures necessary for the commission of the offence.[5] It implies the taking of previous measures necessary for the crime. In one sense everything how remotely so ever connected with the commission of the crime may be regarded as preparation towards it. For instance, a thief may require a stick and a lantern, a pair of shoes and food for his journey. The collection of all these would be preparation, but it is a preparation which is not directly connected with the commission of the crime, and law therefore views it with an indifferent eye. In other words, though a preparation, it is too remote from the crime and as such it is not punishable.

5913. Preparation Distinguished from an Attempt.—But between such preparation and one which is punishable under law, there is only a difference of degree. For instance, where a married woman entered the shop of the accused with a view to have sexual intercourse, and the shop was immediately afterwards besieged, it was held that the act done amounted only to preparation or providing an opportunity, being a stage of the proceeding short of attempt which is not punishable by law.[6] This case followed an earlier precedent in which the accused, who was a member of the Municipal Committee of a town, had had a woman brought into the Committee room for co-habitation, with whom he intended to pass the night, but before he had sexual intercourse with her, her husband surprised them whereupon the Court held that the accused had not proceeded beyond the stage of preparation.[7] The accused who was the milk contractor to the regimental hospital at Ferozepur, was detected in the hospital

(3) Ss. 121-A. 122.
(4) Ss. 399, 400-402.
(5) *Peterson*, 1 A. 316; *Padala Venkatasami*, 3 M. 4; *Srinivasan*, 25 M. 726.
(6) *Paira Ram*, (1902) P. R. 25.
(7) *Ghulam Mahomed*, (1879) P. R. 13.

compound with about three gallons of stale milk in his possession going in the direction of the place where the cows were about to be milked, the milk being in a can similar to those in which the cows were milked. His intention was clearly to adulterate old milk with the new, for which he was convicted, but the Court held the act to amount only to a preparation.(8)

The accused asked a native doctor for medicine to poison her son-in-law. It was held that the act was not an attempt to murder but merely a preparation, though it might be viewed as an instigation of the doctor to abet her in the commission of murder, and as such it would be an offence punishable under section 302|116 of the Code.(9) The accused had a quarrel with the complainant who was his brother, in the course of which he ran off and fetched a sword, when he was disarmed by by-standers. It was held that the mere act of bringing a sword was not an act of such an approximate nature as would amount to an attempt to commit murder or grievous hurt, as though there was a preparation towards the commission of some such offence a mere preparation was not sufficient to constitute an attempt though his menacing attitude while armed was sufficient to constitute criminal assault, for which he was convicted under s. 352.(10) Where the accused raised his knife in a threatening manner manifesting an intention to stab the complainant, but did not actually try to stab him, the act was held to fall short of an attempt to stab.(11)

The accused having had a quarrel with her relations threatened to commit suicide for which she ran up to a well. She was caught before she could jump into it whereupon she was prosecuted for attempted suicide, but the Court held her act not to have gone beyond the stage of preparation. "There is no doubt that the accused intended to commit suicide, and that she prepared to carry out that intention, and proceeded to the well. She might have, however, still changed her mind, and she was caught before she did anything which might be regarded as the commencement of the offence of which she is convicted."(12) A young Brahmin widow was confined of a child. The police made a raid on her house and found her lying on the first floor, while her new-born child was found on the second floor wrapped up in a cloth with a cooking pot turned over it. She was prosecuted under section 307 but West, J., held the evidence insufficient to sustain the conviction. But he did not go into the question whether the act if proved would have sufficed to sustain the conviction, though this may be presumed.(13)

5914. The case where the accused purchases a stamp-paper in the name of a person in whose name it was intended to forge, was in one case held to be a mere preparation,(14) not unlike the person who purchased poison to commit murder.(15) But there is a distinction between

Question one of Degree: Illustrations.

(8) *Sukha*, (1885) P. R. 40.
(9) *Bakhtawar (Mt.)*, (1882) P. R. 24.
(10) *Data Ram*, (1882) P. R. No. 45.
(11) *Tha Do Hla*, (1902) 1 L. B. R. 264.
(12) *Ramakka*, 8 M. 5.
(13) *Chima*, 8 B. H. C. R. 164.
(14) *Ramsarun*, 4 N. W. P. H. C. R. 46.
(15) *Bakhtawar (Mt.)*, (1882) P. R. No. 24.

the two. For the purchase of poison by A does not of itself indicate that he is going to murder B, but the purchase of a stamp-paper by A in the name of B is a distinct act in advance of the preparation so that it may be regarded as an act done towards the commission of the offence, and as such constituting an attempt within the meaning of this section. This case has been distinguished[16] and dissented from in subsequent cases of the same Court[17] upon grounds which considerably shake its authority, but which do not overrule it. But the same view was reached independently in Madras in a case in which the accused were detected after they had prepared a draft of the document they intended to forge, procured a stamp-paper on which the draft was to be copied, and applied to a person there sitting to furnish him the corresponding Telugu date for an English date which they intended to insert therein, upon which it was held that the acts of the prisoners did not go beyond the preparation to commit forgery and towards the commission of which they had done no act. But at the same time it was held that the act amounted to the abetment of forgery under s. 116 of the Code for which they were convicted.[18]

5915. In the second case,[19] the facts were the same, though the conclusion arrived at was different. There the accused, who was a money-lender intending to forge a bond in the name of his debtor Chattar who had already paid off his debt, sent a servant to buy a stamp-paper in the name of Chattar giving the latter's parentage and address. The accused was convicted and in revision his pleader relied on the earlier precedent referring to which Turner, J., said: "The endorsement of the stamp-vendor forms no part of the document which it may be assumed it was the intention of the person who procured the endorsement to make on the face of the stamp-paper. The offence of the forgery had, therefore, not proceeded beyond the stage of preparation; but in the case now before the Court there had been an actual fabrication: something had been done. It is true that no judicial proceeding had been instituted, but the petitioner's pleader is unable to suggest any other object for which the false endorsement could have been procured. The petitioner undoubtedly threatened Chattar Singh that he would make him pay Rs. 50. He could not have carried out his threat without the intervention of the Court. The object of the endorsement made by the vendor of a stamp, is to afford proof of the person to whom it is sold; and in suits brought on documents written on stamp-paper, it is the usual course, when the execution of the document is denied, to advert to the endorsement, and to the stamp-vendor's memory assisted by the endorsement as evidence of the person to whom the stamp was sold, and, therefore, as evidence of the probability that the document was made by the person by whom the paper was procured. I do not say that in the case cited the accused should have been discharged. Had the point been taken, the Court might have held the accused guilty of the offence of which the petitioner has been convicted, but I am of opinion that, in the case before the Court, the evidence for the prosecution warranted the inference that the petitioner procured the false

(16) *Mula*, 2 A. 105.
(17) *MacGrea*, 15 A. 173; *Kalyan Singh*, 16 A. 409.
(18) *Padala Venkataswami*, 3 M. 4.
(19) *Mula*, 2 A. 105.

endorsement for the purpose of thereafter using it in a judicial proceeding, and consequently that the conviction is not open to the objection taken to it."[20] But this much may be said of any forged bond. The case in which the accused had not only purchased a stamp-paper in the name of another, but caused a petition-writer to engross a portion of the bond thereon mentioning the name of the person against whom it was to be used as the executant, is clearly distinguishable. for it was clearly an attempt, inasmuch as the writing which constituted the offence had been written, though it was incomplete and wanted a signature.[21]

Allahabad View Criticised.

5916. The distinction between a preparation and an attempt was much discussed in a case in which the accused had not gone so far as in the Allahabad cases last cited so as to constitute an attempt. There the accused got printed one hundred receipt forms similar to those formerly used by the Bengal Coal Company of which he corrected the second proof in order to assimilate the form to that then used by the said company when he was arrested by the police. The prosecution alleged that the receipts were so printed for the purpose of cheating. The jury found him guilty of an attempt to commit forgery, and one of the questions considered by Garth, C.J., was whether the act amounted to an attempt within the meaning of this section. For this purpose he relied upon the definition of that term as given in the two English cases[22] since overruled (§ 5904) and added: "All that he (the accused) did consisted in mere preparation for the commission of the crime. He was no more guilty of an attempt to commit forgery in having the forms printed than he would have been of an attempt to commit burglary by having a false key made of the house where he intended to commit the offence."[23] This view cannot be combated, but the correctness of the definition of "attempt" adopted by the Court has been questioned in Allahabad,[24] though it was incidentally followed in a later case of the same Court,[25] but the point was perhaps not argued, and in view of the recent decisions of the English Court it is not now even arguable (§ 5904).

5917. As has been remarked before, there is no sharp line of division between a preparation and an attempt. The question whether it is one or the other must depend upon the circumstances of each case. For instance, take the following case: The accused was the stationmaster of a wayside station, where a guard of a goods train when just about to start was persuaded by him to initial in pencil the station Receipt Book against the word "one only." The description column of the book was then blank. He filled this in later by adding "Four bales silk" and altered "one only" into "four only." The additions and alterations were made to convert the entry to mean that the accused had entrusted the guard four bales of silk for conveyance for which he was responsible. His intention was proved to be to

(20) *Mula*, 2 A. 105.
(21) *Kalyan Singh*, 16 A. 409.
(22) *Per* Lord Blackburn in *Cheeseman*, L. & C. Rep. 145; *M'Pherson*, D. & B. 202.
(23) *Riasat Ali*, 7 C. 352.
(24) *MacGrea*, 15 A. 173.
(25) *Chandi Pershad* v. *Abdur Rahman*, 22 C. 131.

defraud the Railway Company, but the Court held that the forwarding by the accused of the fictitious consignment notes could only be regarded as preparatory to the offence of cheating. But the Court held that the act was nevertheless sufficient to uphold the accused's conviction for abetment of cheating.(1)

The same principle may be illustrated by another case with widely different facts. The accused, Baku, was prosecuted at Sholapur for having taken a girl under sixteen years of age from that place to Tuljapur in the Nizam's territory and there dedicated her to a goddess with intent or knowing it likely that the minor would be employed or used for purposes of prostitution. She was charged under s. 372, but the Sessions Judge acquitted her, holding that the removal of the minor from Sholapur to Tuljapur was, at the most, a preparation for the commission of the offence, and as such did not constitute either the principal offence or the abetment thereof. The Local Government appealed, and in upholding the acquittal Ranade, J., held that the conveyance of the girl from Sholapur to Tuljapur was merely preparatory to the offence which consisted in her dedicating the girl at Tuljapur to life-long prostitution, that since the offence commenced and was committed at Tuljapur which was outside British India, the British Courts had no jurisdiction to try her for an ex-territorial offence without a certificate from the Political Agent.(2) As compared to these cases, there is no difficulty in holding that a person who is intent upon contracting a bigamous marriage cannot be convicted of an attempt if he had done nothing more than caused the publication of names of the contemplated bigamous marriage.(3) So a person could not be convicted of an attempt to cheat on the mere fact found against him that he had fraudulently induced the Octroi office to grant him a certificate entitling him to obtain a refund of octroi duty(4) or that he had despatched an insured parcel to the complainant purporting to enclose currency notes in payment of his debt, whereas it contained in fact only waste paper;(5) much less where the accused had taken the thumb impression of the complainant on a blank piece of paper upon which he feared a receipt might be written up.(6) The accused was prosecuted for conveying a police jacket under his arm with intent to pass himself off as a policeman. It was held that the accused could not be convicted under s. 171 as his act amounted to no more than a preparation to commit that offence.(7)

5918. Similarly, in an attempt to commit theft, the question depends upon the proximity between the act done and the act which constitutes the offence. For instance, if A wishes to pick B's pockets, the fact that he was seen shadowing him is too remote, and so is the fact that he lifted the tail of B's coat to ascertain if there was anything in the pocket,(8) but if with the same object A puts his hand into B's pocket then it is clearly an attempt, even though the pocket

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(1) *Raghunath*, (1889) B. U. C. 470. following *Padala*, 3 M. 4.
(2) *Baku*, 24 B. 287.
(3) *Peterson*, 1 A. 316.
(4) *Dhundi*, 8 A. 304.
(5) *Vythinathaswami*, 51 M. L. T. 800; *Tularam*, 83 I. C. 993. (1924) A. 205.
(6) *Shco Prasad*, 94 I. C. 353. (1926) Pat. 267.
(7) *Nga Po Kyaw*, (1904) 1 U. B. R. P. C. 3.
(8) *Taylor* (1871), 25 L. T. 75.

be empty.[9] So it was clearly an attempted house-breaking where the accused was making a hole in the wall with a view to obtain an entry into the house, but before the hole could be completed he had to run away leaving it unfinished, on being surprised.[10] Such was the case of the accused who had offered to sell to the complainant a bagful of coins which were found to be counterfeit. He was arrested before their delivery.[11]

5919. Preparation may be a Distinct Offence.—The question whether an act is merely preparatory or amounts to an attempt depends upon the nature of the offence and whether it is part of the act which is punishable as an offence. Consequently, an act may be merely preparatory to the commission of one offence, though it may amount to another completed offence. So in the case of the prisoner indicted for rape, Patterson, J., said: "In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part."[12] Here is then an instance, when an assault is complete though the act is not rape but only preparation to commit that offence.

So in a case where the accused was convicted of an attempted rape, Melvill, J., said: "We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think that a conviction of an attempt at rape ought not to be arrived at, unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance. In the present case....(the prisoner)seems to have desisted before he was interrupted; and no evidence has been given to show that the complainant's person showed marks of violence.....nor that the clothes either of the complainant or the prisoner showed any stains which would indicate to what point the prisoner's criminality had proceeded." For these reasons the Court quashed his conviction for this offence read with s. 376 and converted it into one under s. 354.[13] So while the presence of a married woman in the same room with the accused may be insufficient to prove an attempt to commit adultery[14] still it may be sufficient to hold the accused guilty of s. 448[15] or of the offence defined in s. 509.[16] So an act may fail to amount to an attempt though it may be sufficient abetment. So where A wrote a letter to B asking the latter to commit sodomy with him A was indicted for instigating B to commit that offence though the letter was never opened by B.[17]

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(9) *Brown*, 24 Q. B. D. 357; *Ring*, (1892) 61 L. J. M. C. 116; *Williams*, (1893) 1 Q. B. 320.

(10) *Chand Khan*, 37 B. 553; *Ghasita*, (1919) P. R. No. 13, 51 I. C. 476; *Jaimal*, 89 I. C. (L.) 848.

(11) *Rahmat Ali*, 103 I. C. 408, (1927) L. 634.

(12) *Llyod*, 7 Car. & Pay. 318.

(13) *Shankar*, 5 B. 403.

(14) *Ghulam Mahomed*, (1879) P. R. 18; *Paira Ram*, (1902) P. R. 25.

(15) *Premanundo* v. *Brindabun*, 22 C. 994; *Balmakand* v. *Ghansam Ram*, 22 C. 398.

(16) *Ib.*

(17) *Ransford*, 13 Cox. 9; cf. *Padala Venkatasami*, 3 M. 4.

5920. But the question whether an act amounts to an attempt or is merely a preparation is not always so easy to answer. For instance, suppose the case of a person found with a piece of live charcoal concealed in a ball of rag found near a place in the neighbourhood of which other houses had been previously set fire to by similar means, was his act an attempt or preparation merely? Glover, J., was of opinion that it was the former while his junior colleague Mitter, J., held it to be the latter, and though the opinion of the senior Judge determined the fate of the prisoner, still the reasons given by Mitter, J., are well worthy of serious consideration. It was conceded by Glover, J., that if the ball of rag found on the accused had contained a piece of unlighted charcoal he should have held that there had been no sufficient commencement of any act which tended towards the commission of mischief by fire, and that the prisoner would have been in the same position as a person who intending to murder some other person whether by shooting or poisoning him, bought a gun or poison, and kept the same by him, which being an ambiguous act and not so immediately connected with the offence, the accused could not be punished under this section. "But in this case the instrument for causing mischief by fire was completely ready, and was not used, only because the party carrying it had no opportunity. It must, I think, be assumed that a person going about at night provided with an apparatus specially fitted for committing mischief by fire intends to commit that mischief, and that he has already begun to move towards the execution of his purpose, and that is sufficient to constitute an attempt."(18)

Cases on the Borderline.

5921. But Mitter, J., dissented from this view on the ground that the act afforded no evidence of the use the accused was going to make of the burning charcoal: "In order to support a conviction for attempting to commit an offence of the nature described in s. 511 it is not only necessary that the prisoner should have done an overt act 'towards the commission of the offence,' but that the act itself should have been done 'in the attempt' to commit it. The Sessions Judge says that the very fact that the prisoner went out of his house with the ball, which was found in his possession was an overt act 'towards the commission of the offence, but the question is, was there any attempt to commit a particular offence, and, if so, was the act done in such attempt? I am of opinion that both these cases must be answered in the negative. Suppose a man goes out of his house into the street with a loaded gun in his possession, and suppose even that there is evidence to show that he did so with the intention of shooting (Z). If Z is not found in the street, or when found no attempt is made to shoot him either from fear or repentance, or from any other cause, can it be said that the man is guilty of attempting to murder Z? The going out of one's house with a loaded gun and with the intention of shooting a particular individual might be in one sense considered as an act done towards the shooting of that individual; but so long as nothing further is done, so long as there is no attempt to shoot him and no overt act done in 'in such attempt,' it is impossible to hold that there has been an attempt to murder. (In the present case) it may be said that the prisoner had some mischievous object in view when he secured the possession of a ball like the one which was found with him, but there is nothing to show what was the particular mischief which he contemplated, or that he attempted to commit any

(18) *Doyal Bawri*, 3 B. L. R. (A. C.) 55.

mischief.[19] But this was the case in which the criminality of the accused had not to be judged from the mere possession of a lighted charcoal. There had been mysterious fires in the village before, which had been caused by means of a similar ball. The accused was found in possession of one such ball at night and he was found to have concealed it on his person. He was, moreover, detected in the vicinity of the fires, and all of which facts may legitimately be used to presume the existence of other facts not disclosed by the mere possession of the ball: It was in fact a case in which the Court after considering the matters before it, believed the fact that the accused was about to set fire to the house before which he was standing so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that he was so about to set fire to it.[20]

5922. At any rate, such cases lie on the frontier between preparation and attempt. Between them and an attempt proper there is no difference of principle but only of degree. But this cannot be more precisely defined, though it may be illustrated. But this much may, however, be premised that this section does not relate only to the penultimate act but to all preceding acts if they were done with the intent to commit or facilitate the commission of the act.[21] The accused asked certain persons to collect men to overthrow the Government and plunder the treasuries and release Tilak who was then in jail being convicted of sedition. He was prosecuted of an attempt to collect men and arms to wage war with the Queen under s. 122 read with this section. But though both Ranade and Fulton, JJ., agreed that the act of the accused was criminal, they were by no means agreed on the nature of the offence committed by him; Ranade, J., was of opinion that the act of the accused was an attempt to commit the offence of collecting men and arms for the purpose of waging war under s. 122 of the Code, but this view was combated by Fulton, J., who said: "I do not think the acts of the accused amounted to an attempt. In many cases it is hard to indicate the precise point at which a preparation to commit a crime becomes an attempt to commit it; and it is still more difficult to define in general terms the difference between a preparation and an attempt. In some cases the distinction is clear. If A merely buys a stick in order to beat B no one would think of saying that he attempted to beat B. If he ran at B with the stick, but was seized by C, probably most people would say that he did attempt to beat him. But there might be many intermediate cases in which there would be a difference of opinion whether the acts amounted to an attempt or merely constituted a preparation."[22] That learned Judge was of opinion that the appropriate section applicable to the case was s. 166 read with s. 122 in other words, the act of the accused was not an attempt but an abetment.[23]

5923. These cases are sufficient to show the difficulty of reducing them to a general principle. So Knox, J., said: "It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends

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(19) *Doyal Bawri*, 3 B. L. R. (A. C.) 55.

(20) "Proved" as defined in s. 3 (2), Indian Evidence Act. (I of 1872).

(21) *Per* Ranade, J., in *Anant Puranik*, 25 B. 90. To the same effect, Knox, J. in *MacCrea*, 15 A. 173.

(22) *Per* Ranade, J., in *Anant Puranik*, 25 B. 90. To the same effect, Knox, J., in *MacCrea*, 15 A. 173.

(23) *Ib.*

and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived, and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the inter-position of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number and yet the first act after preparation completed will, if criminal in itself, be beyond all doubt, equally an attempt with the ninety and ninth act in the series.

Again, the attempt once begun, and a criminal act done in pursuance of it towards the commission of the act attempted does not cease to be a criminal attempt in my opinion, because the person committing the offence does or may repent before the attempt is completed. The attempt to defraud a widow of valuable security, commenced by an act of criminal intimidation committed in such attempt and towards the fraud, does not cease to be an attempt, because the perpetrator repents and abstains from completing the attempt. The question whether the act is an act of preparation or an act in attempt, and towards commission, is a fact to be determined upon the evidence. It is in most cases question for the jury to distinguish between an act after attempt begun, and towards commission of the offence attempted and an act independent of the attempt altogether."(24) These views were generally concurred in by Bliar, J., who said: "It seems to me that the section uses the word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable; and though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that, whosoever in such attempt, obviously using the words in the larger sense, does any act, etc., shall be punishable. The term 'any act' excludes the notion that the *final* act short of actual commission is alone punishable, and the notion that any of the other acts would be without the range of the section is probably derived from the rulings in the English cases.

"The difficulty with section 511 might easily have been removed by saying that where in such an attempt, using the word in the larger sense, any person does any act towards the commission of an offence, he shall be held to have committed an 'attempt' within the meaning of this section. That I take to be the real meaning and drift of the

(24) *MacCrea*, 15 A. 173, O. A. 15 A. 310, P. C.

section, differentiating in a marked manner, the definition of 'attempt' in the Indian Penal Code and the accepted English doctrine.[25]

5924. Degree of Proximity Necessary.—This view has been concurred in in other cases,[1] and they may then be said to have established the proposition that in order to constitute an attempt the act must be one done towards the commission of the offence, but it need not be the penultimate act, but may be "any act" proximate or remote so long as it is done *"towards"* the commission of the offence. But the negative proposition that the act need not be proximate is instructive but it does not carry the discussion much further, for the question still remains—do acts only remotely connected with the commission of the crime equally amount to attempt? And if so, is their remoteness ever a ground for holding them otherwise? Indeed, it is not so much upon the first question as upon the second that the English and Indian views are divergent. For, while both agree that acts too remote or quite foreign to the end proposed, or too insignificant a contribution to it are not sufficient to constitute an attempt, the difficulty is created not in the abstract enunciation of the rule, but in its practical application to concrete facts. For instance, the question was at one time in controversy whether a thief putting his hand into a pocket intending to pick it could be said to commit an attempt when there was nothing in the pocket to steal, but it is now settled that the impossibility of committing the offence does not preclude the possibility of criminal attempt.

"Towards" the Commission of the Offence.

5925. So an "attempt to discharge any kind of loaded arms at any person" is punishable by Statute[2] and it has been held that a person may be guilty of such attempt if he point a gun towards another intending to shoot him and pull the trigger, but the gun fail to go off, because the cartridge was empty and the gun not loaded.[3] So where the accused was indicted for a similar attempt and the evidence was that the prisoner had presented a loaded revolver, but had been prevented from discharging it by a third person, it was held that the prisoner intended to do that which he was prevented from doing and the evidence was sufficient to support the conviction.[4] So while under English law[5] a boy under fourteen years of age is deemed physically incapable of "having carnal knowledge of a girl under thirteen"—an offence punishable under s. 4 of the Statute,[6] still that fact does not preclude the possibility of his conviction under s. 9 of the same Statute for an indecent assault.[7]

Attempt Where Offence Impossible.

5926. These cases then establish another proposition, *viz.*, that there may be an attempt to commit an offence though the commission of the offence was in the circumstances impossible. But the case in which the commission of the offence is impossible must be distinguished from

(25) *MacCrea*, 15 A. 173 (181); O. A. 15 A., 310, P. C.

(1) *Anant Vinayak*, 25 B. 90; *Ganesh*, 34 B. 378; *per* Mitter, J., in *Doyal Bawri*, 3 B. L. R. (A. C.) 55; *Harjee Mull* v. *Imam Ali*, 8 C. W. N. 278.

(2) 24 & 25 Vict., c. 100. s. 14 (Offences against the Person Act, 1861).

(3) *Jackson*, 17 Cox. 104.

(4) *Duckworth*, 17 Cox. 495.

(5) Criminal Law Amendment Act 1885 (48 & 49 Vict., c. 69), s. 4.

(6) *Waite*, (1892) 2 Q. B. 600.

(7) *Williams*, (1893) 1 Q. B. 320.

one in which the act if completed would be no offence at all. For in such a case there is not only the possibility of committing *the* offence attempted, but what was attempted cannot be punished because the act if completed was innocent and not punishable by the Code. So Birdwood J., said: "It is possible to attempt to commit an impossible theft, and so offend against the Code, because theft is itself an offence against the Code, and may, therefore, be attempted within the meaning of the Code. But no criminal liability can be incurred under the Code by an attempt to do an act, which if done, would not be an offence against the Code."(8)

Such a case arose where the accused sent a pseudonymous petition to a Commissioner threatening to kill the complainant unless he was transferred from a certain forest division of which he was in charge. The commissioner was found not to have been "interested" in the complainant so as to make the act of the accused punishable as criminal intimidation(9) (§ 727), and as he could not be punished for that substantive offence he could not be also punished for its attempt under s. 507.(10) But in this case if we suppose the Commissioner had been "interested" in the complainant, then the accused might have been convicted of an attempt, though it might not have created the slightest effect upon the Commissioner. So if A asks B for a bribe, his attempt to obtain an illegal gratification from B is complete though B might have been wholly unwilling to give it to A.(11) And of course, in such a case the attempt may be as much made by addressing a direct request to another as by indulging in a suggestive circumlocution the meaning of which is unmistakable, as in the case last cited where the accused, a clerk employed in the Pension Department of Government told B, an applicant for a pension, what influence he possessed in the department and how he had secured increased pensions in two instances adding that anything could be done by *kar-rawai*, and on rejecting the overture the accused declared that B should rue and repent the rejection of it, and which was held to have been a sufficient attempt to obtain a bribe within the meaning of s. 161.(12) So an attempt would be complete if the accused is shown to have dug a hole intending to place salt therein, with intent that the discovery of the salt so placed might be used in evidence against his enemy whom he intended to get convicted of breach of the customs law.(13)

5927. Such a case presents innumerable variations in accordance with the offence the accused intends the complainant should be convicted of. So he might screen a railway key or other stolen property in the complainant's house intending to implicate him for its theft, or he might use other means of fabricating false evidence in which case the accused would clearly be guilty of this offence irrespective of the consequences. So a person may be guilty of attempted arson if intending to set fire to a stack he approaches it and lights a lucifer match for that purpose, but abandons the attempt because he finds that he is being watched.(14) But here the act of lighting a lucifer was a direct

(8) *Mangesh Jivaji*, 11 B. 376 (381).
(9) Ss. 503, 506.
(10) *Mangesh Jivaji*, 11 B. 376.
(11) *Baldeo Sahai*, 2 A. 253.
(12) *Ib.*
(13) *Nunda*, 4 N. W. P. H. C. R. 133.
(14) *William Taylor*, (1859) 1 F. & F. 511.

overt act converting preparation into an attempt. If, therefore, he had desisted before lighting the match, the fact that he was there with a lucifer match ready to set fire to the stack would not have developed his preparation into an attempt. So it has been said that if a person intending to commit a murder walk towards the place of the contemplated scene, he could not be convicted of an attempt.(15)

So where the servant of a contractor who was sent to deliver meat put a false weight into the scale with the intention of appropriating the difference, but was detected in the act, it was held that he was rightly convicted of an attempt to steal. Erle, C. J., said: "It is said, however, that the evidence here does not show any such proximate overt act as is sufficient to support the conviction for an attempt to steal the meat. In my opinion there are several overt acts, which brought the attempt close to completion. These were the preparation of the false weight, the placing it in the scale, and the keeping back the surplus meat. It is almost the same as if the prisoner had been sent with two articles, and had delivered one of them as if it had been two. To complete the crime of larceny there is only needed one thing—the beginning to move away with the property." To this Blackburn, J., added: "I am of the same opinion. There is, no doubt, a difference between the preparation antecedent to an offence and the actual attempt. But if the actual transaction has commenced, which would have ended in the crime if not interrupted,(16) there is clearly an attempt to commit the crime. Then, applying that principle to this case, it is clear that the transaction which would have ended in the crime of larceny had commenced here."(17)

5928. This statement of the law is too narrow and has been since overruled,(18) but it does not affect the decision which is, of course, still an instance of an indictable attempt. So where the accused procured in England dies for counterfeiting half-dollars of Peru, and his intention was to make only a few counterfeit coins in England, to see whether the apparatus he intended to purchase would answer before sending it out to Peru to be there used in counterfeiting coin, it was held that the procuring of the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence and that alone was sufficient to convict him of an attempt, but his making a few coins in England with the object stated constituted the completed offence of counterfeiting coin.(19) The question whether a person is guilty of attempt may then be a mere matter of chance, so that of two persons both embarking upon the same enterprise with the same determination, one may escape and another may be convicted, because of the intervention of fortuitous circumstances which favour one more than the other.

(15) *Per* Jervis, C. J. in *William Roberts*, (1855) Dears 539 (550).

(16) The unsoundness of this dictum has been already animadverted upon (§§ 3301-3311).

(17) *Cheeseman*, 31 L. J. M. C. 89; *Eagleton*, 24 L. J. M. C. 158.

(18) *Brown*, 24 Q. B. D. 357; *Ring*, 61 L. J. M. C. 116; *Williams*, (1893) 1 Q. B. 320.

(19) *William Roberts*, (1855) Dears 539.

When Innocent Act becomes Criminal Attempt: Locus Paenitentiae.

Nor indeed, is it necessary that the act which constitutes the attempt should be itself criminal. So if one put a thing into another's house with intent to accuse him of theft the act is innocent, but the intention renders it criminal. And so if there be both an act and an intention, and it constitutes an attempt, any subsequent change of intention would not alter the character of the act. So if a thief intending to rob a house goes up to the gate with the implements of house-breaking, but on reaching the door, he finds it on fire and hearing cries of distress he rushes in to rescue the sufferers, he could not be convicted of an attempt. But if after having effected his entry he remained there to rescue the sufferers he would be guilty of attempted house-breaking because his entry with that intention completed that offence, and his subsequent change of intention could not convert a criminal act into an innocent one.[20] So it has been held in America that a person may be guilty of an attempt to commit rape, though he may have voluntarily desisted before consummating the act.[21]

It has been already observed that it is now settled that a person even touching another person's pocket with intent to pick it commits this offence. It was so laid down in the case in which the accused hustled a woman whilst entering the compartment of a railway train, and one of them was endeavouring to find the pocket of her dress, which was held to be sufficient to convict them for an attempt to steal.[22]

Where Accused is Entrapped.

5930. A person may be convicted of an attempt though the act relied on is seen through by the other party who, however, allows him to do it with the object of entrapping him. A had obtained administration to the estate of his brother B, and had caused a Government Promissory Note bearing a certain number belonging to C to be entered in the letters of administration as part of the estate of the deceased. The note was in the possession of the Comptroller-General, and the accused MacCrea joined A in an attempt to induce that officer to deliver it to him, or to A who he stated was legally entitled to the note. The Comptroller-General at once suspected the fraud, but he nevertheless sent to MacCrea certain forms to be filled in which he did, but it was held that the affording of facilities to commit an attempt could not neutralize its criminality[23]; for, a person who intentionally does a wrongful act cannot plead the temptation offered in justification of his act (§ 455). This was the *ratio decidendi* of the case in which the accused wrote a letter to the Currency office at Calcutta enclosing the halves of two Government Currency Notes, stating that the other halves were lost, and enquiring what steps should be taken for recovery of their value. The Currency office having upon enquiry ascertained that the second halves of the Notes had been already paid for and the Notes withdrawn from circulation and cancelled, nevertheless sent the

(20) 1 Bishop's Criminal Law, ss. 366, 664, 692.
(21) *Ib.*, s. 664, note 5.
(22) *Ring*, 61 L. J. M. C. 116.
(23) *MacCrea*, 15 A. 173 O. A. 15 A. 310, P. C., in which, however, leave for special appeal was refused on general grounds. The facts of the case are, however, given here.

accused the usual form of claim to be filled up and returned to it which the accused did. The form was sent on purpose to enable the accused to commit himself—in short, to entrap him. But it was held that the accused was none the less guilty of this offence.(24)

5931. The accused intending to cheat a Municipality of its octroi duty informed the Superintendent that there were 16 maunds of an article in a cart, whereas there were in fact only 6, and the Superintendent believing him granted him a certificate for the refund of octroi duty on 16 maunds, but the true fact was discovered before any money could be paid over to the accused. It was held that the act was punishable for an attempt to cheat.(25) This case is clearly opposed to an earlier decision of the same Court(1) in which Brodhurst, J., allowed the accused a *locus pœnitentiæ* holding that the mere obtaining of a refund certificate did not show that the accused intended to cheat: "Before that time he might have altered his mind even from prudence, if not from penitence, and torn up the certificate and no cheating could then have happened." But this view is clearly untenable, and the obvious reply to it is suggested by the case of the house-breaker who effects an entry to commit burglary, but beats a retreat "from prudence" finding the master upon his heels with a loaded revolver. The case was probably dictated by the narrow doctrine of Cockburn, C.J., (§ 5903), and it is certainly not in keeping with the language of this section.

5932. Attempt Implies Doing of an act.—Of course, an attempt implies the doing of an act which term is defined to include a series of acts.(2) But it does not include an omission, nor anything which would not be an act as understood in the Code (§ 295).

For instance, the mere possession of indecent prints is not criminal, for it is not an act, though to procure them would be such an act.(3) So it was held that the fact that a person was found in possession of a counterfeit coin with intent to utter it as good, was no *act* which was necessary to constitute the crime.(4) But where the prisoner was found in possession of a large quantity of such coins unaccounted for and under suspicious circumstances, it was held to be evidence from which it might be inferred that the prisoner had procured them with intent to utter, which is clearly a criminal act punishable as a misdemeanour.(5)

5933. Case Where Express Provision Made Elsewhere.—This section 307 only punishes an act "where no express provision is made by this Code for the punishment of such attempt." It has already been seen that the Code makes such provision in most important cases, in all of which the provisions of this section are *primafacie* inapplicable. But such is evidently not the view taken in the Punjab where the question arose upon the following facts:-The accused filed a complaint against

Section 307.

(24) *Government of Bengal* v. *Umesh Chunder Mitter*, 16 C. 310; *Saleh Mahomed*, 10 S. L. R. 159, 38 I. C. 991.
(25) *Bhagwan Das*, 2 A. L. J. 718.
(1) *Dhundi*, 8 A. 304; *Saleh Mahamed*, 10 S. L. R. 159, 38 I. C. 991.
(2) S. 33.
(3) *Dugdale*, 1 E. & B. 435.
(4) *Stewart*, R. & R. 288.
(5) *Fuller & Robinson*, R. & R. 308.

the complainant, who being called upon to explain himself called the accused a wicked man if not actually a lunatic. The accused took offence and afterwards intending to avenge himself seized a hatchet and ran up to the complainant ready to strike with it. But as he advanced he cried: "Here am I, the madman. Take care," hearing which the complainant took refuge in a shop; the accused was then disarmed before he could do any harm to the complainant; and he was charged under s. 307, but the Court held that section inapplicable inasmuch as it applied only to an act which is *per se* sufficient to cause death, which in the case before the Court it was not. The question then arose whether the fact that the accused could not be convicted under s. 307 yet left him with the possibility of a conviction under this section. But a consideration of this question was held to be unnecessary, because in the view of the Court the accused might well be convicted under this section read with s. 326,(6) though it gave no reason for holding why the accused was held to premeditate only grievous hurt and not death. The learned Judge was no doubt confronted with the conflicting rulings of the two Courts at Bombay(7) and Allahabad,(8) but the case appears to have been one in which the offence was undoubtedly an attempt to commit homicide, and it necessarily raised the question whether the present provisions are supplementary to those enacted in s. 307. This was considered by Couch, C.J., and Westropp, J., in Bombay and Straight, J., in Allahabad, and though they arrived at opposite conclusions, the grounds of their decision are well worth examination.

5934. The facts of the two cases were almost alike. In the Bombay case, the prisoner a soldier fired at his petty officer but the gun failed to go off as it had not been capped. In the Allahabad case the accused, an absconding dacoit, turned round upon his pursuer and fired a blunderbuss, the cap of which exploded without exploding the charge, and the question in either case was what offence the accused had committed. The Court in both the cases were unfortunately at variance as to the meaning of s. 307 (§§ 3301-3311) and as Straight, J., was of opinion that such a case was well within the scope of s. 307, his dissent from the Bombay view as to the applicability of this section where s. 307 is inapplicable was an *obiter dictum*: still the reasons for his dissentient view are instructive.

5935. But the question as to the applicability of this section was directly at issue before the Bombay Judges, who having held s. 307 inapplicable were necessarily confronted with the question whether the accused could be convicted under this section read with s. 299 or 300. Couch, C. J., and Westropp, J., both held that there was nothing in the Code to prevent a person being convicted under this section, though he could not be under s. 307. The view proceeded upon the two requirements of the section, namely, the intent, and an act towards the commission of the offence. The effect of the clause under reference was not considered. And this view was met by Straight, J., on the

(6) *Jewan Das*, (1904) P. R. No. 30.
(7) *Cassidy*, 4 B. H. C. R. 17; followed in *Martu Vithoba*, 15 Bom. L. R. 991, dissented from in *Niddha*, 14 A. 38.
(8) *Niddha*, 14 A. 38.

principle *Expressio unius exclusio alterius*[9] and on the ground that this section applies only "where no express provision is made by this Code for the punishment of such attempt."[10] But as to this it may be argued that the phrase "*such* attempt" must mean an attempt such as is defined in this section so that if it is not punishable under s. 307, it may still be punishable under this section. In other words, this clause only excludes such attempts as are both punishable under this general section as well as under some special section elsewhere. Consequently, if it is not punishable under a special section it does not necessarily follow that it is not punishable under this section. In this view the conviction of Jiwan Das in the Punjab case[11] under section 302|511 would have been well justified.

5936. Other Attempts.—A similar question arose in the Chief Court at Rangoon, but the Court declined to go into its legal aspects. In that case the accused had put some powder into the complainant's food which chemical analysis showed to be *Datura* seeds. There was no evidence as to the quantity found in the food or of the probable effects on any one who might have eaten it, upon which the Court held that it could not be said that the accused could have intended to cause more than hurt. She was consequently convicted of s. 328 read with this section and sentenced to imprisonment for three years.[12]

5937. A person who presents a fraudulent bill for payment is guilty of an attempt to cheat.[13] A person who, from extreme youth, old age or infirmity, has no power of erection and consequently of penetration, is incapable of committing the offence of rape, and cannot be convicted of committing an attempt, though he might be of indecent assault.[14] But since penetration suffices for completion of the offence[15] a youth having the power of erection could well be convicted of an attempt under this section,[16] subject of course, to the general exceptions enacted in ss. 82 and 83. The accused had instituted a suit on the basis of a forged promissory note. The record of the case was taken by the Munsiff trying another case to his house. The accused removed the forged document from the record and tore it up. It was held that they were guilty of s. 380 as well as of an attempt to commit an offence under s. 201.[17] The complainant had his buffaloes stolen. The accused proposed to him that if he paid Rs. 200 to him and said nothing of his theft he would get back his stolen buffaloes. The accused was convicted of an attempt to commit an offence punishable under s. 215.[18]

The accused travelled by train with a forged railway pass made out in the name of a railway official. He had no occasion to use it, whereupon the court held it to be a case of only an attempt to cheat

(9) "The express mention of one excludes the rest."
(10) *Niddha*, 14 A. 38.
(11) *Jiwan Das*, (1904) P. R. No. 30.
(12) *Mi Pu*, (1909) 5 L. B. R. 79, 3 I. C. 721.
(13) *Billinghurst*, 27 C. W. N. 821; (1924) A. I. R. 18; *Shiamji*, 65 I. C. (N) 994, 23 Cr. L. J. 210.
(14) *Gopalarama*, (1896) B. U. C. 865.
(15) S. 375, Expl.
(16) *Nga Tun Kaing*, 42 I. C. (R) 175, 18 Cr. L. J. 943.
(17) *Sheonandan*, 31 I. C. (A) 647, 16 Cr. L. J. 791.
(18) *Hargayan*, 45 A. 159; dissenting from *contra* in *Chittar*, 20 A. 389.

under s. 419.[19] The accused manufactured some spurious trinkets and took them to the complainant for sale, falsely alleging that they were of gold but stolen and that therefore he could not sell them in the bazar. The complainant did not purchase them. It was held to amount to an attempt to cheat.[20] The accused had, in collusion with a railway booking clerk, obtained a railway receipt for 300 bales of cotton, whereas he had only 200 bales at the station. On the faith of this receipt he attempted to raise Rs. 40,000 for which the complainant gave him some Hundis but these were never cashed. The accused was convicted of an attempt to cheat.[21] The accused entered the compound of a house with intent to commit theft of cattle. He was held to be guilty of an attempt to commit theft.[22] So it was held that while an entry on a verandah may not amount to house trespass, such entry coupled with an attempt to push open the door would amount to an attempt to commit that offence.[23] Section 471 punishes the fraudulent or dishonest use of a forged document. A person who files such a document in court is then guilty of an attempt to use it .[24]

5938. No Attempt.—Besides cases already considered there remain others in which though the accused might have committed another offence, it nevertheless falls short of an attempt as here defined. Such was the case of the accused who attempted to get himself reinstated in the post of the Karnam by the production of a false certificate of having passed a certain examination. The act was not shown to have caused damage or harm to the officer to whom the representation was made. It was held that the accused could not be convicted of s. 419|511 though a prosecution under s. 182 might lie.[25]

5939. A charge of conspiracy was instituted against three police officers in that they had fabricated false evidence to secure the conviction of certain persons whom they had prosecuted for robbery. In order to facilitate their identification by the prosecution witnesses they were stated to have joined hands in photographing the accused while in their custody. It was held that the mere taking of photographs was not an act *towards* the subordination of evidence, even though it be conceded that they were taken with a view to the procuring of false identifying witnesses. The view of the court appears to be that, in order to constitute an attempt the act itself must be necessarily connected with the commission of the offence.[1] Such was held to be the case of the accused who had despatched to his creditor an insured postal cover advising him of the remittance of his debt in currency notes which on opening was found to contain only worthless paper. It was held that there was no attempt to

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(19) *Govindaswamy*, 21 M. L. J. 748, 11 I. C. 590, 12 Cr. L. J. 406.

(20) *Abdullah*, (1914) P. R. No. 14, 23 I. C. 473, 15 Cr. L. J. 265.

(21) *Shiamji*, 65 I. C. (N) 994, 23 Cr. L. J. 210.

(22) *Kohmi*, (1914) P. R. No. 24, 26 I. C. 305, 16 Cr. L. J. 1; *Ghasita*, (1919) 51 I. C. (L). 476, 20 Cr. L. J. 492.

(23) *Nga Pan Hlaing*, 26 I. C. (R.) 306, 16 Cr. L. J. 2.

(24) *Krishna Prasad* v. *Rabindra Nath*, 13 I. C. (C.) 99, 13 Cr. L. J. 6.

(25) *Manikkam*, (1908) 4 M. L. T. 324, 8 Cr. L. J. 421.

(1) *Gulab Singh*, 14 A. L. J. 688, 35 I. C. 991, 17 Cr. L. J. 431.

cheat though it might amount to an attempt to fabricate false evidence.(2) There can be no attempt without the necessary *mense rea*. The accused who was a municipal member was deputed to countersign refund chalans for goods taken out of the municipal limits. As such he applied for refund in respect of 460 bags of linseed, but on the day in question only 230 bags passed out of the octroi *naka*. The accused promised to make good the balance the next day. The refund chalan was not signed by the *moharir*. The court held it to be a mere irregularity for which the accused could not be convicted of attempted cheating under s. 420|511.(3)

Where a woman driven mad with pains of her prolonged labour threw herself into a well, she was convicted of an attempt to cause miscarriage. The Court held that it was an attempt to commit suicide.(4) The complainant, a girl, complained that the accused took off her clothes, threw her down and then sat down besides her. He said and did nothing more. He was convicted of an attempt to commit rape. But it was held to be no such attempt, and his conviction was altered to one under s. 354.(5) The accused had applied for an appointment in the Public Works. He filed with his application a printed pamphlet of his testimonials of which one was found to be forged. The court held it to be no attempt to cheat on the ground that the forged certificate was only one out of the many, and it could not be held to have been singled out for inducing his employer to appoint him.(6)

5940. Cases of preparation must be distinguished from those of attempts. Where the accused, who was employed to weigh the sugarcane carts purchased by his employer, entered a larger weight in the register but was promptly detected before he could fill up the other connected columns completing the transaction, his act was held to have proceeded no further than the stage of a mere preparation.(7) Such was held to be the case of the accused who was detected on the roof of a bazar with an open clasp knife in his hands and two gunny bags. He had come to steal but was surprised before he had proceeded beyond the stage of preparation.(8) Such was held to be the case of the accused who had entered the complainant's house with intent to commit adultery with his wife. He was held to be guilty of house-trespass but not of an attempt to commit adultery.(9)

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(2) *Thularam*, 21 A. I. J. 865; *Raman Behari*, 50 C. 849; *Sadho Lal*, 1 Pat. L. J. 391, 34 I. C. 992, 17 Cr. L. J. 272; *contra* in *Arura*, (1913) P. R. No. 10, 20 I. C. 596, 14 Cr. L. J. 436.

(3) *Birjraj*, 17 C. W. N. 294, 18 I. C. 680, 14 Cr. L. J. 120.

(4) *Mulia*, 17 A. L. J. 32, 49 I. C. 98, 20 Cr. L. J. 114.

(5) *Nuna* (1912) P. W. R. 10, 15 I. C. 309, 13 Cr. L. J. 469.

(6) *Lachman Lal*, 4 Pat. L. J. 16, 49 I. C. 174, 20 Cr. L. J. 148.

(7) *Lakshumi Prasad*, 65 I. C. (Pat.) 492, 23 Cr. L. J. 108.

(8) *Batwa Khan*, 12 Bur. L. J. 222, 52 I. C. (R). 59, 20 Cr. L. J. 571.

(9) *Phentua Lodhi*, 47 I. C.(N) 77, 19 Cr. L. J. 881.

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